Litigation Considerations

The discussion below will follow a rough chronology of a typical FOIA lawsuit – from the threshold question of whether jurisdictional prerequisites have been met, to considerations concerning appeal.

Jurisdiction

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

> On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.[1]

[1] 5 U.S.C. § 552(a)(4)(B) (2012 & Supp. V 2017); see also Frazier v. U.S., 683 F. App'x 938, 940 (Fed. Cir. 2017) (agreeing with Court of Federal Claims that it "does not have jurisdiction over claimed violations of the Privacy Act or FOIA because those statutes do not contain money-mandating provisions"); Searles v. U.S., No. 18-955, 2018 WL 5730275, at *4 (Fed. Cl. Nov. 2, 2018) (holding that "the Court of Federal Claims does not retain jurisdiction over violations of the FOIA"); Conner v. U.S., 641 F. App'x 972, 975 (Fed. Cir. 2016) ("agree[ing] with the Claims Court that it lacks jurisdiction over . . . Freedom of Information Act claims . . . because the federal district courts possess exclusive jurisdiction over such matters"); Toomer v. McDonald, 783 F.3d 1229, 1235 (Fed. Cir. 2015) (agreeing that "'[w]hether the VA complied with its obligation to respond to a FOIA request is a matter outside of the Veterans Court's jurisdiction' because review of an agency's compliance with a FOIA request is vested in the district courts by statute"); In re Lucabaugh, 262 B.R. 900, 905 (E.D. Pa. 2000) (finding FOIA claims insufficient to confer jurisdiction on bankruptcy court). But cf. U.S. Ass'n of Imps. of Textiles & Apparel v. United States, 366 F. Supp. 2d 1280, 1283 n.2 (Ct. Int'l Trade 2005) (concluding that Court of International Trade has jurisdiction under 28 U.S.C. § 1581(i) to consider claims implicating FOIA's affirmative publication provisions, 5 U.S.C. § 552(a)(1)-(2)).

This provision has been held to govern judicial review under all three of the FOIA's access provisions, although as discussed below, this provision has been found by the Court of Appeals for the District of Columbia Circuit to limit the relief that can be afforded under the FOIA (see Litigation Considerations, Relief, below).[2] The FOIA's statutory language, as the Supreme Court ruled in Kissinger v. Reporters Committee for Freedom of the Press, makes federal jurisdiction dependent upon a showing that an agency has (1) "improperly," (2) "withheld," (3) "agency records."[3] As a consequence, courts have found that a plaintiff who does not allege any improper withholding of agency records fails to state a claim over which a court has subject matter jurisdiction within the meaning of Rule 12(b)(1) of the Federal Rules of Civil Procedure[4] or, alternatively, fails to state a claim upon which relief could be granted under Rule 12(b)(6).[5] Regardless of the exact legal basis used, however,

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[2] See Am. Mail Line v. Gulick, 411 F.2d 696, 701 (D.C. Cir. 1969) ("The only viable interpretation of this paragraph is that the judicial process is available to compel the disclosure of agency records not made available under paragraphs (1) and (2) [the affirmative disclosure sections of FOIA] as well as the agency records referred to in paragraph (3)"); accord Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior, 88 F.3d 1191, 1202 (D.C. Cir. 1996) (finding that FOIA's "remedial provision, § 552(a)(4), governs judicial review of all three types of documents," but also finding that relief afforded under FOIA is limited to "production" of agency documents to individual complainant).

[3] 445 U.S. 136, 150 (1980).

[4] See, e.g., Earle v. Holder, No. 11-5280, 2012 WL 1450574, at *1 (D.C. Cir. Apr. 20, 2012) (affirming district court's dismissal of FOIA claims because complaint "did not allege that agency records were withheld"); Segal v. Whitmyre, No. 04-80795, 2005 WL 1406171, at *3 (S.D. Fla. Apr. 6, 2005) (finding lack of jurisdiction over FOIA claim because plaintiff failed to allege improper withholding of agency records); Ellis v. IRS, No. 02-1976, 2003 U.S. Dist. LEXIS 24829, at *11 (D. Colo. Dec. 29, 2003) (dismissing claim for lack of subject matter jurisdiction because all documents were released prior to lawsuit); Armstead v. Gray, No. 3-03-1350, 2003 WL 21730737, at *1-2 (N.D. Tex. July 23, 2003) (finding no basis for jurisdiction under FOIA when plaintiff alleged only that agency employees "improperly accessed" plaintiff's records); Tota v. United States, No. 99-0445E, 2000 WL 1160477, at *2 (W.D.N.Y. July 31, 2000) (dismissing claim for lack of subject matter jurisdiction because the "[p]laintiff has not provided any evidence that the FBI improperly withheld any agency records"); Shafmaster Fishing Co. v. United States, 814 F. Supp. 182, 184 (D.N.H. 1993) ("The court thus lacks subject matter jurisdiction if the information was properly withheld under FOIA exemptions."); see also Goldgar v. Office of Admin., 26 F.3d 32, 34 (5th Cir. 1994) (per curiam) (pointing out that where agency had no records responsive to plaintiff's request, court had no jurisdiction under FOIA); Rae v. Hawk, No. 98-1099, slip op. at 3 (D.D.C. Mar. 7, 2001) (finding no subject matter jurisdiction over claims against agencies that received no FOIA request from plaintiff); Unigard Ins. Co. v. Dep't of the Treasury, 997 F. Supp. 1339, 1341 (S.D. Cal. 1997) ("The court presumes a lack of jurisdiction until the party asserting [it] proves otherwise.").

[5] Carroll v. SSA, No. 11-3005, 2012 WL 1454858, at *2 (D. Md. Apr. 24, 2012) (dismissing for failure to state claim because plaintiff's complaint did not describe records sought nor provide details "of the refusal to turn over the requested information"); Mace v. EEOC, 37 F.

if an agency has not improperly withheld records, courts have dismissed the FOIA suit.[6] Additionally, if a requester files suit before the expiration of the statutory deadline to respond to the request, courts have dismissed the suit, even if the agency still has failed to respond to the request after the deadline has expired because "the Court will only consider those facts and circumstances that existed at the time of the filing of the complaint, and not subsequent events."[7]

Supp. 2d 1144, 1146 (E.D. Mo. 1999) (deciding that dismissal for lack of jurisdiction was "inappropriate," but that dismissal for failure to state claim was applicable because court lacked further jurisdiction to grant relief), aff'd, 197 F.3d 329 (8th Cir. 1999); Prado v. Ilchert, No. 95-1497, 1997 WL 383239, at *3 (N.D. Cal. June 10, 1997) (dismissing for failure to state claim upon which relief can be granted under FOIA when agency to which request was made lacked responsive records).

[6] See, e.g., Kissinger, 445 U.S. at 139 ("When an agency has demonstrated that it has not 'withheld' requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the FOIA."); Bloom v. SSA, 72 F. App'x 733, 735 (10th Cir. 2003) (finding that once documents were released, "there existed no 'case or controversy' sufficient to confer subject matter jurisdiction on the federal court"); Caracciolo v. U.S. Merit Sys. Prot. Bd., No. 07-3487, 2008 WL 2622826, at *2 (S.D.N.Y. July 3, 2008) (dismissing plaintiff's complaint because agency demonstrated that it did not withhold any records responsive to plaintiff's FOIA request); Hoff v. DOJ, No. 07-094, 2007 WL 4165162, at *3 (S.D. Ohio Nov. 19, 2007) (granting motion to dismiss for lack of subject matter jurisdiction because agency established that it possessed no responsive records and plaintiff provided no evidence that agency maintained any responsive records); Harris v. DOJ, No. 06-1806, 2007 WL 3015246, at *4-5 (N.D. Tex. Oct. 12, 2007) (court lacks subject matter jurisdiction because "Plaintiff has failed to point to evidence in the record which controverts Defendant's evidence that it did not improperly withhold any agency records"); cf. Richardson v. Bd. Of Governors of Fed. Reserve Sys., 248 F.Supp.3d 91, 103 (D.D.C. 2017) (noting that plaintiff filed no FOIA request and finding that court does not have jurisdiction under FOIA based on plaintiff's claim that his 'personal privacy interests are protected by two provisions of FOIA, exemptions 6 and 7(C)'").

[7] Judicial Watch, Inc. v. FBI, No. 01-1216, slip op. at 8 (D.D.C. July 26, 2002) (citing Judicial Watch, Inc. v. DOJ, No. 97-2089, slip op. at 11 (D.D.C. July 14, 1998) (citing, in turn, Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."))); see also Rush v. FBI, No. 09-0955, 2009 WL 1438241, at *1 (D.D.C. May 31, 2009) (dismissing complaint because it was filed before defendant's deadline to respond to FOIA request); Said v. Gonzales, No. 06-986, 2007 WL 2789344, at *6 (W.D. Wa. Sept. 24, 2007) (dismissing FOIA claims as complaint was filed prematurely); cf. Dorn v. Comm'r, No. 2:03CV539, 2005 WL 1126653, at *3-4 (M.D. Fla. May 12, 2005) (dismissing lawsuit where complaint was filed prematurely, even though agency ultimately responded after twenty-day period), reconsideration denied, 2005 WL 2248857 (M.D. Fla. June 1, 2005). But cf. Judicial Watch, Inc. v. DOE, 191 F. Supp. 2d 138, 139 (D.D.C. 2002) (permitting premature complaint to be cured by filing of "supplemental" complaint).

If an agency does not have possession or control of the requested record, courts have held that there was no improper withholding.[8] At the same time, however, an agency's failure to consider those records that came into its possession or were created after receipt of a FOIA request, but prior to the start of the search for records, may be considered an improper withholding.[9] (For a further discussion of "cut-off" dates, see

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[8] See DOJ v. Tax Analysts, 492 U.S. 136, 145 (1989) (finding that agency must be in control of records requested when FOIA request made and "[b]y control [the court] mean[s] that the materials have come into the agency's possession in the legitimate conduct of its official duties"); DeBrew v. Atwood, 792 F.3d 118, 123 (D.C. Cir. 2015) (finding FOIA's disclosure requirements not violated "because the agency is not obligated, nor is it able, to disclose a record it does not have"); Lechliter v. Rumsfeld, 182 F. App'x 113, 116 (3d Cir. 2006) (finding no improper withholding where agency destroyed documents for reason that "'is not itself suspect'" (citing SafeCard Servs. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991))); Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (finding no remedy for records destroyed prior to FOIA request); Zaldivar v. VA, No. 14-01493, 2015 WL 6468207, at *5 (D. Ariz. Oct. 27, 2015) ("When an agency does not possess a record or document, it cannot be claimed that the document was improperly withheld."); Cambrel v. Fulwood, No. 09-1930, 2011 U.S. Dist. LEXIS 115458, at *12 (M.D. Pa. Oct. 6, 2011) (noting that Courts "cannot mandate the production of documents the agencies do not have in their custody or control at the time of the FOIA request"); Sliney v. BOP, No. 04-1812, 2005 WL 839540, at *5 (D.D.C. Apr. 11, 2005) ("The fact that the agency once possessed documents that have been destroyed does not preclude the entry of summary judgment for the agency."); Piper v. DOJ, 294 F. Supp. 2d 16, 22 (D.D.C. 2003) ("FOIA does not impose a document retention requirement on government agencies."), reconsideration denied, 312 F. Supp. 2d 17 (D.D.C. 2004); Folstad v. Bd. of Governors of the Fed. Reserve Sys., No. 1:99-124, 1999 U.S. Dist. LEXIS 17852, at *5 (W.D. Mich. Nov. 16, 1999) (declaring that FOIA "does not independently impose a retention obligation on the agency" and that "[e]ven if the agency failed to keep documents that it should have kept, that failure would create neither responsibility under FOIA to reconstruct those documents nor liability for the lapse"), aff'd, 234 F.3d 1268 (6th Cir. 2000) (unpublished table decision); cf. Kissinger, 445 U.S. at 155 n.9 ("[T]here is no FOIA obligation to retain records prior to [receipt of a FOIA] request."); Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam) ("[T]he fact that responsive documents once existed does not mean that they remain in the [agency's] custody today or that the [agency] had a duty under FOIA to retain the records."); Blanton v. DOJ, 182 F. Supp. 2d 81, 85 (D.D.C. 2002) (rejecting plaintiff's contention that agency should have contacted former employees about location of responsive records, and awarding agency summary judgment), aff'd, 64 F. App'x 787 (D.C. Cir. 2003) (per curiam), reh'g en banc denied, Nos. 02-5115, 02-5296 (D.C. Cir. July 22, 2003). But see Cal-Almond, Inc. v. USDA, No. 89-574, slip op. at 2-3 (E.D. Cal. Mar. 12, 1993) (ruling that when agency returned requested records which were disclosable to submitter four days after denying requester's administrative appeal, in violation of its own records-retention requirements, agency must seek return of records from submitter for disclosure to requester), appeal dismissed per stipulation, No. 93-16727 (9th Cir. Oct. 26, 1994).

[9] See Pub. Citizen v. DOS, 276 F.3d 634, 643-44 (D.C. Cir. 2002) (refusing to approve agency's "date-of-request cut-off" policy for identifying responsive records, and pointing out

Procedural Requirements, Searching for Responsive Records, above. For further discussions on determining the scope of a FOIA request, see Procedural Requirements, Proper FOIA Requests, above; and Procedural Requirements, Searching for Responsive Records, above.)

The FOIA provides jurisdiction over records held by federal agencies and does not extend to other entities or to individuals.[10] (For further discussions of the terms "agency"

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that it effectively results in withholding of potentially large number of relevant agency records).

[10] See, e.g., Taitz v. Ruemmler, No. 11-5306, 2012 WL 1922284, at *1 (D.C. Cir. May 25, 2012) (holding that FOIA does not apply to White House Counsel's Office); Drake v. Obama, 664 F.3d 774, 785 (9th Cir. 2011) (finding that FOIA does not apply to any defendants as they are individuals, not agencies); Citizens for Responsibility & Ethics in Wash. v. Office of Admin., 566 F.3d 219, 224 (D.C. Cir. 2009) (holding that Office of Administration "lacks substantial independent authority" and so is not "agency" subject to FOIA); Megibow v. Clerk of U.S. Tax Court, 432 F.3d 387, 388 (2d Cir. 2005) (ruling that United States Tax Court is not subject to FOIA); Blankenship v. Claus, 149 F. App'x 897, 898 (11th Cir. 2005) (affirming dismissal of FOIA claim brought against state authority); Wright v. Curry, 122 F. App'x 724, 725 (5th Cir. 2004) (emphasizing that FOIA "applies to federal agencies, not state agencies"); United States v. Alcorn, 6 F. App'x 315, 316-17 (6th Cir. 2001) (affirming dismissal of FOIA claim against district court "because the federal courts are specifically excluded from FOIA's definition of 'agency'"); McDonnell v. Clinton, 132 F.3d 1481, 1481 (D.C. Cir. 1997) (dismissing FOIA claim brought solely against the President) (unpublished table decision); Ortez v. Wash. Cnty., 88 F.3d 804, 811 (9th Cir. 1996) (dismissing FOIA claims against county and county officials); Mabie v. USMS, No. 18-1276, 2018 WL 4401752, at *1 (S.D. Ill. Sept. 14, 2018) (finding no jurisdiction over withholdings by city jail and police department and that "state or local governments are not subject to the FOIA just because they receive grants or other funds from the federal government or work with the federal government"); Isiwele v. HHS, 85 F. Supp. 3d 337, 353 (D.D.C. 2015) (stating that "the FOIA does not apply to the Administrative Office of the United States Courts because it is an arm of the judicial branch, which is not subject to the FOIA"); Voigt v. Muffenbier, No. 11-89, 2012 WL 90486, at *2 (D.N.D. Jan. 11, 2012) (finding that FOIA does not create private cause of action against individuals); Elec. Priv. Info. Ctr. v. NSA, 795 F. Supp. 2d 85, 91 (D.D.C. 2011) (finding that D.C. Circuit has "unambiguously held that the [National Security Council] NSC is not an agency subject to the FOIA."); Hossein v. City of Southfield, No. 11-12947, 2011 U.S. Dist. LEXIS 129481, at *1 (E.D. Mich. Nov. 9, 2011) (holding that FOIA does not apply to State agencies and courts); Cruz v. Superior Court Judges, No. 3:04-CV-1103, 2006 WL 547930, at *1 (D. Conn. Mar. 1, 2006) (holding that municipal police department is not subject to FOIA); Davis v. Johnson, No. 05-2060, 2005 U.S. Dist. LEXIS 12475, at *1 (N.D. Cal. June 20, 2005) (disallowing FOIA claim against deputy public defender who represented plaintiff in state criminal trial); Allnutt v. DOJ, 99 F. Supp. 2d 673, 678 (D. Md. 2000) (ruling that trustees of bankruptcy estates are "private" and thus are not subject to FOIA), aff'd sub. nom. Allnutt v. Handler, 8 F. App'x 225 (4th Cir. 2001). But see Moye, O'Brien, O'Rourke, Hogan & Pickert v. National R.R. Passenger Corp., No. 6:02-CV-126, 2003 WL 21146674, at *6 (M.D. Fla. May 13, 2003) ("Although Amtrak is not a federal agency, it must comply with FOIA pursuant to statute."), rev'd & remanded on other

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

Whether an agency has "improperly" withheld records usually turns on whether one or more exemptions apply to the documents at issue.[11] If the agency can establish that no responsive records exist, have been destroyed, or transferred, then courts have found that there is no "improper" withholding.[12] The same is true if all responsive records have been released in full to the requester.[13]

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grounds, 116 F. App'x 251 (11th Cir. 2004); cf., Sierra Club v. TVA, 905 F. Supp. 2d 356, 363 (D.D.C. 2012) (finding that venue and personal jurisdiction are separate and that "§ 552(a)(4)(B) does not give the Court personal jurisdiction over [the Tennessee Valley Authority (a wholly owned government corporation)]").

[11] See Tax Analysts, 492 U.S. at 151 (generalizing that "agency records which do not fall within one of the exemptions are improperly withheld"); Abraham & Rose, P.L.C. v. United States, 138 F.2d 1075, 1078 (6th Cir. 1998) (indicating that agency denying FOIA request bears burden of establishing that requested information falls within exemption and remanding case for consideration of appropriate exemptions).

[12] See, e.g., Perales v. DEA, 21 F. App'x 473, 474 (7th Cir. 2001) (affirming dismissal because information requested does not exist); Coal. on Political Assassinations v. DOD, 12 F. App'x 13, 14 (D.C. Cir. 2001) (granting summary judgment in favor of agency finding no improper withholding where potentially responsive records have either been destroyed or transferred to NARA prior to FOIA request being filed); Jones, 41 F.3d, at 249 (finding no improper withholding when records were destroyed prior to FOIA request); Burr v. Huff, No. 04-C-53, 2004 WL 253345, at *2 (W.D. Wis. Feb. 6, 2004) ("If no documents exist, nothing can be withheld, and jurisdiction cannot be established."), aff'd, 112 F. App'x 537, 537-38 (7th Cir. Oct. 14, 2004); cf. Hardway v. CIA, 384 F.Supp.3d 67, 76 (D.D.C. 2019) (holding that "FOIA does not permit plaintiffs to demand "proof" that particular records they requested were destroyed, or otherwise dictate how defendants carry out searches for responsive records").

[13] See, e.g., Gabel v. Comm'r, No. 94-16245, 1995 WL 267203, at *2 (9th Cir. May 5, 1995) (finding no improper withholding because "it was uncontested" that agency provided complete response to request); Ferranti v. Gilfillan, No. 04-cv-339, 2005 WL 1366446, at *2 (D. Conn. May 31, 2005) (dismissing suit for lack of jurisdiction after agency fully released all requested records); Reg'l Mgmt. Corp. v. Legal Servs. Corp., 10 F. Supp. 2d 565, 573-74 (D.S.C. 1998) (concluding that "no case or controversy exists" because agency produced all requested documents), aff'd in part & remanded in part on other grounds, 186 F.3d 457 (4th Cir. 1999); cf. Martinez v. BOP, 444 F.3d 620, 624 (D.C. Cir. 2006) (holding that agency fulfilled its FOIA obligations by affording prisoner-plaintiff "meaningful opportunity to review" his presentence reports and to take notes on them); Howell v. DOJ, No. 04-0479, 2006 WL 890674, at *2 (D.D.C. Apr. 4, 2006) (finding no improper withholding where, pursuant to Federal Bureau of Prisons policy, inmate was afforded opportunity to review his presentence investigation report (citing Martinez)).

The Supreme Court has held that an agency has not improperly withheld records when it is prohibited from disclosing them by a preexisting court order.[14] While it has been held that the validity of such a preexisting court order does not depend upon whether it is based upon FOIA exemptions,[15] the D.C. Circuit has held that it is the agency's burden to demonstrate that the order was intended to operate as an injunction against the agency, rather than as a mere court seal.[16]

Further, courts have declined to order disclosure of information to a FOIA requester with a special restriction, either explicit or implicit, that the requester not further disseminate the information received.[17] As the Supreme Court explained: "There

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[14] See, e.g., GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 387 (1980) ("To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the Freedom of Information Act would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress."); Freeman v. DOJ, 723 F. Supp. 1115, 1120 (D. Md. 1988) (refusing to order release of records covered by preexisting nondisclosure order of sister district court).

[15] See Wagar v. DOJ, 846 F.2d 1040, 1047 (6th Cir. 1988) (holding that validity of nondisclosure orders does not depend on their being based on FOIA exemptions).

[16] Morgan v. DOJ, 923 F.2d 195, 197 (D.C. Cir. 1991) ("[T]he proper test for determining whether an agency improperly withholds records under seal is whether the seal, like an injunction, prohibits the agency from disclosing the records."); see, e.g., Judicial Watch v. DOJ, 813 F.3d 380, 383-84 (D.C. Cir. 2016) (vacating district court's judgment and remanding to give defendant opportunity to seek clarification on intended effect and scope of sealing order because "[a]n ambiguous court order does not protect a record from disclosure pursuant to the FOIA"); Odle v. DOJ, No. 05-2771, 2006 WL 1344813, at *14 (N.D. Cal. May 17, 2006) (concluding that agency may not withhold information pursuant to sealing order unless that court order prohibits disclosure in response to FOIA requests); Gerstein v. DOJ, No. 03-04893, slip op. at 10-11 (N.D. Cal. Sept. 30, 2005) (determining that sealing orders pertaining to search and seizure warrants prohibited FOIA disclosure, because they were intended to prevent investigative targets "from learning about the warrant[s]"); McDonnell Douglas Corp. v. NASA, No. 91-3134, slip op. at 1-2 (D.D.C. July 12, 1993) ("While this court's sealing Order temporarily precluded release, that order was not intended to operate as the functional equivalent of an injunction prohibiting release. It was only approved by the court for the purposes of expediting this litigation and protecting information . . . until this lawsuit was resolved.").

[17] See, e.g., Chin v. U.S. Dep't of the Air Force, No. 99-3127, 2000 WL 960515, at *2 (5th Cir. June 15, 2000) (refusing to allow disclosure of exempt information under protective order); Raher v. BOP, 749 F. Supp. 2d 1148, 1162 (D. Or. 2010) (stating that release of records subject to protective order would place agency "in the untenable position of having to enforce any violation . . . and claw back any unwarranted disclosure"); Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) (overruling district court's order limiting access to persons other than plaintiff because "such action is not authorized by FOIA"); cf. Maricopa Audulon Soc. v. U.S. Forest Serv., 108 F.3d 1082, 1088-89 (9th Cir. 1997) (rejecting, as irrelevant,

is no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination."[18]

In a decision involving a somewhat related issue, the Court of Appeals for the Eighth Circuit upheld the removal of a state FOIA case to a federal court because the records at issue actually belonged to the United States Attorney's Office, which had intervened to protect its interests.[19] The Eighth Circuit explained that not only does the federal removal statute, 28 U.S.C. § 1442(a)(1),[20] establish an independent basis for federal court jurisdiction, but the FOIA itself raises a "colorable defense" to the state action.[21]

Standing

In order to establish standing to bring an action under the FOIA an individual must show that they made a request for records that was improperly denied.[22]

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plaintiff's offer to agree not to further disclose requested information: "FOIA does not permit selective disclosure of information only to certain parties . . . . [O]nce the information is disclosed to [this requester], it must also be made available to all members of the public who request it.").

[18] NARA v. Favish, 541 U.S. 157, 174 (2004).

[19] See United States v. Todd, 245 F.3d 691, 693 (8th Cir. 2001) (finding "colorable defense" based on FOIA, which justified removal); see also, e.g., Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 930 & 932 (C.D. Ill. 2002) (indicating that United States removed state FOIA case pursuant to "federal question doctrine," and ultimately finding that information at issue was exempt under FOIA and therefore should not be disclosed).

[20] (2019).

[21] 245 F.3d at 693.

[22] See Pub. Citizen v. DOJ, 491 U.S. 440, 449 (1989) (analogizing in non-FOIA case that all that is required to establish standing under FOIA is for requesters to show "that they sought and were denied specific agency records"); United States v. Richardson, 418 U.S. 166, 204 (1974) ("[T]he Freedom of Information Act creates a private cause of action for the benefit of persons who have requested certain records from a public agency and whose request has been denied."); Prisology, Inc. v. BOP, 852 F.3d 1114, 1117 (D.C. Cir. 2017) (finding that plaintiff lacked standing because it failed to allege an 'injury in fact' through the denial of a FOIA request); Slaughter v. NSA, No. 15-5047, 2015 WL 7180511, at *2 (3d Cir. Nov. 16, 2015) ("In effect, the agency's adverse decision to a FOIA request satisfies the injury-in-fact requirement of standing for the requester."); Zivotofsky, 444 F.3d 617-18 (analogizing FOIA standing requirements in non-FOIA case stating that "[a] requester is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive"); McDonnell v. United States, 4 F.3d 1227, 1238 (3d Cir. 1993) ("The filing of a request, and its denial, is the factor that distinguishes the harm suffered by the plaintiff in an FOIA case

As a general rule, only the person who submitted a FOIA request at the administrative level can be the proper party plaintiff in any subsequent court action based on that request.[23] Courts have denied standing to clients where "an attorney makes a [FOIA] request for documents that are of interest to her client, but does not indicate that the request is being made on the client's behalf."[24] Similarly, a plaintiff has been found

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from the harm incurred by the general public arising from deprivation of the potential benefits accruing from the information sought."); Halperin v. CIA, 629 F.2d 144, 152 (D.C. Cir. 1980) (finding that plaintiff lacked standing because he did not allege an injury which was not common to all members of public); The Sierra Club v. EPA, 75 F. Supp. 3d 1125, 1138 (N.D. Cal. 2014) (finding that "any person who submits a FOIA request has standing to bring a FOIA challenge in federal court if the request is denied in whole or part (citing Richardson, 418 U.S. at 204)); Three Forks Ranch Corp. v. Bureau of Land Mgmt., 358 F. Supp. 2d 1, (D.D.C. 2005) ("Any person who submitted a request for existing documents that the petitioned agency denied has standing to bring a FOIA challenge."); cf. Nat. Sec. Counselors v. CIA, 898 F. Supp. 2d 233, 254 (D.D.C. 2012) ("An agency's duties under the FOIA are triggered by a properly framed request for information, and the agency's obligations flowing from that request are with respect to 'the requester' of information").

[23] See Wingate v. DHS, No. 11-223, 2012 U.S. Dist. LEXIS 75270, at *3-8 (M.D. Fla. May 31, 2012) (concluding that plaintiffs lack standing where they "were not mentioned by name in the FOIA requests or related correspondence with the agency"); Abuhouran v. Dep't of State, 843 F. Supp. 2d 73, 77 (D.D.C. 2012) (dismissing amended complaint brought by plaintiff's sister for lack of standing where "she was not a party to the underlying FOIA request"); Fieger v. FEC, 690 F. Supp. 2d 644, 649 (E.D. Mich. 2010) ("A plaintiff who has neither made a request for information on his own nor explicitly through counsel cannot show an injury in fact."); Fieger v. FEC, 690 F. Supp. 2d 644, 650-51 (D. Mich. 2010) (concluding that plaintiff lacked standing in FOIA action because "there is no evidence presented that the named plaintiff ever requested information from the FEC, or that information was requested on his behalf" and noting that requester "cannot [later attempt to] confer standing that did not exist when lawsuit commenced"); Cherry v. FCC, No. 09-680, 2009 U.S. Dist. LEXIS 112276, at *7 (M.D. Fla. Dec. 3, 2009) (accepting finding of magistrate that plaintiff "lacks standing to bring the FOIA Complaint because the relevant FOIA requests did not disclose [him] as an interested party"); SAE Prods. v. FBI, 589 F. Supp. 2d 76, 79-82 (D.D.C. 2008) (dismissing FOIA claim on basis that plaintiff lacked standing to pursue judicial review because individual who made FOIA requests did not clearly indicate that he was doing so on behalf of plaintiff corporation); United States v. Trenk, No. 06-1004, 2006 WL 3359725, at *9 (D.N.J. Nov. 20, 2006) (concluding that plaintiff lacks standing to bring FOIA action because "[h]is name does not appear on the document requests, and he is not the client for which the requests were made"); But cf. A Better Way for BPA v. DOE, 2018 WL 2376165 (9th Cir. May 25, 2018) (finding that "the submitted form's unambiguous reference to plaintiff" in the Organization field and defendant's acknowledgement of plaintiff in confirming correspondence "make clear that plaintiff was the requester and consequently has standing to sue").

[24] Smallwood v. DOJ, 266 F. Supp. 3d 217, 218 (D.D.C. 2017); see also Slaughter, 2015 WL 7180511, at *1 (dismissing plaintiff for lack of standing where plaintiff's attorney submitted request in his own name without explaining that requests were submitted on plaintiff's

to lack standing where she attempted to initiate a lawsuit under the FOIA for claims arising from a FOIA request made by someone else who had attempted to assign their right to litigate to the plaintiff.[25] Courts have allowed assignments of requester's statutory rights in certain limited circumstances, such as the death of the original requester after a lawsuit has been initiated[26] or where the employee of the requester who sent in the request changes employment.[27] Additionally, in situations where an agency has treated an unnamed party to the original request as a requester, at least one court has found that the agency may be precluded from arguing that that unnamed party lacks standing.[28]

Venue and Removal

The venue provision of the FOIA provides requesters with a broad choice of forums in which to bring suit. Specifically, the requester can bring his or her action in the district where the requester resides, the district where the requester has his or her principle place

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behalf); The Haskell Co. v. DOJ, No. 05-1110, 2006 WL 627156, at *2 (D.D.C. Mar. 13, 2006) (dismissing case because plaintiff had no standing to sue agency on FOIA request submitted solely by its law firm); Three Forks Ranch Corp., 358 F. Supp. 2d at 2 (holding that "a FOIA request made by an attorney must clearly indicate that it is being made 'on behalf of' the corporation to give that corporation standing to bring a FOIA challenge"); Mahtesian v. OPM, 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) (finding that attorney's reference to anonymous client in FOIA request does not confer standing on that client).

[25] Feinman v. FBI, 680 F. Supp. 2d 169, 176 (D.D.C. 2010) (finding that "institutional regularity at the administrative level weighs against permitting pre-litigation assignments of FOIA rights" and concluding that plaintiff lacks standing because there is no indication "(1) that the requester is unable to pursue her own litigation or (2) that the original requester shares the same interests and purposes as the plaintiff-assignee"), appeal dismissed, 598 F. App'x 15 (D.C. Cir. 2015).

[26] See Sinito v. DOJ, 176 F.3d 512, 516 (D.C. Cir 1999) (finding FOIA lawsuits may survive death of requester and substitution can be made if successor can "adequately represent the interests of the deceased party" as outlined under Fed. R. Civ. Pro. 25).

[27] See Nat. Sec. Counselors v. CIA, 898 F. Supp. 2d 233, 257-59 (D.D.C. 2012) (holding that assignment of FOIA rights permissible "when the sole reason for the assignment is to keep a request with the person or persons who have assumed stewardship of that request").

[28] See The Sierra Club v. EPA, 75 F. Supp. 3d 1125, 1138-40 (N.D. Cal. 2014) (holding that "[a]lthough Sierra Club was not named in the initial request, . . . the correspondence between the EPA and Plaintiffs, and the EPA's subsequent actions in this case, sufficiently identify Sierra Club as an interested party to the initial FOIA request" and therefore, Sierra Club "meet[s] the standing requirements"); Olsen v. Dep't of Transp. Fed. Transit Admin., No. 02-00673, 2002 WL 31738794, at *2 n.2 (N.D. Cal. Dec. 2, 2002) (declining to find lack of standing when plaintiff was not identified by his attorney in initial request, because agency's administrative appeal response itself acknowledged plaintiff's identity).

of business, the district where the records are located, or the District of Columbia.[29] When a requester sues in a jurisdiction other than the District of Columbia, however, he is obliged to allege the nexus giving rise to proper venue in that other jurisdiction.[30] Largely due to the statutory designation of the District of Columbia as an appropriate forum for any FOIA action,[31] the District Court for the District of Columbia and the Court of Appeals

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[29] See 5 U.S.C. § 552(a)(4)(B) (2012 & Supp. V 2017).

[30] See Rosiere v. U.S., 693 Fed.Appx. 556, 557 (9th Cir. 2017) (affirming district court's determination that District of Hawaii is not proper venue because requester resides in Nevada and records are located in Colorado, New Jersey, and Washington, D.C.); Friends of the River v. U.S. Army Corps of Engineers, No. 16-05052, 2016 WL 6873467 (N.D. Cal. Nov. 22, 2016) (granting transfer request because "the responsive documents are, in fact, entirely located in [another] district" and "there is no reasonable expectation that relevant agency records would be maintained . . in this District); Alldredge v. NSA, No. 15-3638, 2015 U.S. Dist. LEXIS 149073, at *3 (N.D. Cal. Nov. 2, 2015) (dismissing plaintiff's complaint because "[p]laintiff is incarcerated in the Eastern District of California and there is no indication that the records are located in this district"); Fleming v. Medicare Freedom of Info. Grp., No. 15-594, 2015 WL 4365283, at *1 (D. Minn. July 13, 2015) (rejecting plaintiff's argument "that even if the records are not physically located here, they are accessible electronically and therefore present in this district for purposes of FOIA" and also finding that plaintiff's "place of . . . imprisonment . . . is not her residence" because "involuntary and temporary detention is insufficient to establish residence in the district of incarceration"); Bosman v. United States, No. 12-1320, 2012 WL 1747972, at *2-3 (N.D. Cal. May 15, 2012) (discussing difference between "domicile" and "residence," and finding that FOIA "look[s] only to 'residence'" for venue purposes); Brehm v. DOJ Office of Info. & Privacy, 591 F. Supp. 2d 772, 773 (E.D. Pa. 2008) (dismissing complaint as plaintiff neither resides nor has principal place of business in court's district and disputed records are also not located in court's district); O'Neill v. DOJ, No. 05-0306, 2007 WL 983143, at *7 (E.D. Wis. Mar. 26, 2007) (concluding that venue is proper because one of disputed documents is located in court's district and because agency withdrew venue argument with respect to three other disputed documents); Gaylor v. DOJ, No. 05-CV-414, 2006 WL 1644681, at *1 (D.N.H. June 14, 2006) (finding venue lacking in New Hampshire, where plaintiff, who claimed to be resident of Texas, was incarcerated and was general partner in company that was no longer in good standing in New Hampshire); Schwarz v. IRS, 998 F. Supp. 201, 203 (N.D.N.Y. 1998) (finding venue improper where agency maintains regional office unless substantial part of activity complained of also occurred there), appeal dismissed for lack of merit, No. 98-6065 (2d Cir. July 30, 1998).

[31] See 5 U.S.C. § 552(a)(4)(B). See generally Akutowicz v. United States, 859 F.2d 1122, 1126 (2d Cir. 1988) (finding District of Columbia sole appropriate forum when requester resides and works outside United States and records requested are located in District of Columbia); Arevalo-Franco v. INS, 889 F.2d 589, 590-91 (5th Cir. 1989) (ruling that aliens should be treated same as United States citizens for venue purposes and therefore that resident alien may bring FOIA suit in district where he in fact resides).

for the District of Columbia Circuit have, over the years, decided a great many of the leading cases under the FOIA.[32]

The judicial doctrine of forum non conveniens, as codified in 28 U.S.C. § 1404(a),[33] can permit the transfer of a FOIA case to a different judicial district even if the plaintiff's chosen venue is proper.[34] The courts have invoked this doctrine to transfer FOIA cases under a variety of circumstances.[35] Similarly, when the requested records are the subject

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[32] See, e.g., Gaylor, 2006 WL 1644681, at *1 (transferring suit to District Court for District of Columbia, because of its "special expertise in FOIA matters"); Matlack, Inc. v. EPA, 868 F. Supp. 627, 630 (D. Del. 1994) ("The United States Court of Appeals for the District of Columbia Circuit has long been on the leading edge of interpreting the parameters of what a federal agency must disclose and may withhold consistent with the terms of FOIA.").

[33] (2019).

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

[35] See, e.g., Ohio State Univ. Moritz College of Law Civil Clinic v. CBP, No. 14-2329, 2015 WL 1928736, at *2 (S. D. Ohio Apr. 28, 2015) (granting defendant's motion to transfer because "[t]wo of the three parties to this litigation, as well as the documents responsive to Plaintiffs' FOIA request, are located in the Northern District of Ohio" and "*in camera* review is a distinct possibility" and not allowing the transfer "could create unnecessary practical issues"); Our Children's Earth Found. v. EPA, No. 08-01461, 2008 WL 3181583, at *7 (N.D. Cal. Aug. 4, 2008) (granting defendants' motion for transfer of venue to District of Hawaii because "instant case could have been filed as a crossclaim" in existing lawsuit in Hawaii); Carpenter v. DOJ, No. 3:05-CV-172, 2005 WL 1290678, at *2 (D. Conn. Apr. 28, 2005) (transferring FOIA suit to district in which plaintiff's criminal case was pending, because request sought records from that proceeding); Cecola v. FBI, No. 94 C 4866, 1995 WL 645620, at *3 (N.D. Ill. Nov. 1, 1995) (transferring remainder of case to district where remaining records and government's declarant are located, where plaintiff operates business, and where activities described in requested records presumably took place); Southmountain Coal Co. v. Mine Safety & Health Admin., No. 94-0110, slip op. at 2-3 (D.D.C. Mar. 10, 1994) (justifying transfer of suit to district where corporate requester resides and has principal place of business and where criminal case on which request is based is pending, on grounds that "a single court [handling] both FOIA and criminal discovery would obviate the possibility of contradictory rulings, and would prevent the use of FOIA as a mere substitute for criminal discovery"); cf. Envtl. Crimes Project v. EPA, 928 F. Supp. 1, 1-2 (D.D.C. 1995) (finding that "[t]he interest of justice clearly favors transfer of this case," but absent "precise" information as to location of records sought, declining to order transfer in view of "substantial weight due to plaintiff's choice of forum"). But see Haswell v. Nat'l R.R. Passenger Corp., No. 05-723, 2006 WL 839067, at *3-4 (D. Ariz. Mar. 28, 2006) (denying government's request to transfer venue to District of Columbia, because plaintiff was resident of Arizona, even though agency and all responsive records were located in Washington, D.C.; reasoning that "case [likely] will be decided on summary judgment" based upon affidavits).

of pending FOIA litigation in another judicial district, the related doctrine of "federal comity" can permit a court to defer to the jurisdiction of the other court, in order to avoid unnecessarily burdening the federal judiciary and delivering conflicting FOIA judgments.[36]

Statute of Limitations

A FOIA plaintiff ordinarily must file suit before expiration of the applicable statute of limitations.[37] In Spannaus v. DOJ, the Court of Appeals for the District of Columbia Circuit applied the general federal statute of limitations, which is found at 28 U.S.C. § 2401(a),[38] to FOIA actions.[39] Section 2401(a) provides, in pertinent part, that "every

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[36] See, e.g., McHale v. FBI, No. 99-1628, slip op. at 8-9 (D.D.C. Nov. 7, 2000) (applying "first-filed" rule to dismiss case when similar litigation was already pending in another jurisdiction); Hunsberger v. DOJ, No. 93-1945, slip op. at 1 (D.D.C. Mar. 16, 1994) (dismissing case because identical complaint is pending in Eastern District of Pennsylvania); Beck v. DOJ, No. 88-3433, 1991 WL 519827, at *5 (D.D.C. Jan. 31, 1991), summary affirmance granted in pertinent part & denied in part, No. 91-5292 (D.C. Cir. Nov. 19, 1992), aff'd on remaining issues, 997 F.2d 1489 (D.C. Cir. 1993) (dismissing on grounds of federal comity all claims pertaining to documents at issue in the Western District of Texas); cf. City of Chicago v. U.S. Dep't of the Treasury, No. 01 C 3835, 2001 WL 1173331, at *3 (N.D. Ill. Oct. 4, 2001) (finding "comity" inapposite when related case seeking much of same information at issue is before ~~a~~ court of appeals); Envtl. Crimes Project, 928 F. Supp. at 2 (denying government's transfer motion, but ordering stay of proceedings pending resolution of numerous discovery disputes in related cases in other jurisdiction).

[37] See, e.g., Reep v. DOJ, No. 18-5132, 2018 WL 6721099, at *1 (D.C. Cir. Dec. 18, 2018) (holding that six year statute of limitations precludes inclusion of FOIA requests administratively exhausted in 2010), cert. denied, 139 S.Ct. 2674 (2019); Wilbur v. CIA, 273 F. Supp. 2d 119, 123 (D.D.C. 2003) (dismissing case, in part, on basis of plaintiff's failure to file complaint within six year statute of limitations even though plaintiff was pro se), aff'd on other grounds, 355 F.3d 675 (D.C. Cir. 2004) (per curiam), reh'g denied, No. 03-5142 (D.C. Cir. Apr. 7, 2004). But see Manfredonia v. SEC, No. 08-1678, 2008 WL 2917079, at *2 (E.D.N.Y. July 24, 2008) (acknowledging that plaintiff may have failed to meet FOIA's six year statute of limitations but holding that "in light of plaintiff's pro se status and the liberal construction that is due his pleadings, the sua sponte dismissal of his FOIA claims is not appropriate").

[38] (2009).

[39] 824 F.2d 52, 55-56 (D.C. Cir. 1987); see also, e.g., Zaldivar v. VA, 695 F. App'x 319 (9th Cir. 2017) (affirming district court's descision that plaintiff's claim was barred by six year statute of limitations); Pit River Tribe v. Bureau of Land Mgmt., No. 04-cv-0969, 2013 U.S. Dist. LEXIS 106903 (E.D. Cal. July 29, 2013) (determining plaintiff's FOIA claim barred by six year statute of limitations); Porter v. CIA, 579 F. Supp. 2d 121, 126 (D.D.C. 2008) (same); Lighter v. IRS, No. 00-00289, 2001 U.S. Dist. LEXIS 3483, at *4 (D. Haw. Feb. 27, 2001) (dismissing complaint filed eight years after plaintiff exhausted his administrative

action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[40] In Spannaus, the D.C. Circuit held that the FOIA cause of action accrued – and, therefore, that the statute of limitations began to run – once the plaintiff had "constructively" exhausted his administrative remedies (see the discussion of Litigation Considerations, Exhaustion of Administrative Remedies, below) and not when all administrative appeals had been finally adjudicated.[41] However, the District Court for the District of Columbia has held that a time-barred FOIA cause of action can be cured by filing a new FOIA request "so long as the new claims

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remedies, two years too late); Jackson v. FBI, No. 02-3957, 2007 WL 2492069, at *8 (N.D. Ill. Aug. 28, 2007) (dismissing FOIA claims as time-barred because complaint was filed ten years after right of action accrued); Harris v. Freedom of Info. Unit, DEA, No. 3:06-0176, 2006 WL 3342598, at *6 (N.D. Tex. Nov. 17, 2006) (holding that plaintiff's suit is barred by six year statute of limitations and further concluding that plaintiff is not entitled to equitable tolling); Aftergood v. CIA, 225 F. Supp. 2d 27, 29 (D.D.C. 2002) (noting that section 2401(a) is "jurisdictional condition attached to the government's waiver of sovereign immunity," and dismissing complaint filed five months too late because the statute of limitations "must be strictly construed"); Madden v. Runyon, 899 F. Supp. 217, 226 (E.D. Pa. 1995) (finding that even assuming plaintiff exhausted his administrative remedies, statute of limitations would have expired four years prior to commencement of suit); see also Peck v. CIA, 787 F. Supp. 63, 66 (S.D.N.Y. 1992) (refusing to waive the statute of limitations because to do so would be "a waiver of sovereign immunity," which "cannot be relaxed based on equitable considerations," but noting that "there is nothing in the statute that prevents plaintiff from refiling an identical request . . . and thereby restarting the process").

[40] 28 U.S.C. § 2401(a) (2019).

[41] 824 F.2d at 57-59; see, e.g., Agolli v. OIG, 125 F. Supp. 3d 274, 281-82 (D.D.C. 2015) (agreeing "with Defendant's calculation that the date of accrual was ["20 business days after . . . the date Plaintiff filed her last administrative appeal regarding her FOIA request"]" and rejecting plaintiff's argument "that the statute of limitations only begins to run from the date of Plaintiff's last correspondence with the agency"); Rosenfeld v. DOJ, No. 07-03240, 2008 WL 3925633, at *10 (N.D. Cal. Aug. 22, 2008) (explaining that "'[c]onstructive exhaustion occurs when the time limits by which an agency must reply to a FOIA claimant's request or appeal . . . expire'" (quoting Aftergood, 225 F. Supp. 2d at 27)); Peck, 787 F. Supp. at 65-66 (noting that once constructive exhaustion period has run, statute of limitations is not tolled while request for information is pending before agency); see also Kenney v. DOJ, 700 F. Supp. 2d 111, 116 (D.D.C. 2010) (finding requester's failure to pay fees does not toll the statute of limitations because "the requirement that a requester pay fees before he may be deemed to have exhausted his administrative remedies is for the agency's protection, not the requester's"); cf. Zaldivar v. VA, No. 14-01493, 2015 WL 6468207, at *7 (D. Ariz. Oct. 27, 2015) (finding "continuing violation" doctrine did not rescue time-barred claim because requester "would know by the expiration of the applicable response date whether he had the documents he sought").

replace the time-barred claims."[42] The National Archives and Records Administration has issued General Records Schedule 4.2,[43] which sets a general record-retention period for case files and supporting documentation relating to FOIA requests involving either a grant or denial of information at six years after final action by an agency or three years after final adjudication by the courts, whichever is later.[44]

Relief

The FOIA statute imposes limitations on the types of relief a court may grant in a FOIA lawsuit.[45] Specifically, the Court of Appeals for the District of Columbia Circuit has held that the statutory language of the FOIA limits relief to the disclosure of improperly withheld records to a particular requester.[46]

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[42] Aftergood, 225 F. Supp. 2d at 31; see also Rosenfeld, 2008 WL 3925633, at *10 (holding that plaintiff's first FOIA request is time-barred, but noting that "ruling has little effect because defendants do not contest the validity of the substantially similar newly filed FOIA request").

[43] Nat'l Archives & Records Admin., General Records Schedule, Schedule 4.2 (2017).

[44] Id.; see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 28 n.51 (Dec. 1987) (advising agencies to maintain any "excluded" records for purposes of possible further review (citing FOIA Update, Vol. V, No. 4, at 4 (advising same regarding "personal" records))).

[45] See 5 U.S.C. § 552(a)(4)(B) (providing jurisdiction "to enjoin the agency from withholding agency records and to order production of any agency records improperly withheld"); see also id. § 552(a)(4)(E)(i) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed.").

[46] See Fabricant v. DOJ, No. 15-00294, 2017 U.S. Dist. LEXIS 128878 (D. Ariz. Aug. 11, 2017) (holding that plaintiff was not entitled to relief he sought in form of an order requiring Office of Information Policy to process his appeals); Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior, 88 F.3d 1191, 1203 (D.C. Cir. 1996) (holding that remedial provision of FOIA limits relief to ordering disclosure of documents to FOIA complainant); Carson v. U.S. Office of Special Counsel, No. 08-317, 2009 WL 1616763, at *5 (E.D. Tenn. June 9, 2009) (holding that court lacked authority under FOIA to order agency to create new documents that plaintiff believed agency was required to create); Hersh & Hersh v. HHS, No. 06-4234, 2007 WL 1411557, at *3 (N.D. Cal. May 11, 2007) (explaining that "the proper remedy for an agency's failure to adhere to the statutory deadlines is for the court to order the agency to respond or to review the request itself"); Dietz v. O'Neill, No. 00-3440, 2001 U.S. Dist. LEXIS 3222, at *2 (D. Md. Feb. 15, 2001) (same), aff'd per curiam, 15 F. App'x 42 (4th Cir. 2001); Green v. NARA, 992 F. Supp. 811, 817 (E.D. Va. 1998) (concluding that unless agency records have been improperly withheld, "'a district court lacks jurisdiction to devise remedies to force an agency to comply with FOIA's disclosure requirements'" (quoting DOJ v. Tax Analysts, 492 U.S. 136, 142 (1989))); cf. Bayala v. DHS, 246 F. Supp. 3d 16, 21 (D.D.C. 2017) (rejecting plaintiff's request "that the Court order

Consequently, the D.C. Circuit has held that the FOIA does not authorize a court to order the publication of information, even information required to be made available for public inspection under subsection (a)(2), and instead authorizes courts to order "production" of the information to the FOIA plaintiff.[47] The Court of Appeals for the Ninth Circuit, in an opinion that disagreed with the D.C. Circuit, held that "FOIA authorizes district courts to stop the agency from holding back records it has a duty to make available, which includes requiring an agency to post § 552(a)(2) documents online."[48]

The D.C. Circuit has held that the FOIA does not provide a jurisdictional vehicle for a court to consider Bivens-type constitutional tort claims against FOIA officers[49] or to

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[defendant] to 're-write' its intial response letter more fulsomely"); Navigators Ins. Co. v. DOJ, 155 F. Supp. 3d 157, 167-68 (D. Conn. 2016) ("Plaintiffs cite no authority for the proposition that an agency's violation of FOIA's deadlines entitles the requester to automatic disclosure of the requested documents without any analysis of the agency's claimed exemptions.").

[47] See CREW v. DOJ, 846 F.3d 1235, 1243 (D.C. Cir. 2017) ("We think it clear that a court has no authority under FOIA to issue an injunction mandating that an agency 'make available for public inspection' documents subject to the reading room provision."); Kennecott, 88 F.3d at 1203 ("We think it significant, however, that § 552(a)(4)(B) is aimed at relieving the injury suffered by the individual complainant, not by the general public. It allows district courts to order 'the production of any agency records improperly withheld from the complainant,' not agency records withheld from the public." (quoting 5 U.S.C. § 552(a)(4)(B) (emphasis added by court))); cf. Ass'n of Imps. of Textiles & Apparel v. U.S., 366 F. Supp. 2d 1280, 1283 n.2 (Ct. Int'l Trade 2005) (opining that 28 U.S.C. § 1581(i) confers Court of International Trade with jurisdiction to hear claims seeking publication under subsection (a)(1) of FOIA).

[48] Animal Legal Def. Fund v. Dep't of Agric., No. 17-16858, 2019 WL 4062524, at *8-13 (9th Cir. Aug. 29, 2019) (finding that "[t]he injuries complained of here *are* injuries sustained by individuals[;] [o]rdering an agency to upload records that FOIA mandates agencies will post in reading rooms would provide relief to plaintiffs, like those here, injured by the agency's failure to make those records so available").

[49] See, e.g., Cooper v. Stewart, No. 11-5061, 2011 WL 6758484, at *1 (D.C. Cir. Dec. 15, 2011) (determining that "'all agency decisions' regarding the classification of information under FOIA are reviewable only under FOIA and are 'not subject to judicial second-guessing in tort' through an [Federal Tort Claims Act] claim" (quoting Crumption v. Stone, 59 F.3d 1400, 1406 (D.C. Cir. 1995))); Johnson v. EOUSA, 310 F.3d 771, 777 (D.C. Cir. 2002) (explaining that "FOIA precludes the creation of a Bivens remedy"); Isasi v. Office of the Att'y Gen., 594 F. Supp. 2d 12, 14 (D.D.C. 2009) (dismissing claim against individual defendant because "a Bivens action is not viable as a remedy for FOIA violations, and the FOIA does not permit claims against individual federal officers"); Thomas v. FAA, No. 05-2391, 2007 WL 219988, at *3 (D.D.C. Jan. 25, 2007) (noting that plaintiffs "cannot obtain a Bivens remedy for an alleged violation of FOIA").

relitigate criminal matters.[50] Some courts have suggested, however, that the Administrative Procedure Act may be available in situations where the FOIA does not provide the court power to impose the requested declaratory and/or injunctive relief.[51]

Courts have ruled that once a determination is made that information has been properly withheld pursuant to a FOIA exemption, the court has no inherent, equitable power to order disclosure.[52] In the converse situation, courts have held that they cannot order records to be protected if they do not fall within the FOIA's exemptions.[53] Although

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[50] See, e.g., Williams & Connolly v. SEC, 662 F.3d 1240, 1245 (D.C. Cir. 2011) (holding that "FOIA is neither a substitute for criminal discovery [] nor an appropriate means to vindicate discovery abuses); Sanders v. Obama, 729 F. Supp. 2d 148, 158 (D.D.C. 2010) (finding no remedial powers under FOIA for courts to "determine the authenticity of the produced documents or to make findings of fact and law as to whether probable cause existed" in previous criminal trial), aff'd, No. 10-5273, 2011 WL 1769099 (D.C. Cir. April 21, 2011); Richardson v. DOJ, 730 F. Supp. 2d 225, 234 (D.D.C. 2010) (noting that "a Brady violation is a matter appropriately addressed to the court that sentenced [plaintiff], not through a FOIA action"); Mingo v. DOJ, 2009 WL 2618129, at *2 (D.D.C. Aug. 24, 2010) (maintaining that government's statutory obligation to disclose records under FOIA is separate from its constitutional obligation established by Brady to disclose exculpatory information to criminal defendants).

[51] See Nat'l Sec. Counselors v. CIA, 898 F. Supp. 2d 233, 265 (D.D.C. 2012) (finding relief may be available under Administrative Procedure~~s~~ Act to enforce compliance with FOIA, but such relief is precluded when court has power under FOIA to provide requested declaratory and injunctive remedies); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *28 (W.D. Pa. Feb. 7, 2001) (deciding that Administrative Procedure Act confers jurisdiction to order publication of ~~an~~ index under FOIA's subsection (a)(2) even though FOIA itself does not), appeal dismissed voluntarily, No. 01-1868 (3d Cir. Apr. 24, 2002); Pub. Citizen v. Lew, No. 97-2891, slip op. at 4 (D.D.C. July 14, 1998) (refusing to dismiss claim alleging noncompliance with FOIA requirement to publish descriptions of "major information systems" compiled under Paperwork Reduction Act, because even in the absence of ~~an~~ express judicial review provision in the FOIA, the Administrative Procedure Act provides a "strong presumption that Congress intend[ed] judicial review of administrative action").

[52] See Spurlock v. FBI, 69 F.3d 1010, 1016-18 (9th Cir. 1995) (concluding that when court finds records exempt under FOIA, it has no "inherent" authority to order disclosure of agency information just because it might conflict with depositions or other public statements of informant); see also ACLU v. DOJ, 681 F.3d 61, 71 (2d Cir. 2012) (finding district court's ruling improper where it had directed agency to release material "by substituting a purportedly neutral phrase composed by the court" for the properly exempt material, ruling that such ~~an~~ order "exceeded the court's authority under FOIA").

[53] See Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1087 (9th Cir. 1997) ("We conclude that a district court lacks inherent power, equitable or otherwise, to exempt materials that FOIA itself does not exempt."); Weber Aircraft Corp. v. United States, 688 F.2d 638, 645 (9th Cir. 1982) ("The careful balancing of interests which Congress attempted

ordinarily there can be no relief provided when an agency establishes that it has released the responsive records in full to the requester, the D.C. Circuit has held that a court may grant equitable relief if it finds in an exceptional case that the agency maintains an unlawful FOIA "policy or practice" threatening to impair the requester's ability to obtain records in the future, upon application of a strict "capable of repetition but evading review" standard.[54] (For further discussion see Litigation Considerations, Mootness and Other Grounds for Dismissal, below.) However, the D.C. Circuit has distinguished equitable relief from a declaratory judgment, holding that a declaratory judgment would constitute an advisory opinion that courts lack the jurisdiction to issue.[55] Some lower courts in other jurisdictions have, nonetheless, issued such judgments.[56]

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to achieve in the FOIA would be upset if courts could exercise their general equity powers to authorize nondisclosure of material not covered by a specific exemption."), rev'd on other grounds, 465 U.S. 792 (1984); see also Abraham & Rose, 138 F.3d at 1077 ("Basing a denial of a FOIA request on a factor unrelated to any of the[] nine exemptions clearly contravenes [the FOIA]."). But see Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 20 (1973) (suggesting, in dicta, that FOIA does not "limit the inherent powers of an equity court"); Campos v. INS, 32 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 1998) (same).

[54] See Payne Enters. v. United States, 837 F.2d 486, 490-92 (D.C. Cir. 1988) (finding repeated, unacceptably long agency delays in providing nonexempt information sufficient to grant equitable relief where such delays are likely to recur absent judicial intervention); Pub. Citizen v. Office of the U.S. Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (deciding that courts have jurisdiction to consider "agency's policy to withhold temporarily, on a regular basis, certain types of documents"); see also Gavin v. SEC, No. 04-4552, 2005 WL 2739293, at *6 (D. Minn. Oct. 24, 2005) (rejecting request to enjoin SEC from using "Glomar" response, because "future harm is merely speculative in nature, and injunctive relief is [therefore] inappropriate") reconsideration denied, 2006 WL 208783 (D. Minn.. Jan. 26, 2006); Ctr. for Individual Rights v. DOJ, No. 03-1706, slip op at 11-12 (D.D.C. Sept. 21, 2004) (finding ~~a~~ lack of jurisdiction to grant equitable relief – after agency made full disclosure during the course of litigation – because plaintiff failed to establish ~~an~~ unlawful FOIA policy or otherwise "articulate what documents it might seek in the future or in what way future requests would mirror the circumstances of its original request").

[55] Payne Enters., 837 F.2d at 491 (distinguishing between issuance of "[a] declaration that an agency's initial refusal to disclose requested information was unlawful, after the agency made that information available, [which] would constitute an advisory opinion in contravention of Article III of the Constitution," and grant of equitable relief, following full disclosure, where ~~an~~ agency maintains ~~an~~ otherwise-unreviewable "policy or practice that will impair . . . lawful access to information in the future"); see also Comptel v. FCC, 945 F. Supp. 2d 48, 61 (D.D.C. 2013) ("'[A] declaration that an agency's initial refusal to disclose requested information was unlawful, after the agency made that information available, would constitute an advisory opinion'"); Pagosans for Pub. Lands v. U.S. Forest Serv., No. 06-cv-00556, 2007 WL 162745, at *3 (D. Colo. Jan. 18, 2007) ("There is no jurisdiction under FOIA for a declaratory judgment.").

[56] See Navigators Ins. Co., 155 F. Supp. 3d at 168 (noting that courts have granted declaratory judgments where agencies have engaged in pattern or practice of delayed

Preliminary Injunctions

On occasion, FOIA plaintiffs have attempted to expedite judicial consideration of their suits by seeking a preliminary injunction to "enjoin" the agency from continuing to withhold the requested records.[57] When such extraordinary relief is sought, the court does not adjudicate the parties' substantive claims, but rather weighs: 1) whether the plaintiff is likely to prevail upon the merits, 2) whether the plaintiff will be irreparably harmed absent relief, 3) whether the defendant will be substantially harmed by the issuance of injunctive relief, and 4) whether the public interest will be benefitted by such

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disclosure "and it is possible the violations will recur with respect to the same requesters"); Our Children's Earth Found. v. Nat. Marine Fisheries Serv., No. 14-4365, 2015 WL 6331268, at *9 (N.D. Cal. Oct. 21, 2015) (granting declaratory relief primarily due to agency's "pattern-and-practice of failure to meet FOIA deadlines"); South Yuba River Citizens League v. Nat'l Marine Fisheries, No. 06-2845, 2008 WL 2523819, at *6 (N.D. Cal. June 20, 2008) (granting plaintiff's motion for declaratory judgment and declaring that agency's "failure to adhere to FOIA's deadline for responding to plaintiffs' information requests is unlawful"); Or. Natural Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (issuing, after ~~the~~ agency's disclosure of all requested records, declaratory judgment that its failure "to make a timely determination resulted in an improper withholding under the Act"); Beacon Journal Publ'g Co. v. Gonzalez, No. 05-CV-1396, 2005 U.S. Dist. LEXIS 28109, at *3-4 (N.D. Ohio Nov. 16, 2005) (pronouncing, following agency's disclosure of the requested photographs, that its initial withholding was "contrary to the FOIA").

[57] See Aronson v. HUD, 869 F.2d 646, 648 (1st Cir. 1989) (denying preliminary injunction); Animal Legal Def. Fund v. Dep't of Agric., No 17-00949, 2017 WL 2352009 (N.D. Cal. May 31, 2017) (denying request for preliminary injuction because plaintiffs failed to "demonstrate that the law and facts clearly favor the relief they have requested" and "they are not likely to succeed on their FOIA claim"); Dorsett v. DOJ, 307 F. Supp. 2d 28, 42 (D.D.C., 2004) (describing plaintiff's motion for injunction to prevent agency from "not taking any action honoring or denying" FOIA request, but dismissing it because court has no jurisdiction to make "advisory findings" regarding agency conduct towards FOIA requesters); Wiedenhoeft v. United States, 189 F. Supp. 2d 295, 296-97 (D. Md. 2002) (refusing to issue temporary restraining order to force "immediate compliance" with plaintiff's FOIA requests by moving them "to the head of the queue forthwith"); Pinnacle Armor, Inc. v. United States, No. 07-1655, 2008 WL 108969, at *9 (E.D. Cal. Jan. 7, 2008) (denying injunctive relief and noting that "[p]laintiff has not provided any authority for the proposition that the claim for the Freedom of Information Act supports a claim for an injunction"); Carlson v. USPS, No. 02-5471, 2005 WL 756573, at *8 (N.D. Cal. Mar. 31, 2005) (denying request for injunction sought to compel "timely" response to FOIA request); Al-Fayed v. CIA, No. 00-2092, slip op. at 18 (D.D.C. Dec. 11, 2000) (reminding plaintiffs, who twice before had petitioned for temporary restraining order, that preliminary injunctions amount to "extraordinary" relief, which must be granted "sparingly"), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); Beta Steel Corp. v. NLRB, No. 2:97 CV 358, 1997 WL 836525, at *2 (N.D. Ind. Oct. 22, 1997) (denying preliminary injunction).

relief.[58] Courts have expressed concern that preliminary injunctions risk disclosing the very information that is the subject of the litigation and can interfere with the orderly briefing of the case.[59]

The FOIA contemplates expedited processing of requests in cases of "compelling need" and in other situations that are determined by agency regulation to warrant such processing.[60] (For further discussion of expedited processing, see Procedural Requirements, Expedited Processing, above.) The timing of an agency's response to an expedited processing request itself has been subject to a preliminary injunction.[61] Such

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[58] See Pinson v. DOJ, No. 18-486, 2018 WL 5464706, at *6 (D.D.C. Oct. 29, 2018) (denying plantiff's motion for preliminary injunction based on harm suffered in past because plaintiff has not demonstrated irreparable harm in future) (appeal filed); Allied Progress v. Consumer Fin. Prot. Bureau, No. 17-686, 2017 WL 1750263, at *6 (D.D.C. May 4, 2017)(finding that "[p]laintiff has failed to establish its likelihood of success on the merits, or that it will be irreparably harmed, and the pulic interests and equities are in equipoise"); Judicial Watch, Inc. v. DHS, 514 F. Supp. 2d 7, 11 (D.D.C. 2007) (denying injunctive relief "because the plaintiff has failed to establish the necessary irreparable harm and because granting the motion would impose a significant hardship on the defendant agencies and not serve the public interest"); Long v. DHS, 436 F. Supp. 2d 38, 43 (D.D.C. 2006) (discussing all four factors and denying plaintiff's request for injunctive relief); Elec. Privacy Info. Ctr. v. DOJ, 416 F. Supp. 2d 30, 36-42 (D.D.C. 2006) (same); Al-Fayed v. CIA, No. 00-2092, 2000 WL 34342564, at *2-6 (D.D.C. Sept. 20, 2000) (same); see also Mayo v. U.S. Gov't Printing Office, 839 F. Supp. 697, 700 (N.D. Cal. 1992) (finding fact that FOIA expressly authorizes injunctive relief does not divest district court of obligation to "exercise its sound discretion," relying on traditional legal standards, in granting such relief (citing Weinberger v. Romero Barcelo, 456 U.S. 305, 312 (1982))), aff'd, 9 F.3d 1450 (9th Cir. 1993).

[59] See Aronson, 869 F.2d at 648 ("To issue the preliminary injunction discloses the names, permanently injuring the interest HUD seeks to protect[.]"); see also Long, 436 F. Supp. 2d at 44 (refusing to issue preliminary injunction to compel production of records, because "[t]he government has not yet had a chance to review its files, prepare and file a dispositive motion, and provide the Court the information necessary to make a decision on any material that might be subject to an exemption"); Hunt v. U.S. Marine Corps, No. 94-2317, slip op. at 5 (D.D.C. Oct. 28, 1994) (denying temporary restraining order, in part on basis of strong "public interest in an 'orderly, fair and efficient administration of the FOIA'" (quoting Nation Magazine, 805 F. Supp. at 74)).

[60] 5 U.S.C. § 552(a)(6)(E)(i)(I)-(II); see, e.g., Dep't of State FOIA Regulations, 22 C.F.R. § 171.11(f)(3) (2019) (providing for expedited processing if "[f]ailure to release the information would impair substantial due process rights or harm substantial humanitarian interests").

[61] See Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008) (granting preliminary injunction and ordering defendants to timely process and produce requested documents to plaintiff within seventeen days of court order); Elec. Privacy Info. Ctr., 416 F. Supp. 2d at 42 (granting preliminary injunction to accelerate agency's processing of expedited request); Gerstein v. CIA, No. 06-4643, 2006 WL 3462659,

was the case in a ruling by the District Court for the District of Columbia in Electronic Privacy Information Center (EPIC) v. DOJ, which involved a request which had been granted expedited processing.[62] In EPIC, the court ruled that jurisdictional authority exists to impose "concrete deadlines" on any agency that "delay[s]" the processing of an expedited FOIA request beyond what arguably is "as soon as practicable,"[63] i.e., the statutory standard applicable to expedition.[64] The court then issued an injunction to accelerate the processing of the FOIA request by requiring production of records within twenty days of its order.[65]

Frivolous Lawsuits

Occasionally, courts have considered whether a FOIA plaintiff is filing frivolous lawsuits. The Court of Appeals for the District of Columbia Circuit has ruled that generally FOIA plaintiffs' "mere litigiousness alone does not support the issuance of an injunction" against filing further lawsuits.[66] Nevertheless, where a plaintiff has a history of initiating frivolous claims, courts have required them to seek leave of court before filing further FOIA actions.[67]

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at *4-5 (N.D. Cal. Nov. 29, 2006) (granting plaintiff's motion for preliminary injunction and ordering agencies to process plaintiff's FOIA requests within thirty days); Wash. Post v. DHS, 459 F. Supp. 2d 61, 68 n.4, 76 (D.D.C. 2006) (granting plaintiff preliminary injunction and ordering agency to process records within ten days because not granting injunction would cause plaintiff to "lose out on its statutory right to expedited processing and on the time-sensitive public interests which underlay the request"). But cf. Long, 436 F. Supp. 2d at 44 (denying, given "broad scope of plaintiff's requests," motion for preliminary injunction to compel processing within twenty days, and explaining that "[t]he government has not yet had a chance to review its files, prepare and file a dispositive motion, and provide the Court the information necessary to make a decision on any material that might be subject to an exemption").

[62] See Elec. Privacy Info. Ctr., 416 F. Supp. 2d at 33.

[63] Id. at 38.

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

[65] See Elec. Privacy Info. Ctr., 416 F. Supp. 2d at 40.

[66] In re Powell, 851 F.2d 427, 434 (D.C. Cir. 1988); cf. Zemansky v. EPA, 767 F.2d 569, 573-74 (9th Cir. 1995) (holding that district court exceeded its authority by requiring frequent requester, whose requests included "questions, commentary, narrative" and other extraneous material, to make future requests in "'separate document which is clearly defined as an FOIA request' and not 'intertwined with non-FOIA matters'").

[67] See, e.g., Schwarz v. NSA, 526 U.S. 122, 122 (1999) (barring plaintiff from further filings, citing thirty-five frivolous petitions for certiorari); Schwarz v. USDA, 22 F. App'x 9, 10 (D.C. Cir. 2001) (affirming district court prohibition against plaintiff's filing of any further civil actions without first obtaining leave of court, because of her long history of frivolous claims

Appointment of Counsel

Where a pro se FOIA plaintiff seeks appointment of counsel, a district court has wide discretion to decide whether to grant that request under 28 U.S.C. § 1915(e)(1).[68] The Court of Appeals for the District of Columbia Circuit has held that a court should consider several factors in making this decision: 1) the nature and complexity of the action, 2) the potential merit of the claims, 3) the inability of a pro se party to obtain counsel by other means, and 4) the degree to which the interests of justice will be served by appointment of counsel.[69] (For a discussion of the availability of attorney fees in the

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and litigation abuses); Hoyos v. VA, No. 98-4178, slip op. at 4 (11th Cir. Feb. 1, 1999) (affirming district court's order barring plaintiff from future filings without court's permission, and noting that plaintiff "has frivolously sued just about everyone even remotely associated with the VA . . . and has burdened the district court with over 130 motions and notices, many of them duplicative"); Goldgar v. Office of Admin., 26 F.3d 32, 35-36 & n.3 (5th Cir. 1994) (warning plaintiff that subsequent filing or appeal of FOIA lawsuits without jurisdictional basis may result in assessment of costs, attorney's fees and proper sanctions or that plaintiff may be required to "obtain judicial preapproval of all future filings"); Robert v. DOJ, No. 05-2543, 2005 WL 3371480, at *12-15 (E.D.N.Y. Dec. 12, 2005) (enjoining plaintiff from filing future actions without leave of court, as plaintiff's "litigation history in the EDNY is vexatious," based on twenty-four FOIA cases filed in the EDNY, which "have required a substantial use of judicial resources at considerable expense to Defendants"); Peck v. Merletti, 64 F. Supp. 2d 599, 603 (E.D. Va. 1999) (noting plaintiff's "continued pursuit of nonexistent information . . . and the drain on valuable judicial and law enforcement resources," requiring that plaintiff's future filings comply with "Federal Rule of Civil Procedure 8 in regards to 'a short and plain statement of the claim'" (quoting Fed. R. Civ. P. 8(a)(2))).

[68] (2019); see, e.g., Schwarz v. U.S. Dep't of the Treasury, No. 00-5453, 2001 WL 674636, at *1 (D.C. Cir. May 10, 2001) (declaring that "appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits").

[69] See, e.g., Willis v. FBI, 274 F.3d 531, 532-33 (D.C. Cir. 2001) (citing local court rules as most appropriate basis upon which to decide appointment of counsel question in FOIA case); Pinson v. DOJ, 104 F. Supp. 3d 30, 35 (D.D.C. 2015) (agreeing with parties that "because the BOP's mail policy prohibits [plaintiff] from accessing some documents responsive to his FOIA requests," "[plaintiff] is currently unable to view documents relevant to this litigation, and in light of the fact that a number of his FOIA claims have proven meritorious and survived Defendants' motions for partial summary judgment, appointment of counsel is appropriate and will serve the interests of justice"); Shehadeh v. FBI, No. 10-3306, 2011 WL 2909202, at *1 (D.C. Ill July 18, 2011) ("In deciding whether to allow a request for pro bono counsel, the Court must consider: (1) whether the indigent plaintiff has made a reasonable attempt to obtain counsel or has been effectively precluded from doing so; and, (2) whether the plaintiff appears competent to litigate the matter for himself."); Jackson v. EOUSA, No. 07-6591, 2008 WL 4444613, at *2-3 (S.D.N.Y. Sept. 25, 2008) (denying appointment of counsel in light of plaintiff's demonstrated abilities to pursue her

event that counsel is appointed, see Attorney Fees, below.) Additionally, it has been held that the FOIA does not provide a plaintiff, pro se or otherwise, with a right to a jury trial.[70]

Pleadings

An agency has thirty days from the date of service to answer a FOIA complaint,[71] not the typical sixty days provided by Federal Rule of Civil Procedure 12(a)(2). Courts are not required to automatically accord expedited treatment to FOIA lawsuit; however, as with other civil actions, they may do so "if good cause therefore is shown."[72]

Only federal agencies are proper party defendants in FOIA litigation.[73] Consequently, neither the agency head nor other federal employees are proper parties to

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FOIA claim, and given that factual and legal issues relating to her FOIA claim do not appear overly complex).

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

[71] See 5 U.S.C. § 552(a)(4)(C) (2012 & Supp. V 2017).

[72] Federal Courts Improvement Act, 28 U.S.C. § 1657 (2019).

[73] See 5 U.S.C. § 552(a)(4)(B) (granting district courts "jurisdiction to enjoin the agency from withholding agency records improperly withheld from complainant") (emphasis added); 5 U.S.C. § 552(f)(1) (defining term "agency"); see also, Taitz v. Ruemeller, No. 11-1421, 2012 U.S. App. LEXIS 10714, at *1 (D.C. Cir. May 25, 2012) (per curiam) (affirming district court's decision that White House Chief Counsel's Office is not agency subject to FOIA); Earle v. Holder, No. 11-5280, 2012 WL 1450574, at *1 (D.C. Cir. Apr. 19, 2012) (per curiam) (affirming district court's dismissal of claims against District of Columbia employees); Wells v. State Att'y Gen. of La., 469 F. App'x 308, 309 (5th Cir. 2012) (per curiam) (affirming decision of district court to dismiss FOIA claim brought against state entity); Citizens for Resp. & Ethics in Wash. v. Office of Admin., 566 F.3d 219, 220-26 (D.C. Cir. 2009) (concluding that Office of Administration within Executive Office of the President is not agency subject to FOIA, "because it . . . lacks substantial independent authority"); Dunleavy v. N.J., 251 F. App'x 80, 83 (3d Cir. 2007) (upholding district court's decision to dismiss FOIA claim against state agency); Megibow v. Clerk of U.S. Tax Ct., 432 F.3d 387, 387 (2d Cir. 2005) (concluding that United States Tax Court is not subject to FOIA); Pennyfeather v. Tessler, 431 F.3d 54, 56 (2d Cir. 2005) (holding that FOIA does not provide for private right of action against municipal or state agencies or officials); Henderson v. Sony Pictures Entm't, 135 F. App'x 934, 935 (9th Cir. 2005) (affirming that private company is not agency and, accordingly, not subject to FOIA); United States v. Casas, 376 F.3d 20, 22 (1st Cir. 2004) (stating that judicial branch is not subject to FOIA); United We Stand Am., Inc. v. IRS, 359 F.3d 595, 597 (D.C. Cir. 2004) ("Because Congress is not an agency, congressional documents are not subject to FOIA's disclosure requirement."); Elec. Priv. Info. Ctr. v. NSA, 795 F. Supp. 2d 85, 91 (D.D.C. 2011) (finding that "[t]his Circuit has unambiguously held that the [National Security Council] is not an agency subject to FOIA"); Godaire v. Napolitano, No. 10-1266, 2010 U.S. Dist. LEXIS

a FOIA suit,[74] nor is "the United States."[75] (For a further discussion of which entities are subject to the FOIA, see Procedural Requirements, Entities Subject to the FOIA, above.) In some instances when FOIA plaintiffs name an office or component of an agency as a defendant, courts will substitute the appropriate agency as the proper party.[76] However,

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122237, at *1-3 (D. Conn. Nov. 17, 2010) (dismissing plaintiff's FOIA claims against individuals, state entities, and private businesses because "FOIA applies only to federal agencies"); Thornton-Bey v. Admin. Office of U.S. Courts, No. 09-0958, 2009 WL 1451571, at *1 (D.D.C. May 21, 2009) (concluding that Administrative Office of U.S. Courts is part of judicial branch and thus not an agency for purposes of FOIA); Banks v. Lappin, 539 F. Supp. 2d 228, 234 (D.D.C. 2008) (dismissing plaintiff's FOIA claims against Offices of the President and Vice President and Congress for lack of subject matter jurisdiction because they are not "agencies").

[74] See, e.g., Offor v. EEOC, 687 Fed.Appx. 13, 15 n. 1 (2d Cir. 2017) (per curiam) (finding that "[t]he district court correctly determined that [the requester] was unable to assert claims against [a named official] individually because FOIA imposes a responsibility on the agency, not individual federal officials, to produce documents"); Drake v. Obama, 664 F.3d 774, 786 (9th Cir. 2011) (affirming district court's dismissal of FOIA claims against defendants because "they are all individuals, not agencies"); Cooper v. Stewart, No. 11-5061, 2011 WL 6758484, at *1 (D.C. Cir. Dec. 15, 2011) (per curiam) (affirming district court's dismissal of "claims against individual defendants because the [FOIA] only authorizes suits against certain executive branch 'agencies' not individuals"); Martinez v. BOP, 444 F.3d 620, 624 (D.C. Cir. 2006) (affirming district court's decision to dismiss FOIA claims against individual federal employees); Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993) (per curiam) (dismissing suit brought against prosecutor, because plaintiff "sued the wrong party"); Petrus v. Bowen, 833 F.2d 581, 582 (5th Cir. 1987) ("Neither the Freedom of Information Act nor the Privacy Act creates a cause of action for a suit against an individual employee of a federal agency."); Sanders v. Obama, 729 F. Supp. 2d 148, 151 n.1 (D.D.C. 2010) (dismissing President and two federal employees as defendants to action since "FOIA only provides for a cause of action based on the actions/inactions of agencies, not individuals"); Brown v. DOJ, 734 F. Supp. 2d 99, 102 (D.D.C. Aug. 30, 2010) (granting motion to dismiss claims against component office of DOJ and federal employees).

[75] See Batton v. Evers, 598 F.3d 169, 172 n.1 (5th Cir. 2010) (noting that neither United States nor individuals are proper parties to FOIA actions); Sanders v. United States, No. 96-5372, 1997 WL 529073, at *1 (D.C. Cir. July 3, 1997) (dismissing complaint because "United States" is not agency subject to FOIA); United States v. Trenk, No. 06-1004, 2006 WL 3359725, at *8 (D.N.J. Nov. 20, 2006) ("The United States is not a proper party in a FOIA action."); Huertas v. United States, No. 04-3361, 2005 WL 1719143, at *7 (D.N.J. July 21, 2005) (granting defendants' motion for summary judgment because United States and individual defendants were only defendants named).

[76] See, e.g., Schmidt v. Shah, No. 08-2185, 2010 U.S. Dist. LEXIS 25539, at *2-3 n.2 (D.D.C. Mar. 18, 2010) (substituting "USAID as the real party in interest" where plaintiff brought FOIA action against USAID Administrator in his official capacity); Williams v. Comm'r of IRS, 723 F. Supp. 2d 925, 929 (M.D. La. 2010) (granting plaintiff leave to amend complaint to name agency as proper party defendant); Richardson v. DOJ, 730 F. Supp. 2d 225,

in other situations, courts have allowed agency components to be sued in their own capacity.[77]

Although the D.C. Circuit has held that an agency in possession of records originating with another agency "cannot simply refuse to act on the ground that the documents originated elsewhere,"[78] it has also ruled that an "agency may acquit itself through a referral, provided the referral does not lead to improper withholding.[79]

Lastly, courts have rejected attempts by FOIA plaintiffs to amend their complaints when amendment is unduly delayed,[80] the complaint as amended still would fail to state

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229 n.1 (D.D.C. 2010) (considering DOJ proper party defendant where two of its component offices were named).

[77] Flaherty v. IRS, 468 F. Appx. 8, 9 (D.C. Cir. June 6, 2012) (per curiam) (affirming district court's decision to dismiss claims against individuals and substitute IRS as sole defendant); Batton, 598 F.3d at 172 n.1 (providing that on remand plaintiff should be given opportunity to substitute IRS as proper party defendant in place of IRS Commissioner and United States); Peralta v. U.S. Att'ys Office, 136 F.3d 169, 173 (D.C. Cir. 1998) (dictum) (suggesting that "the FBI is subject to FOIA in its own name"); Jean-Pierre v. BOP, 880 F. Supp. 2d 95, 101 (D.D.C. 2012) (determining that "[a]lthough a small number of decisions hold that only the DOJ, and not its subcomponents, may be sued under FOIA, . . . the weight of authority is that subcomponents of federal executive departments may, at least in some cases, be properly named as FOIA defendants"); Brown v. FBI, 793 F. Supp. 2d 368, 385 (D.D.C. 2011) (denying FBI's motion to dismiss and concluding that substitution of DOJ is unnecessary because "no court has found that FOIA does not apply to the FBI" and it "'has litigated numerous FOIA cases in its own name'"); Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 509 (D. Minn. 2008) (concluding that Bureau of Land Management, a constituent office of Department of the Interior, "is an agency for purposes of FOIA"); Cnty. of Santa Cruz v. Ctrs. for Medicare & Medicaid Servs., No. 07-2889, 2009 WL 816633, at *1 (N.D. Cal. Mar. 26, 2009) (refusing to dismiss Centers for Medicare and Medicaid Services, part of HHS, as defendant in FOIA action because it "failed to demonstrate that it is not establishment in the executive branch of the government").

[78] McGehee v. CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983).

[79] Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1118 (D.C. Cir. 2007) (rejecting plaintiff's argument that referrals are barred outright because, while consultations are per se acceptable, other reasonable procedures including referrals are not precluded); Chaplin v. Stewart, 763 F. Supp. 2d 1, 4 (D.D.C. 2011) (concluding that fact that certain documents maintained by agency may have originated with another agency "does not relieve [defendant] of its statutory obligations to search its files for responsive records and to either release them to plaintiff or to refer them to [other agency] for processing"); see also DOJ, OIP Guidance: Referrals, Consultations, and Coordination (2011) (advising agencies of responsibilities with respect to referrals, consults, and coordinations).

[80] See, e.g., Brown v. FBI, 744 F. Supp. 2d 120, 123 (D.D.C. 2010) (denying pro se plaintiff leave to amend where he provided "no explanation why he waited more than two years to

a justiciable claim,[81] or the proposed amendments would dramatically alter the scope and nature of the FOIA litigation.[82]

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try to amend" and where proposed amendment would "prejudice defendants by expanding the scope of the litigation – after the litigation concluded – beyond its initial character as solely a FOIA action"); James v. U.S. Customs & Border Prot., 549 F. Supp. 2d 1, 12-13 (D.D.C. 2008) (refusing to allow plaintiff to amend his complaint to include new defendants because he waited "nearly two years" and sought leave only after receiving defendant's renewed motion for summary judgment); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1200 (N.D. Cal. 2006) (denying motion to amend complaint because "[t]he parties' summary judgment motions have been fully briefed and argued, and allowing amendment would unduly prolong these proceedings").

[81] See, e.g., Pickering-George v. Alcohol & Tobacco Tax & Trade Bureau, 399 F. App'x 602, 603 (D.C. Cir. Nov. 8, 2010) (per curiam) (concluding that district court "did not abuse its discretion in denying as futile appellant's motion to amend the complaint"); Dunleavy, 251 F. App'x at 84 (holding that district court did not abuse its discretion by disallowing plaintiff to amend his complaint because the "amended complaint could not withstand a renewed motion to dismiss"); Tereschchuk v. BOP, 851 F. Supp. 2d 157, 162 (D.D.C. 2012) (finding amendment of complaint "is futile" where plaintiff failed to exhaust his administrative remedies with respect to two requests for which he did not pay fees or request fee waiver); Union Leader Corp. v. DHS, No. 12-18, 2012 U.S. Dist. LEXIS 39730, at *5-8 (D.N.H. Mar. 23, 2012) (denying plaintiff's motion to amend complaint on grounds that it would be "futile" where agency had not issued ~~a~~ decision on request and twenty-day statutory time period had not run); Stanko v. BOP, 842 F. Supp. 2d 132, 140-~~1~~41 (D.D.C. Feb. 3, 2012) (denying plaintiff leave to amend where proposed Privacy Act and First Amendment claims would be futile and where there was an eighteen month delay in raising these claims); Brown, 793 F. Supp. 2d at 391 (denying as futile plaintiff's motion for leave to amend complaint to add new FOIA claims where he "has not placed information into the record showing that [any of the] agenc[ies] denied his request or that he appealed their denial"); Pohl v. EPA, No. 09-1480, 2010 WL 2607476, at *5 (W.D. Pa. June 25, 2010) (dismissing one of plaintiff's proposed amendments as futile because that claim "rests on an alleged violation of FOIA" by private hospital and private citizen); McDermott v. Potter, No. 09-0776, 2009 WL 2971585, at *1 (W.D. Wa. Sept. 11, 2009) (denying leave to amend as "futile" where plaintiff failed to submit proper FOIA request); cf. Feinman v. FBI, 269 F.R.D. 44, 51-53 (D.D.C. 2010) (granting plaintiff leave to add claim that FBI violated FOIA via particular policy and rejecting defendant's argument that such amendment was "futile because it does not state a valid claim for equitable relief").

[82] See, e.g., Cause of Action v. DOJ, 282 F. Supp. 3d 66, 76 (D.D.C. Oct. 10, 2017) (refusing to grant leave to amend because doing so "would unduly prejudice the [defendant] by expanding this litigation from a simple FOIA claim . . . into a more complex case"); Brown, 744 F. Supp. 2d at 123 (denying pro se plaintiff leave to amend where proposed amendment would "prejudice defendants by expanding the scope of the litigation – after the litigation concluded – beyond its initial character as solely a FOIA action"); Wolf v. CIA, 569 F. Supp. 2d 1, 25 (D.D.C. 2008) (denying plaintiff's motion to amend complaint to include additional FOIA and APA claims, because "the proposed amendments bear no relationship to [the] original case and would result in a 'radical' change to the 'scope and nature' of this litigation") (citation omitted); Reynolds v. United States, No. 06-0843, 2007 WL 3071179,

Standard of Review

The standards and procedures that apply to FOIA lawsuits are atypical within the field of administrative law. First, the usual "substantial evidence" standard of review of agency action is replaced in the FOIA by a de novo review standard.[83] Second, the defendant agency maintains the burden of proof to justify its decision to withhold any information.[84]

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at *2-3 (S.D.N.Y. Oct. 19, 2007) (denying plaintiff's request to amend complaint where his new claims had "no relation to the claims [he] originally asserted" and where he sought to add additional defendants at advanced stage in the case); Caton v. Norton, No. 04-439, 2005 WL 1009544, at *4 (D.N.H. May 2, 2005) (denying motion to amend complaint where plaintiff sought to add claims barred by doctrines of sovereign immunity and exhaustion of administrative remedies); Szymanski v. DEA, No. 93-1314, 1993 WL 433592, at *2 (D.D.C. Oct. 6, 1993) ("This Court will not permit a F.O.I.A. complaint, properly filed, to become the narrow edge of a wedge which forces open the court house door to unrelated claims against unrelated parties."). But see Eison v. Kallstrom, 75 F. Supp. 2d 113, 117 (S.D.N.Y. 1999) (allowing plaintiff to amend original complaint in order to allege improper withholding of records, where original complaint had asked for injunction against "pattern and practice" of delayed agency responses, which court deemed "now moot").

[83] See 5 U.S.C. § 552(a)(4)(B) (2012 & Supp. V 2017); see also DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989) (noting that the FOIA "directs the district courts to 'determine the matter de novo'" (citing 5 U.S.C. § 552(a)(4)(B)); DiBacco v. Dep't of Army, 926 F.3d 827, 832 (D.C. Cir. 2019) (noting that standard of review in FOIA cases is de novo); Bloomberg, L.P. v. Bd. of Governors of the Fed. Res. Sys., 601 F.3d 143, 147 (2d Cir. 2010) ("The agency's decision that the information is exempt from disclosure receives no deference; accordingly, the district court decides de novo whether the agency has sustained its burden."); Summers v. DOJ, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (explaining that review is "de novo").

[84] See 5 U.S.C. § 552(a)(4)(B); DiBacco, 926 F.3d at 834 (D.C. Cir. 2019) (noting that agency bears burden of proof to justify withholdings); Watkins v. U.S. Bureau of Customs, 643 F.3d 1189, 1194 (9th Cir. 2011) ("'FOIA's strong presumption in favor of disclosure means that an agency that invokes one of the statutory exemptions to justify the withholding of any requested documents or portions of documents bears the burden of demonstrating that the exemption properly applies to the documents.'" (quoting Lahr v. NTSB, 569 F.3d 964, 973 (9th Cir. 2009))); Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (explaining that it is agency's burden "to justify the withholding of any requested documents"); DOJ v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989) ("The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'"); Reporters Comm., 489 U.S. at 755 (stating that "unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action'" (citing 5 U.S.C. § 552(a)(4)(B)).

In certain contexts, however, courts modify these standards. For example, when Exemption 1 is invoked, most courts apply a highly deferential standard of review for classified documents in order to avoid compromising national security.[85] (See the discussion under Exemption 1, Standard of Review, above). Fee waiver issues are also reviewed under the de novo standard of review, but the scope of review is specifically limited by statute to the record before the agency.[86] (For a further discussion of fee waiver review standards, see Fees and Fee Waivers, Fee Waivers, above.) Additionally, in instances where the requester seeks expedition under the statutorily based "compelling need"[87] standard and an agency denies that request for expedition, courts review that decision de novo.[88] Significantly, however, the Court of Appeals for the District of Columbia Circuit has observed that, in cases where an agency has established additional grounds for expedited processing, the applicable regulation and the agency's interpretation of it are "entitled to judicial deference."[89]

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[85] See, e.g., ACLU v. DOD, 628 F.3d 612, 624 (D.C. Cir. 2011) (reiterating that "'[i]n the FOIA context, we have consistently deferred to executive affidavits predicting harm to national security, and have found it unwise to undertake searching judicial review'") (citation omitted); Larson v. Dep't of State, 565 F.3d 857, 865 (D.C. Cir. 2009) (same); Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007) ("Although the court has 'consistently maintained that vague and conclusory affidavits, or those that merely paraphrase the words of a statute, do not allow a reviewing judge to safeguard the public's right of access to government records,' the text of Exemption 1 itself suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified.") (citation omitted); Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007) (finding that "in conducting de novo review in the context of national security concerns, courts 'must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record'" (quoting Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984))).

[86] 5 U.S.C. § 552(a)(4)(A)(vii); see, e.g., Stewart v. U.S. Dep't of the Interior, 554 F.3d 1236, 1241 (10th Cir. 2009); Judicial Watch, Inc. v. Rosotti, 326 F.3d 1309, 1311 (D.C. Cir. 2003).

[87] 5 U.S.C. § 552(a)(6)(E)(i)(I).

[88] See Al-Fayed v. CIA, 254 F.3d 300, 306-08 (D.C. Cir. 2001) (holding, in ~~a~~ case of first impression, that "a district court must review de novo an agency's denial of a request for expedition under FOIA"); CareToLive v. FDA, No. 08-005, 2008 U.S. Dist. LEXIS 41393, at *5 (S.D. Ohio May 22, 2008) (same), aff'd on other grounds, 631 F.3d 336 (6th Cir. 2011); Jerome Stevens Pharms. Inc. v. FDA, No. 07-1985, 2008 U.S. Dist. LEXIS 81163, at *9 (E.D.N.Y. Jan. 11, 2008) (same).

[89] Al-Fayed, 254 F.3d at 307 n.7. Contra ACLU of N. Cal. v. DOJ, No. 04-4447, 2005 U.S. Dist. LEXIS 3763, at *22 (N.D. Cal. Mar. 11, 2005) (concluding that "in the absence of any controlling Ninth Circuit authority to the contrary, . . . judicial review of any denial of a request for expedited processing – whether the request is made pursuant to the 'compelling need provision' of subparagraph (E)(i)(I), or is made pursuant to 'other cases determined by the agency provision' of subparagraph (E)(i)(II) – must be conducted de novo").

Exhaustion of Administrative Remedies

Under the FOIA, administrative remedies generally must be exhausted prior to judicial review.[90] In other words, with the exceptions noted below, under most circumstances, a requester must file a proper FOIA request and administrative appeal prior to seeking relief in the courts.[91] The Court of Appeals for the District of Columbia Circuit has explainted that exhaustion allows the top-level officials of an agency the opportunity to use their expertise and experience to review the matter and to make an administrative record, potentially obviating the necessity of judicial review.[92] When a FOIA plaintiff attempts to obtain judicial review without first properly undertaking full and timely administrative exhaustion, the D.C. Circuit has held that the lawsuit is subject

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[90] See, e.g., Calhoun v. FBI, 546 F. App'x 487, 490 (5th Cir. 2013) ("Under the FOIA, a plaintiff must exhaust his administrative remedies prior to seeking judicial review of a federal agency's decision."); Schoenman v. FBI, No. 04-2202, 2006 WL 1582253, at *9 (D.D.C. June 5, 2006) ("exhaustion of administrative remedies is required before a party can seek judicial review"); Judicial Watch, Inc. v. FBI, 190 F. Supp. 2d 29, 33 (D.D.C. 2002) (same (citing Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61-62 (D.C. Cir. 1990))); Makuch v. FBI, No. 99-1094, 2000 WL 915640, at *2 (D.D.C. Jan. 5, 2000) ("Under FOIA, a party must exhaust available administrative remedies before seeking judicial review." (citing Dettmann v. DOJ, 802 F.2d 1472, 1476-77 (D.C. Cir. 1986))); Trueblood v. U.S. Dep't of Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996) ("A plaintiff's FOIA suit is subject to dismissal for lack of subject matter jurisdiction if he fails to exhaust all administrative remedies.").

[91] See, e.g., DeBrew v. Atwood, 792 F.3d 118, 123 (D.C. Cir. 2015) (finding that requester failed to exhaust administrative remedies by not responding to agency's request for clarity on requester's inadequately described request or, alternatively, administratively appealing agency's interpretation of that request); ExxonMobil Corp. v. Dep't. of Commerce, 828 F. Supp. 2d 97, 104 (D.D.C. 2001) (stating that "a requester under FOIA must file an administrative appeal within the time limit specified in an agency's FOIA regulations or face dismissal of any lawsuit complaining about the agency's response" to FOIA request).

[92] Oglesby, 920 F.2d at 61 ("Exhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision."); see also Taylor v. Appleton, 30 F.3d 1365, 1369 (11th Cir. 1994) ("Allowing a FOIA requester to proceed immediately to court to challenge an agency's initial response would cut off the agency's power to correct or rethink initial misjudgments or errors."); Martin v. Court Servs. & Offender Supervision Agency, No. 05-853, 2005 WL 3211536, at *3 (D.D.C. Nov. 17, 2005) (recognizing that administrative exhaustion "[g]ives the parties and the courts the benefit of the agency's experience and expertise"); Hogan v. Huff, No. 00-Civ.-6753, 2002 WL 1359722, at *4 (S.D.N.Y. June 21, 2002) (explaining that administrative appeal procedures "provide agencies an opportunity to correct internal mistakes"); cf. Hoeller v. SSA, 670 F. App'x 413 (7th Cir. 2016) (denying a post-judgment motion to reconsider the dismissal of FOIA claim for failure to exhaust because "exhaustion must be completed before initiating suit in order to realize the goal of allowing administrative remedies to relieve the burden of litigation on the courts").

to dismissal because the "exhaustion of administrative remedies is a mandatory prerequisite to a lawsuit under FOIA."[93] There have been times, however, when courts have allowed the suit to proceed without exhaustion.[94]

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[93] Wilbur v. CIA, 355 F.3d 675, 676 (D.C. Cir. 2004) (per curiam) (citing Oglesby, 920 F.2d at 61-64, 65 n.9); see, e.g., Freedom Watch, Inc. v. NSA, 783 F.3d 1340, 1344 (D.C. Cir. 2015) (upholding dismissal for failure to exhaust because requester "failed to internally appeal the agencies' denials"); Almy v. DOJ, No. 96-1207, 1997 WL 267884, at *3 (9th Cir. May 7, 1997) ("[T]he FOIA requires exhaustion of administrative remedies before the filing of a lawsuit."); Taylor, 30 F.3d at 1367 ("The FOIA clearly requires a party to exhaust all administrative remedies before seeking redress in the federal courts."); McDonnell v. United States, 4 F.3d 1227, 1240, 1241 (3d Cir. 1993) (same); Voinche v. U.S. Dep't of the Air Force, 983 F.2d 667, 669 (5th Cir. 1993) ("We conclude that the FOIA should be read to require that a party must present proof of exhaustion of administrative remedies prior to seeking judicial review."); see also Scherer v. U.S. Dep't of Educ., 78 F. App'x 687, 690 (10th Cir. 2003) (affirming dismissal based on failure to exhaust because while plaintiff's "labors may have been exhausting . . . he failed to pursue any of his requests as far as he could"); McKevitt v. Mueller, 689 F. Supp. 2d 661, 667 (S.D.N.Y 2010) (finding "no jurisdiction under the FOIA, because the FOIA administrative process was never used"); Abou-Hussein v. Gates, 657 F. Supp. 2d 77, 81 (D.D.C. 2009) (same). But cf. Bayala v. DHS, 827 F.3d 31 (D.C. Cir. 2016) (holding that plaintiff was not required to exhaust where defendant "reversed course and spontaneously released a number of previously withheld documents" shortly after plaintiff filed suit).

[94] See, e.g., Nat'l Sec. Counselors v. DOJ, 848 F.3d 467, 470 (D.C. Cir. 2017) (allowing plaintiff to maintain unexhausted claim because "two co-plaintiffs jointly asserting precisely the same claim in the same action did exhaust"); Gonzales & Gonzales Bonds & Ins. Agency v. DHS, No. 11-2267, 2012 WL 1815632, at *4 (N.D. Cal. May 17, 2012) (holding that courts will not dismiss for failure to exhaust where "the party's claim rests upon statutory interpretation – an area of court, rather than agency, expertise"); People for the Ethical Treatment of Animals v. NIH, 853 F. Supp. 2d 146, 153 (D.D.C. 2012) (determining plaintiff's failure to file timely administrative appeal did not bar court's consideration under exhaustion where agency provided substantive response to untimely appeal), rev'd on other grounds, 745 F.3d 535 (D.C. Cir. 2014); Skybridge Spectrum Found. v. FCC, 842 F. Supp. 2d 65, 77 (D.D.C. 2012) (finding doctrine of exhaustion did not bar judicial review where agency failed to inform requester of exemption relied upon until its response to administrative appeal); Am. Small Bus. League v. SBA, No. 09-1098, 2009 WL 1916896, at *5 (N.D. Cal. July 1, 2009) (determining additional administrative review unnecessary where that review is considered "futile" because agency's position appears to already be set), rev'd on other grounds, 623 F.3d 1052 (9th Cir. 2010), cert. denied, 563 U.S. 989 (2011); Fischer v. FBI, No. 07-2037, 2008 WL 2248711, at *2 (D.D.C. May 29, 2008) (permitting plaintiff's suit to proceed despite failure to exhaust administrative remedies because "considering [agency's] own disregard of the FOIA appeal deadline, jurisprudential considerations strongly favor plaintiff's position"); Jones v. BOP, No. 03-1647, slip op. at 3 (D.D.C. May 18, 2004) (allowing plaintiff to maintain unexhausted claim that was "substantially similar" to exhausted claim, because reaching its merits would not undermine purposes of administrative review), summary affirmance granted, No. 04-5498 (D.C. Cir. Jan. 20, 2006).

When a plaintiff has failed to exhaust administrative remedies, many courts have held that dismissal is appropriate under Rule 12(b)(1) of the Federal Rules of Civil Procedure, treating exhaustion under the FOIA as essentially the same as a jurisdictional requirement.[95] However, the Court of Appeals for the D.C. Circuit,[96] as well as the

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[95] See, e.g., McDonnell, 4 F.3d at 1240 & n.9 (affirming dismissal for lack of subject matter jurisdiction because plaintiff failed to exhaust administrative remedies); Hymen v. MSPB, 799 F.2d 1421, 1423 (9th Cir. 1986) (same); Sharkey v. FBI, No. 16-837, 2017 WL 3336617, at *16-17 (N.D. Ohio Aug. 4, 2017) (dismissing plaintiff's claim because "exhaustion is a jurisdictional prerequisite in the Sixth Circuit"); Said v. Gonzales, No. 06-986, 2007 WL 2789344, at *6 (W.D. Wash. Sept. 24, 2007) (explaining that although D.C. Circuit views exhaustion as "a prudential consideration rather than a jurisdictional prerequisite," instant court must follow Ninth Circuit law which views exhaustion as "a jurisdictional requirement"); Hardy v. Daniels, No. 05-955, 2006 WL 176531, at *1 (D. Or. Jan. 23, 2006) ("Where a plaintiff has failed to exhaust . . . the district court will dismiss the case for lack of jurisdiction."); Snyder v. DOD, No. 03-4992, slip op. at 5 (N.D. Cal. Feb. 2, 2005) (finding that "exhaustion goes to court's subject matter jurisdiction"); Thomas v. IRS, No. 03-CV-2080, 2004 WL 3185320, at *1 (M.D. Pa. Nov. 16, 2004) (concluding that court lacks jurisdiction because plaintiff failed to exhaust his administrative remedies), aff'd, 153 F. App'x 89 (3d Cir. 2005); McMillan v. Togus Reg'l Office, VA, No. 03-CV-1074, 2003 WL 23185665, at *1 (E.D.N.Y. Nov. 18, 2003) (dismissing unexhausted FOIA claim because "[s]ubject matter jurisdiction is lacking"), aff'd, 120 F. App'x 849 (2d Cir. 2005); Redding v. Christian, 161 F. Supp. 2d 671, 674 (W.D.N.C. 2001) (finding that "when this action was filed, this court lacked jurisdiction over the subject matter of this case as a matter of law because plaintiff had not sought any administrative remedies, much less exhausted them"); Jones v. Shalala, 887 F. Supp. 210, 214 (S.D. Iowa 1995) (declaring that failure to exhaust administrative remedies deprives court of jurisdiction to compel disclosure of records); cf. Kemmerly v. DOI, 430 F. App'x 303, 303 (5th Cir. 2011) (affirming district court's grant of defendant's motion to dismiss for lack of subject matter jurisdiction "for failure to exhaust administrative remedies" where plaintiff failed to pay fees).

[96] See Hildalgo v. FBI, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003) (finding exhaustion requirement is not jurisdictional because "the FOIA does not unequivocally make it so," but then explaining that exhaustion is required if "'the purposes of exhaustion' and the 'particular administrative scheme' support such a bar" (quoting Oglesby, 920 F.2d at 61)); see also Pinson v. DOJ, No. 12-1872, 2016 WL 29245, at *12 (D.D.C. Jan. 4, 2016) (noting that "FOIA's exhaustion requirement is a prudential consideration, rather than a jurisdictional prerequisite); Isiwele v. HHS, 85 F. Supp. 3d 337, 354 (D.D.C. 2015) (same); Hines v. U.S., 736 F. Supp. 2d 51, 53 (D.D.C. 2010) (dismissing claim for failure to exhaust administrative remedies while noting that "the exhaustion requirement is a prudential consideration, not a jurisdictional prerequisite, and therefore a plaintiff's failure to exhaust does not deprive the court of subject-matter jurisdiction"); Jones v. DOJ, 576 F. Supp. 2d 64, 66 (D.D.C. 2008) ("It is settled in this circuit, however, that exhaustion of administrative remedies in a FOIA case is not a jurisdictional bar to judicial review . . . the matter is properly the subject of a motion brought under Rule 12(b)(6) for failure to state a claim upon which relief may be granted."); Skrzypek v. U.S. Dep't of Treasury, 550 F. Supp. 2d 71, 73 (D.D.C. 2008) (explaining that exhaustion requirement under FOIA is "'a jurisprudential doctrine' rather than a jurisdictional prerequisite," and accordingly

Eleventh Circuit,[97] the Tenth Circuit,[98] and the Seventh Circuit,[99] as well as the lower courts within the Fifth Circuit[100] and Second Circuit[101] have held that exhaustion of administrative remedies in a FOIA case is "a jurisprudential doctrine" rather than a jurisdictional prerequisite and therefore Rule 12(b)(6) is the appropriate vehicle for dismissal based on a failure to exhaust administrative remedies.

To exhaust administrative remedies a requester must first follow agency regulations,[102] including making a proper FOIA request in the first instance as well as

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reviewing agency's motion to dismiss under Rule 12(b)(6)); Bestor v. CIA, No. 04-2049, 2005 WL 3273723, at *3 (D.D.C. Sept. 1, 2005) (dismissing complaint under Rule 12(b)(6) where plaintiff failed to "allege or demonstrate" that he exhausted his administrative remedies).

[97] See Thompson v. U.S. Marine Corp., 398 F. App'x 532, 532 (11th Cir. 2010) (maintaining that "[e]xhaustion of administrative remedies is not a jurisdictional requirement, but 'performs a function similar to the judicial doctrine of ripeness by postponing judicial review'" (quoting Taylor, 30 F.3d at 1367)).

[98] See Watters v. DOJ, 576 F. App'x 718, 721 (10th Cir. 2014) (noting that exhaustion of administrative remedies is "prudential matter"); Hull v. IRS, 656 F.3d 1174, 1181 (10th Cir. 2011) (finding "exhaustion under FOIA is a prudential consideration rather than a jurisdictional prerequisite").

[99] See Scherer v. Balkema, 840 F.2d 437, 443 (7th Cir. 1988) (ruling that plaintiff failed to state claim when he failed to allege exhaustion of administrative remedies).

[100] See Gambini v. U.S. Customs Serv., No. 5:01-CV-300, 2001 U.S. Dist. LEXIS 21336, at *4-5 (N.D. Tex. Dec. 21, 2001) (dismissing complaint under Rule 12(b)(6) because plaintiff had not exhausted administrative remedies).

[101] See Kennedy v. DHS, No. 03-6076, 2004 WL 2285058, at *4-5 (W.D.N.Y. Oct. 8, 2004) (noting that "[t]he precise nature of the exhaustion requirement is not well-settled," but concluding that it is "not jurisdictional"). But see Robert VIII v. DOJ, 2005 WL 3371480, at *7 (holding that "court lacks subject matter jurisdiction over a requester's claim where the requester has failed to exhaust the administrative remedies provided under the FOIA statute"); McMillan v. Togus Reg'l Office, VA, 2003 WL 23185665, at *1 (dismissing unexhausted FOIA claim because "[s]ubject matter jurisdiction is lacking"), aff'd, 120 F. App'x 849 (2d Cir. 2005).

[102] See, e.g., Wilson v. DOT, 730 F. Supp. 2d 140, 151 (D.D.C. 2010) (finding failure to exhaust even when plaintiff lodged complaints with several DOT offices and requested mediation because those efforts did not comply with DOT's FOIA regulations); Calhoun v. DOJ, 693 F. Supp. 2d 89, 91 (D.D.C. 2010) ("Where a FOIA request is not made in accordance with the published regulations, the FOIA claim is subject to dismissal for failure to exhaust administrative remedies."), aff'd, No. 10-5125, 2010 WL 4340370, at *1 (D.C. Cir. Oct. 19, 2010); McDermott v. Potter, No. 09-0776, 2009 WL 2971585, at *1 (W.D. Wash. Sept. 11, 2009) ("It is not enough to simply ask any government employee for the

filing an administrative appeal after receiving an agency's final determination.[103] (For a further discussion of the requirements for making requests and filing administrative appeals, see Procedural Requirements, Proper FOIA Requests, and Procedural Requirements, Administrative Appeals, above.) Courts have found that a plaintiff has not exhausted his administrative remedies when he attempts to file a new request and/or expand the scope of his original FOIA request as part of a judicial proceeding.[104]

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documents" requester must follow published agency regulations), aff'd, 408 F. App'x 51 (9th Cir. 2011); Booth v. IRS, No. 09-0637, 2009 WL 2031766, at *4 (E.D. Cal. July 9, 2009) (determining that plaintiff failed to exhaust administrative remedies by failing to comply with IRS regulations when he sent request to wrong address).

[103] See, e.g., DeBrew v. Atwood, 792 F.3d 118, 123 (D.C. Cir. 2015) (observing that to allow requester to "pursue judicial review without benefit of prior OIP consideration [on administrative appeal] would undercut the purposes of exhaustion" (quoting Hidalgo v. FBI, 344 F.3d 1256, 1259 (D.C. Cir. 2003))); Davidson v. BOP, No. 15-351, 2017 WL 1217168 (E.D. Ky. Mar. 31, 2017) (holding that "the plaintiff in a FOIA action bears the burden of demonstrating not merely that he mailed a request, but that the agency actually received it"); Pinson v. DOJ, 145 F. Supp. 3d 1, 10 (D.D.C.2015) ("In order to have fully exhausted his administrative remedies, and before his claim can be heard before this Court, [requester] must appeal the EOUSA's decision to OIP."); Ebling v. DOJ, 796 F. Supp. 2d 52, 65 (D.D.C. 2011) (dismissing part of plaintiff's claim for failure to exhaust where DOJ had no record of receiving administrative appeal); Powell v. Gibbons, No. 3:09-cv-00093, 2010 WL 4293278, at *6 (D. Nev. Oct. 20, 2010) (dismissing plaintiff's FOIA count for failing to allege "full and proper" request was made), aff'd, 453 F. App'x 712 (9th Cir. 2011); Brown v. FBI, 675 F. Supp. 2d 122, 127 (D.D.C. 2009) (dismissing FOIA claim for plaintiff's failure to properly submit request even though FBI responded to attempted request); Pickering-George v. Registration Unit, DEA/DOJ, 553 F. Supp. 2d 3, 4 (D.D.C. 2008) (dismissing plaintiff's FOIA claim when agency had no record of receiving it); Banks v. DOJ, 538 F. Supp. 2d 228, 234 (D.D.C. 2008) (finding that plaintiff failed to exhaust administrative remedies because agencies had no records of plaintiff's requests); Arnold v. U.S. Secret Serv., No. 05-0450, 2006 WL 2844238, at *2 (D.D.C. Sept. 29, 2006) (holding that "certified mail return receipt is not competent evidence of plaintiff's compliance with the FOIA's exhaustion requirement"); Schoenman v. FBI, No. 04-2202, 2006 WL 1126813, at *13 (D.D.C. Mar. 31, 2006) (dismissing FOIA claims where agencies contended that they never received requests, and noting that plaintiff provided no proof that draft requests on his counsel's computer were ever mailed and received and declaring that "[w]ithout a copy of a stamped envelope . . . or a returned receipt . . . [p]laintiff cannot meet the statutory requirements under FOIA"); Antonelli v. ATF, No. 04-1180, 2005 WL 3276222, at *5 (D.D.C. Aug. 16, 2005) (finding that plaintiff failed to sufficiently demonstrate that FOIA requests were submitted to agency, which could not locate them in its files, even though plaintiff produced copies of requests and asserted that he mailed them); cf. Chelmowski v. FCC, No. 16-5587, 2017 WL 736893, at *8 (N.D. Ill. Feb. 24, 2017) (finding that a request to OGIS for assistance does not supplant an application for review by the defendant agency);

[104] See Gillin v. IRS, 980 F.2d 819, 823 n.3 (1st Cir. 1992) (per curiam) (ruling that plaintiff cannot expand scope of FOIA request "after the agency has responded and litigation has commenced"); Pray v. DOJ, 902 F. Supp. 1, 2-3 (D.D.C. 1995) (disallowing request to FBI field office "made only in response to the government's motion for summary judgment"),

Constructive Exhaustion

The FOIA permits requesters to treat an agency's failure to comply with its time limits as "constructive," exhaustion of administrative remedies.[105] Thus, when an agency "fails to comply with the applicable time limit provisions" of the FOIA,[106] the requester is deemed to have exhausted his administrative remedies and can seek immediate judicial review, even though the requester has not filed an administrative appeal.[107]

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aff'd in part & remanded in part on other grounds, No. 95-5383, 1996 WL 734142, at *1 (D.C. Cir. Nov. 20, 1996); Pollack v. DOJ, No. 89-2569, 1993 WL 293692, at *4 (D. Md. July 23, 1993) (finding that court lacks subject matter jurisdiction when request not submitted until after litigation filed), aff'd on other grounds, 49 F.3d 115 (4th Cir. 1995); cf. Serv. Women's Action Network v. DOD, 570 F. App'x 54, 55 (2d Cir. 2014) (noting that "it is doubtful whether permitting FOIA litigants to narrow their requests at will in the midst of ongoing litigation would not itself destroy the 'prompt' and 'efficient' disclosure of government records"). But cf. Forest Guardians v. U.S. Dep't of the Interior, No. 02-1003, 2004 WL 3426434, at *11 (D.N.M. Feb. 28, 2004) (rejecting agency's argument that plaintiff's attempt to narrow scope of its request – during the course of litigation -- was tantamount to failure to exhaust and stating that "there is no evidence in record that the [agency] would reach a different conclusion if given the opportunity to decide a more narrow FOIA request"), rev'd & remanded on other grounds, 416 F.3d 1173 (10th Cir. 2005).

[105] See 5 U.S.C. § 552(a)(6)(C) (2012 & Supp. IV 2017); see also Nurse v. Sec'y of the Air Force, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) ("The FOIA is considered a unique statute because it recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines.").

[106] 5 U.S.C. § 552(a)(6)(A)(i).

[107] See, e.g., Calhoun, 546 F. App'x 487, 490 (5th Cir. 2013) (finding requester deemed to have exhausted administrative remedies where "agency fails to respond to a FOIA request in a timely manner"); Pollack v. DOJ, 49 F.3d 115, 118-19 (4th Cir. 1995) ("Under FOIA's statutory scheme, when an agency fails to comply in a timely fashion with a proper FOIA request, it may not insist on the exhaustion of administrative remedies unless the agency responds to the request before suit is filed."); Campbell v. Unknown Power Superintendent of the Flathead Irrigation & Power Project, No. 91-35104, 1992 WL 84315, at *1 (9th Cir. Apr. 22, 1992) (noting that exhaustion is deemed to have occurred if agency fails to respond to request within statutory time limit); Pinson v. DOJ, 145 F. Supp. 3d 1, 10 (D.D.C. 2015) (finding constructive exhaustion as to some of plaintiff's claims due to agency's failure to respond to certain requests before requester filed suit); Accuracy in Media, Inc. v. NTSB, No. 03-0024, 2006 WL 826070, at *6 (D.D.C. Mar. 29, 2006) (finding constructive exhaustion because plaintiff filed its FOIA Complaint seven months after NTSB received its request and before NTSB complied with it); Hall v. CIA, No. 04-0614, 2005 WL 850379, at *2 & n.6 (D.D.C. Apr. 13, 2005) (finding constructive exhaustion where plaintiff filed suit prior to CIA's belated response to his request); cf. Or. Natural Desert Ass'n, 409 F. Supp. 2d at 1247 (finding constructive exhaustion with respect to "cut-off" date challenge, even though plaintiff did not raise such claim in its administrative appeal, because document

The United States Court of Appeals for the District of Columbia Circuit has addressed the issue of "what kind of agency response qualifies as a 'determination'" under the FOIA in order to trigger the requirement that the requester exhaust administrative remedies (i.e., file an administrative appeal) prior to filing suit.[108] In Citizens for Responsibility & Ethics in Washington v. FEC, the D.C. Circuit held that the FOIA "requires that, within the relevant time period, an agency must determine whether to comply with a request – that is, whether a requester will receive all of the documents the requester seeks."[109] The court held that this means that "within the relevant time period, the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions."[110] To "make a 'determination' and thereby trigger the administrative exhaustion requirement, the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the 'determination' is adverse."[111] The D.C. Circuit clarified that "a 'determination' does not require actual production of the records to the requester at the exact same time that the 'determination' is communicated to the requester."[112] The court concluded that what the FOIA does require is that the agency make the records "promptly available" which "typically would mean within days or a few weeks of a 'determination,' not months or years."[113]

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production from agency and referral agencies continued after plaintiff filed suit and plaintiff could not have foreseen effect of "cut-off" policy at time appeal was filed); Anderson v. USPS, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998) (finding that "vague positive response" from agency received after statutory time limit allows plaintiff to claim "constructive" exhaustion), aff'd, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision).

[108] Citizens for Responsibility & Ethics in Wash. v. FEC, 711 F.3d 180 (D.C. Cir. 2012).

[109] Id. at 186; see also Amadis v. DOJ, No. 16-2230, 2019 WL 400619, at *5 (D.D.C. Jan. 31, 2019) (holding that "[a]n agency's offer to conduct an 'additional' search does not alter the final, appealable nature of its determination[;] [i]nstead, it allows a requester additional process that is not required by FOIA).

[110] Id.

[111] Id. at 188 (summarizing that "agency usually has 20 working days to make a 'determination,'" that this can be extended "to 30-working days if unusual circumstances delay the agency's ability to search for, collect, examine, and consult about the responsive documents," and if more time is needed, "exhaustion requirement will not apply" but "in exceptional circumstances, the agency may continue to process the request," and if litigation has been filed, court "will supervise the agency's ongoing process.").

[112] Id.

[113] Id.

The D.C. Circuit has held that the right to immediate judicial review that arises from the lack of a timely determination lapses if an agency responds to a request at any time before the requester's FOIA suit is filed; in that situation, the requester must administratively appeal a denial and wait at least twenty working days for the agency to adjudicate that appeal – as is required by 5 U.S.C. § 552(a)(6)(A)(ii) – before commencing litigation.[114] This latter point was established by the Court of Appeals for the District of Columbia Circuit in Oglesby v. U.S. Department of the Army, which held that "an administrative appeal is mandatory if the agency cures its failure to respond within the statutory period by responding to the FOIA request before suit is filed."[115] Thus, under Oglesby, if a FOIA requester waits beyond the statutory deadline for the agency's initial response and then, in fact, receives that response before suing the agency, the requester must exhaust his administrative appeal rights before litigating the matter.[116] If an agency

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[114] See, e.g., Oglesby v. U.S. Department of the Army, 920 F.2d 57, 63 (D.C. Cir. 1990) (ruling that if requester receives agency response before filing suit – even response that is untimely – requester must submit an administrative appeal before filing suit); Pinson, 2015 WL 7008124, at *6 (same); Schwaner v. Dep't of the Army, 696 F. Supp. 2d 77, 81 (D.D.C. 2010) (same); cf. Citizens for Responsibility & Ethics in Wash. v. Bd. of Governors of the Fed. Reserve, 669 F. Supp. 2d 126, 130 (D.D.C. 2009) (finding plaintiff failed to exhaust administrative remedies when agency correspondence regarding ten-day working extension was sent before plaintiff filed complaint, even though it was not received until day complaint was filed); Percy Squire Co. v. FCC, No. 09-428, 2009 WL 2448011, at *5 (S.D. Ohio Aug. 7, 2009) (finding that agency cured its untimely response when requesters agreed to phased response before filing suit).

[115] 920 F.2d at 63.

[116] See 920 F.2d at 63-64; see also, e.g., Rease v. Harvey, 238 F. App'x 492, 495 (11th Cir. 2007) ("Even when an agency belatedly responds to a FOIA request, the requester still must exhaust his administrative remedies."); Almy v. DOJ, No. 96-1207, 1997 WL 267884, at *2-3 (7th Cir. May 7, 1997) (holding that requester's failure to appeal agencies' "no records" responses constitutes "failure to exhaust his administrative remedies"); Taylor v. Appleton, 30 F.3d 1365, 1369 (11th Cir. 1994) ("We therefore join the District of Columbia Circuit and the Third Circuit on this issue."); McDonnell v. United States, 4 F.3d 1227, 1240 (3d Cir. 1993) (applying Oglesby); Yang v. IRS, No. 06-1547, 2006 WL 2927548, at *2 (D. Minn. Oct. 12, 2006) (same); Hardy v. Lappin, No. 03-1949, 2005 WL 670753, at *1 (D.D.C. Mar. 21, 2005) (same); Allen v. IRS, No. 03-1698, 2004 WL 1638155, at *1 (D. Ariz. June 15, 2004) (same), aff'd on other grounds, 137 F. App'x 22 (9th Cir. 2005); Judicial Watch, Inc. v. FBI, 190 F. Supp. 2d 29, 33 (D.D.C. 2002) (same); Samuel v. DOJ, No. 93-0348, slip op. at 3-4 (D. Idaho Feb. 3, 1995) (same); Sloman v. DOJ, 832 F. Supp. 63, 66-67 (S.D.N.Y. 1993) (same); cf. Mosby v. Hunt, No. 09-1917,- 2010 WL 1783536, at *3 (D.D.C. May 5, 2010) (finding requester failed to exhaust administrative remedies where OIP had remanded request to component for additional search and a final determination had not been rendered), aff'd on other grounds, No. 10-5296, 2011 WL 3240492, at *1 (D.C. Cir. July 6, 2011). But cf. Wadhwa v. VA, 342 F. App'x 860, 862 (3rd Cir. 2009) (finding that although agency sent response, "[u]nder FOIA's constructive exhaustion provision, [plaintiff] was not required to exhaust administrative remedies if he did not receive a response to his FOIA

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

Even in instances where the agency has provided a timely response the requester's exhaustion obligation may be excused if the agency's response fails to supply notice of the right to file an administrative appeal as required by 5 U.S.C. § 552(a)(6)(A)(i),[118] or

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request before filing suit") (unpublished table decision); Thomas v. Comptroller of the Currency, 684 F. Supp. 2d 29, 32 (D.D.C. 2010) (finding constructive exhaustion where defendant's initial response was untimely and it was undisputed that plaintiff never received any response sent); Rosenfeld v. DOJ, No. 07-03240, 2008 WL 3925633, at *9 (N.D. Cal. Aug. 22, 2008) (finding that plaintiff exhausted administrative remedies in spite of failure to appeal from FBI's interim response to one of requests); Or. Natural Desert Ass'n, 409 F. Supp. 2d at 1247 (finding some "difficulty in applying Oglesby" when agency responds in piecemeal fashion).

[117] See Pollack, 49 F.3d at 119 (holding that "it was error for the district court to conclude that it was somehow deprived of jurisdiction because [the requester] failed to file administrative appeals . . . during the litigation"); Pinson, 2015 WL 7008124, at *6 ("Where, as here, the agency belatedly responds only after the plaintiff has filed suit, the plaintiff is nevertheless considered to have constructively exhausted his administrative remedies."); Zander v. DOJ, No. 10-2000, 2011 WL 1775059, at *1 (D.D.C. May 10, 2011) ("Moreover, where, as in this case, an agency has failed to timely respond to a FOIA request and a requester commenced a FOIA action before the agency made any response whatsoever, a request is deemed to have constructively exhausted his administrative remedies and does not need to first administratively appeal an adverse determination before proceeding with already-begun litigation." (citing Pollack, 49 F.3d at 119)); Lewis v. DOJ, 733 F. Supp. 2d 97, 106-07 (D.D.C. 2010) (finding agency's failure in providing substantive response until after plaintiff filed lawsuit made it "not reasonable to expect plaintiff to exhaust his administrative remedies by filing an appeal . . . and the law does not require him to do so"); Crooker v. Tax Div. of DOJ, No. 94-30129, 1995 WL 783236, at *8 (D. Mass. Nov. 17, 1995) (magistrate's recommendation) (concluding that disclosures made during litigation did not moot plaintiff's complaint based on agency's failure to respond; instead complaint "remained alive to test the adequacy of the disclosures, once made"), adopted, (D. Mass. Dec. 15, 1995), aff'd on other grounds per curiam, No. 96-1094 (1st Cir. Aug. 20, 1996). But cf. Calhoun, 546 F. App'x at 490 (holding that although FBI did not produce responsive records until after lawsuit was filed, requester must still challenge adequacy of search "through the appropriate administrative appeals process" and, therefore, lower court's dismissal for failure to exhaust was proper); Voinche v. FBI, 999 F.2d 962, 963-64 (5th Cir. 1993) (holding that in action based on agency's failure to comply with FOIA's time limits for responses, disclosures made only after litigation commenced rendered action moot).

[118] See Ruotolo v. DOJ, 53 F.3d 4, 9 (2d Cir. 1995) (holding that exhaustion requirement not triggered when agency response contained no notification of right to administratively appeal); Oglesby, 920 F.2d at 65 (finding exhaustion requirement only triggered if response includes "the agency's determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of the requester to appeal"); Isiwele v. HHS,

ultimately to supply notice of the right to seek court review at the conclusion of the administrative appeal process.[119] However, so long as such notice is given, there is no particular formula or set of "magic words" that the agency must employ in giving it.[120] (For further discussions of administrative notification requirements, see Procedural Requirements, Responding to FOIA Requests, above; and Procedural Requirements, Administrative Appeals, above.) Furthermore, Oglesby counsels that a requester must file an administrative appeal within the time limit specified in an agency's FOIA regulations or else face dismissal for failure to exhaust administrative remedies.[121]

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85 F. Supp. 3d 337, 352 (D.D.C. 2015) (finding that "an agency's failure to 'provide notice [to the requester] of [his] right to appeal' an adverse decision to the head of the agency is 'insufficient under the FOIA to trigger the exhaustion requirement'" (quoting Oglesby, 920 F.2d at 67)); Ozment v. DHS, No. 11-429, 2011 WL 6026590, at *2 (M.D. Tenn. Dec. 1, 2011) (finding agency's notice insufficient although within statutory time period where notice did not provide administrative appeal rights); Thomas v. HHS, 587 F. Supp. 2d 114, 117-18 (D.D.C. 2008) (finding constructive exhaustion because agency did not advise plaintiff of appeal rights nor respond to plaintiff's appeal of constructive denial); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 97 (D.D.C. 2008) (holding that agency's action "did not trigger the exhaustion requirement" because agency notified plaintiff of right to file administrative appeal only after plaintiff filed suit); Leinbach v. DOJ, No. 05-744, 2006 WL 1663506, at *6 (D.D.C. June 14, 2006) (excusing plaintiff's failure to file administrative appeal, because agency's response letter failed to provide him with "[correct] information regarding the administrative process to be followed"); Lamb v. IRS, 871 F. Supp. 301, 303 (E.D. Mich. 1994) (declaring that failure to inform requester of his right to appeal constitutes failure to comply with statutory time limits, thus permitting lawsuit). But cf. Envtl. Prot. Info. Ctr. & Forest Issues Group v. U.S. Forest Serv., No. 03-cv-449, slip op. at 8 (N.D. Cal. Oct. 14, 2003) (holding that "[t]he requirements under 5 U.S.C. § 552(a)(6)(A)(i) pertain [only] to the agency's decision whether or not to release the requested files," not to its decision to provide records in format different from that requested), rev'd & remanded on other grounds, 432 F.3d 945 (9th Cir. 2005).

[119] See Nurse, 231 F. Supp. 2d at 328-29 (finding that agencies are required to notify requesters of right to judicial review just as agencies are required to notify requesters of right to administratively appeal).

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

[121] See Oglesby, 920 F.2d at 65 n.9 (citing regulations of agencies involved); ExxonMobil Corp. v. Dep't of Commerce, 828 F. Supp. 2d 97, 104 (D.D.C. 2001) (holding that "a requester under FOIA must file an administrative appeal within the time limit specified in

Whether the agency has met or exceeded its statutory time period for making a determination on a request or appeal,[122] requesters have been deemed not to have constructively exhausted administrative remedies when they have failed to comply with the necessary requirements of the FOIA's administrative process. This has been the case, for example, when requesters have failed to:

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an agency's FOIA regulations or face dismissal of any lawsuit complaining about the agency's response"); Hamilton Sec. Group, Inc. v. HUD, 106 F. Supp. 2d 23 (D.D.C. 2000) (finding that requester failed to exhaust administrative remedies when it submitted administrative appeal one day after agency's regulatory time period had expired), summary affirmance granted, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001) (per curiam); Voinche v. CIA, No. 96-1708, slip op. at 3 (W.D. La. Nov. 25, 1996) (holding that plaintiff's filing of administrative appeal eleven months after agency's response justifies dismissal notwithstanding delay of almost four years by agency in responding to request), appeal dismissed as frivolous, 119 F.3d 3 (5th Cir. 1997) (unpublished table decision). But cf. People for the Ethical Treatment of Animals v. NIH, 853 F. Supp. 2d 146, 152 (D.D.C. 2012) (finding that requester did exhaust administrative remedies although it filed administrative appeal late where agency nevertheless provided substantive response to appeal); Kennedy v. DOJ, No. 93-0209, slip op. at 2-3 (D.D.C. July 12, 1993) (explaining that when requester's affidavit attests to mailing of timely administrative appeal but agency affidavit denies receipt, court may permit requester additional time to submit another appeal and agency additional time to respond; "nothing in the FOIA statute or regulations requires the Plaintiff to do more than mail his administrative appeal in a timely fashion").

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

(1) provide required proof of identity[123] in first-party requests[124] or disclosure authorization by third parties when required by agency regulations;[125]

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[123] See Summers v. DOJ, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (holding that authorization for release of records need not be notarized, but can be attested to under penalty of perjury pursuant to 28 U.S.C. § 1746 (2011)); Ramstack v. Dep't of the Army, 607 F. Supp. 2d 94, 102-103 (D.D.C. 2009) (holding that plaintiff failed to exhaust administrative remedies because request was not notarized or submitted under penalty of perjury as required by agency's regulations).

[124] See Ruston v. BOP, No. 10-0917, 2010 WL 2266065, at *1 (D.D.C. June 4, 2010) (finding agency had no obligation to respond to request when requester did not provide certification of identity); Banks v. DOJ, 538 F. Supp. 2d 228, 234 (D.D.C. 2008) (dismissing FOIA claim where plaintiff failed to provide verification of identity); Lee v. DOJ, 235 F.R.D. 274, 286 (W.D. Pa. 2006) (dismissing FOIA claims because plaintiff failed to verify his identity in accordance with agency regulations by omitting his full name and place of birth from his request); Davis v. U.S. Attorney, Dist. of Md., No. 92-3233, slip op. at 2-3 (D. Md. July 5, 1994) (dismissing suit without prejudice when plaintiff failed to provide identification by notarized consent, attestation under 28 U.S.C. § 1746, or alternative form of identification in conformity with agency regulations); Lilienthal v. Parks, 574 F. Supp. 14, 18 (E.D. Ark. 1983) (holding that plaintiff failed to exhaust administrative remedies because plaintiff did not submit proper identification in accordance with IRS regulations).

[125] Compare Strunk v. Dep't of State, 693 F. Supp. 2d 112, 115 (D.D.C. 2010) (finding plaintiff's third-party request not proper because it failed to include written authorization from third party), Penny v. DOJ, 662 F. Supp. 2d 53, 54-55 (D.D.C. 2009) (dismissing FOIA claim as to third parties when plaintiff failed to submit privacy waivers before commencing lawsuit), Pusa v. FBI, No. 99-04603, slip op. at 5 (C.D. Cal. Aug. 5, 1999) (dismissing case because plaintiff did not comply with agency regulations concerning third-party requests), Harvey v. DOJ, No. CV 92-176, slip op. at 17-18 (D. Mont. Jan. 9, 1996) (declining to grant motion for production of third-party records because plaintiff failed to submit authorization at the administrative level), aff'd on other grounds, 116 F.3d 484 (9th Cir. June 3, 1997) (unpublished table decision), and Freedom Magazine v. IRS, No. 91-4536, 1992 U.S. Dist. LEXIS 18099, at *10-13 (C.D. Cal. Nov. 13, 1992) (finding that court lacked jurisdiction when, prior to filing suit, plaintiff failed to provide waivers for third-party records as required by IRS regulations), with Lewis v. DOJ, 609 F. Supp. 2d 80, 83 (D.D.C. 2009) (holding that according to agency's regulations privacy waivers "[are] 'help[ful]' but not required," but nonetheless concluding that "defendant properly invoked the FOIA's personal privacy provisions – exemptions 6 and 7(C) – to justify its categorical denial of the request for third-party records"), and Martin v. DOJ, No. 96-2866, slip op. at 7-8 (D.D.C. Dec. 15, 1999) (ruling that agency was not justified in refusing to process third-party request in absence of privacy waiver because agency's regulation on privacy waivers was permissive, not mandatory, but nevertheless dismissing complaint because all records would be subject to Exemption 7(C) protection in any event). But see Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS, 913 F. Supp. 2d 865, 880 (N.D. Cal. 2012) (enjoining agency from using regulation which made authorized consent by third-party mandatory, not permissive, before considering FOIA request perfected).

(2) "reasonably describe" the records sought;[126]

(3) comply with fee requirements;[127]

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[126] See, e.g., Gillin v. IRS, 980 F.2d 819, 822-23 (1st Cir. 1992) (deciding that request for records "used as a basis to conclude there was a deficiency in [requester's] tax return" did not "reasonably describe" records of the agency's field examination of requester's tax return, since agency concluded after completion of its field examination that there was no deficiency); Vest v. Dep't of the Air Force, 793 F. Supp. 2d 103, 113 (D.D.C. 2011) (finding failure to exhaust because requester's unperfected request did not trigger agency's obligations to provide appeal rights under FOIA); Exxon Mobile Corp. v. DOI, No. 09-6732, 2010 WL 2653353, at *8 (E.D. La. June 29, 2010) (finding that requests which seek "any and all documents," "any documents," or "all documents" are "impermissibly broad and do not comply with FOIA's requirement that the request for records 'reasonably describe[] such records'" (quoting 5 U.S.C. § 552(a)(3)(A))); Latham v. DOJ, 658 F. Supp. 2d 155, 161 (D.D.C. 2009) (holding that requester did not reasonably describe records sought and therefore requester "has not submitted a proper FOIA request [and] has not exhausted his administrative remedies"); Keys v. DHS, No. 08-0726, 2009 WL 614755, at *5 (D.D.C. Mar. 10, 2009) (holding that plaintiff failed to exhaust administrative remedies because plaintiff did not reasonably describe records sought by not responding to EOUSA's request that he identify specific offices to be searched); Dale v. IRS, 238 F. Supp. 2d 99, 104-05 (D.D.C. 2002) (finding that agency is "under no obligation to release records that have not been reasonably described" and that requests which fail to conform to agency requirements "amount[] to an all-encompassing fishing expedition . . . at taxpayer expense"); see also Voinche v. U.S. Dep't of the Air Force, 983 F.2d 667, 669 n.5 (5th Cir. 1993) (concluding that administrative remedies on fee waiver request were not exhausted when requester failed to amend request to achieve specificity required by agency regulations).

[127] See, e.g., Reynolds v. Att'y Gen. of the U.S., 391 F. App'x 45, 46 (2d Cir. 2010) (affirming dismissal for failure to exhaust because plaintiff failed to either pay or request waiver of assessed fees); Pollack, 49 F.3d at 119-20 (rejecting plaintiff's argument that untimeliness of agency response required it to provide documents free of charge); Pinson v. DOJ, 2016 WL 29245, at *12 (D.D.C. Jan. 4, 2016) (noting that when agency seeks advance payment, requester has not exhausted administrative unless fees are paid or administrative appeal is filed); McLaughlin v. DOJ, 598 F. Supp. 2d 62, 66 (D.D.C. 2009) (concluding that plaintiff failed to exhaust administrative remedies by not paying duplication fee); Kurdyukov v. DEA, 578 F. Supp. 2d 61, 65-66 (D.D.C. 2008) (holding that agency's failure to comply with FOIA's statutory time limits does not relieve plaintiff from obligation to exhaust administrative remedies by either paying fees or appealing denial of fee waiver); Banks, 538 F. Supp. 2d at 237 (finding that plaintiff failed to exhaust administrative remedies by not paying aggregated fees); Ivey v. Snow, No. 05-CV-1095, 2006 WL 2051339, at *4 (D.D.C. July 20, 2006) (finding that plaintiff failed to exhaust administrative remedies, because he neither paid fees associated with requests nor sought fee waiver), aff'd, 227 F. App'x 1 (D.C. Cir. 2007); Hicks v. Hardy, No. 04-769, 2006 WL 949918, at *2 (D.D.C. Apr. 12, 2006) (holding that "plaintiff cannot maintain his claim without paying the assessed fee," and explaining that this holds true "[r]egardless of whether . . . plaintiff 'filed' suit before or after receiving a request for payment"); Thorn v. United States, No. 04-1185, 2005 WL 3276285, at *1-2 (D.D.C. Aug. 11, 2005) (finding that plaintiff's administrative remedies were not exhausted, because he failed to pay assessed fees, and noting that "[c]ommencement of a

(4) pay authorized fees incurred in a prior request before making new requests;[128]

(5) present for review at the administrative appeal level any objection to earlier processing practices;[129]

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civil action pursuant to FOIA does not relieve a requester of his obligation to pay any required fees"); Ctr. to Prevent Handgun Violence v. Dep't of Treasury, 981 F. Supp. 20, 23 (D.D.C. 1997) (rejecting requester's "equitable tolling" argument; requester's agreement to accept sampling of documents for free does not excuse noncompliance with exhaustion requirement in subsequent fee waiver suit covering all records); Trueblood v. U.S. Dep't of the Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996) ("Regardless of whether the plaintiff 'filed' suit before or after receiving a request for payment, the plaintiff has an obligation to pay for the reasonable copying and search fees assessed by the defendant."); see cf. Francis v. FBI, No. 06-0968, 2008 WL 1767032, at *7 (E.D. Cal. Apr. 16, 2008) (magistrate's recommendation) ("[W]here the agency provides a response to the FOIA request rather than substantively addressing a request for fee waiver, the exhaustion requirement may be waived."), rev'd on other grounds, 404 F. App'x 233 (9th Cir. 2010); Wiggins v. Nat'l Credit Union Admin., No. 05-2332, 2007 WL 259941, at *5 (D.D.C. Jan. 30, 2007) (finding that, despite plaintiff's failure to exhaust, "no purpose would be served by having this matter delayed until plaintiff pays the required fee" because agency "has already considered and processed plaintiff's request"); Sliney v. BOP, No. 04-1812, 2005 WL 839540, at *4 (D.D.C. Apr. 11, 2005) (recognizing that plaintiff's failure to pay requested fees "constitutes a failure to exhaust," but excusing failure to pay duplication fee because agency "produced no evidence" that it ever informed him of fee amount). Compare Antonelli v. ATF, 555 F. Supp. 2d 16, 23 (D.D.C. 2008) (finding that plaintiff's failure to pay owed fees prior to commencing litigation entitles agency to summary judgment on claims arising from non-payment of fees, notwithstanding plaintiff's alleged payment of fees "some three years" after litigation began), with Hemmings v. Freeh, No. 95-738, 2005 WL 975626, at *3 (D.D.C. Apr. 25, 2005) (denying defendant's motion to dismiss, because plaintiff "cured" his failure to exhaust by paying assessed fees, even though he did so only after government filed its dismissal motion). But see Saldana v. BOP, 715 F. Supp. 2d 10, 22 (D.D.C. 2010) (finding that because plaintiff did not agree to pay copying fees for certain records, agency could not claim that he has failed to exhaust because plaintiff "is free to decline an offer to copy records he does not want"); King v. DOJ, 772 F. Supp. 2d 14, 18 (D.D.C. 2010) (holding that while plaintiff failed to exhaust administrative remedies with respect to agency's search for failure to pay fees, merits of withholdings could still be adjudicated).

[128] See, e.g., Trenerry v. IRS, No. 95-5150, 1996 WL 88459, at *1 (10th Cir. Mar. 1, 1996) (agreeing with lower court that it had no subject matter jurisdiction where plaintiff failed to exhaust administrative remedies by not paying fees owed on previous FOIA request); Crooker, 577 F. Supp. at 1219-20 (finding that there was no subject matter jurisdiction where plaintiff failed to pay fees in previous FOIA request).

[129] See, e.g., Halpern v. FBI, 181 F.3d 279, 289 (2d Cir. 1999) (approving FBI practice of seeking clarification of requester's possible interest in "cross-references," and dismissing portion of suit challenging failure to process those records when plaintiff did not dispute agency action until after suit was filed); Dettmann, 802 F.2d 1472, 1477 (D.C. Cir. 1986) (same); Kenney v. DOJ, 700 F. Supp. 2d 111, 118 (D.D.C. 2010) (finding failure to exhaust where requester argued for first time in litigation that he should not have to provide privacy

(6) administratively request a waiver of fees;[130] or

(7) challenge a fee waiver denial at the administrative appeal stage.[131]

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waivers for individuals who already signed waivers for previous request but failed to present this argument to FBI through administrative process); Lair v. Dep't of Treasury, No. 03-827, 2005 WL 645228, at *3 (D.D.C. Mar. 21, 2005) (determining that plaintiff exhausted his administrative remedies as to certain aspects of agency's action on his request, but not as to others), reconsideration denied, 2005 WL 1330722 (D.D.C. June 3, 2005). But see Skybridge Spectrum Found. v. FCC, 842 F. Supp. 2d 65, 77 (D.D.C. 2012) (finding doctrine of exhaustion did not bar judicial review where agency failed to inform requester of exemption relied upon until its response to administrative appeal).

[130] See, e.g., Ivey, 2006 WL 2051339, at *4 (finding failure to exhaust administrative remedies, in part, because plaintiff failed to request fee waiver or reduction of fees); Antonelli v. ATF, No. 04-1180, 2005 WL 3276222, at *8 (D.D.C. Aug. 16, 2005) (explaining that "payment or waiver of assessed fees or an administrative appeal from the denial of a fee waiver request is a condition precedent to failing a FOIA claim in the district court").

[131] See, e.g., Voinche, 983 F.2d at 669 (holding "that claimants seeking a fee waiver under FOIA must exhaust their administrative remedies prior to seeks judicial relief"); Anderson v. U.S. Dep't of State, 661 F. Supp. 2d 6, 10 n.1 (D.D.C. 2009) (holding sua sponte that plaintiff failed to exhaust administrative remedies for fee waiver issue); Jones v. DOJ, 653 F. Supp. 2d 46, 50 (D.D.C. 2009) ("Any dispute regarding fees, the aggregation, or a fee waiver must first be raised and pursued to exhaustion in the administrative process before it will be entertained in a federal lawsuit."); Fulton v. EOUSA, No. 05-1300, 2006 WL 1663526, at *3-4 (D.D.C. June 15, 2006) (dismissing complaint because plaintiff did not pay fees or appeal denial of his fee waiver request); Boyd v. DOJ, No. 04-1100, 2005 WL 555412, at *4 (D.D.C. March 9, 2005) ("Failure to pay the requested fees or to appeal the denial from a refusal to waive fees constitutes a failure to exhaust administrative remedies."); Oguaju v. EOUSA, No. 00-1930, slip op. at 1 n.1 (D.D.C. Sept. 25, 2003) (refusing to consider plaintiff's "motion to waive fees," because he failed to administratively appeal fee waiver denial), summary affirmance granted, No. 04-5407, 2005 U.S. App. LEXIS 23891 (D.C. Cir. Nov. 3, 2005); Mells v. IRS, No. 99-2030, 2001 U.S. Dist. LEXIS 1262, at *5 (D.D.C. Jan. 23, 2001) (deciding that plaintiff must pay fee or seek waiver from agency before challenging government's response concerning fees), subsequent opinion denying fee waiver, 2002 U.S. Dist. LEXIS 24275 (D.D.C. Nov. 21, 2002); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 148 (D.D.C. 2000) ("Exhaustion of administrative remedies . . . includes payment of required fees or an appeal within the agency from a decision refusing to waive fees."), summary affirmance granted, No. 00-5453 (D.C. Cir. May 10, 2001); Tinsley v. Comm'r, No. 3:96-1769-P, 1998 WL 59481, at *4 (N.D. Tex. Feb. 9, 1998) (finding no exhaustion because plaintiff failed to appeal fee waiver denial).

Despite statutory language referring to administrative appeals of denials of requests for expedited processing,[132] the few courts that have considered the issue thus far have ruled that exhaustion of administrative remedies is not required prior to seeking court review of an agency's denial of requested expedited access.[133]

"Open America" Stays of Proceedings

When a requester who has constructively exhausted administrative remedies due to an agency's failure to comply with the FOIA's time deadlines files a suit in court, the court may retain jurisdiction over the case – ordinarily through issuance of a stay of proceedings – while allowing the agency additional time to complete its processing of the request. The FOIA itself explicitly permits such a stay if it can be shown that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request."[134] This provision of the FOIA provides an important "safety valve" for agencies that are often overwhelmed by increasing numbers of FOIA requests.[135]

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

[133] See ACLU v. DOJ, 321 F. Supp. 2d 24, 28-29 (D.D.C. 2004) (concluding that FOIA does not require administrative appeal of agency's denial of expedition request); Elec. Privacy Info. Ctr. v. DOJ, No. 03-2078, slip op. at 5 (D.D.C. Dec. 19, 2003) (finding that administrative appeal of refusal to grant expedited processing of request is required by "neither the statute nor applicable case law"); Judicial Watch, Inc. v. FBI, No. 01-1216, slip op. at 6 (D.D.C. July 26, 2002) (noting statutory language "provides for direct judicial review of an agency's failure to timely respond to a request for expedited processing"); Al-Fayed v. CIA, No. 00-2092, 2000 U.S. Dist. LEXIS 21476, at *8 (D.D.C. Sept. 20, 2000) (concluding that "[n]othing in the statute or its legislative history" indicates that administrative appeal of denial of expedited processing is required before applicant may seek judicial review), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); cf. NAACP Legal Def. & Educ. Fund, Inc. v. HUD, No. 07-3378, 2007 WL 4233008, at *4 (S.D.N.Y. Nov. 30, 2007) (finding that plaintiff constructively exhausted administrative remedies when agency failed to respond to expedited processing request within ten days).

[134] 5 U.S.C. § 552(a)(6)(C)(i)-(iii) (2012 & Supp. V 2017).

[135] See Manna v. DOJ, No. 93-81, 1994 WL 808070, at *10 (D.N.J. Apr. 13, 1994) (noting "huge number of FOIA requests that have overwhelmed [agency's] human and related resources"); Cohen v. FBI, 831 F. Supp. 850, 854 (S.D. Fla. 1993) (explaining that court "cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of requests received within the time constraints imposed by FOIA"); see also Natural Res. Def. Council v. DOE, 191 F. Supp. 2d 41, 42 (D.D.C. 2002) (noting that "it is commonly accepted that no federal agency can meet the impossibly rigorous timetable set forth in the [FOIA]," but nevertheless granting motion for expedited release of records).

The leading case construing this FOIA provision is Open America v. Watergate Special Prosecution Force.[136] In Open America, the Court of Appeals for the District of Columbia Circuit held that "exceptional circumstances" may exist when an agency can show that it "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A)."[137]

The Electronic Freedom of Information Act Amendments of 1996 explicitly redefined the term "exceptional circumstances" to exclude any "delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."[138] Courts have found that this definition of "exceptional circumstances" requires more than just the existence of a FOIA backlog as the basis for a stay.[139] At the same time, in enacting the Electronic FOIA amendments, Congress specifically contemplated that other factors may be relevant to a court's determination as to whether "exceptional circumstances" exist: An agency's efforts to reduce its pending request backlog; the size and complexity of other requests being processed by the agency; the amount of classified material involved; and the number of requests for records by courts or administrative tribunals that are also pending.[140] Furthermore, the amendments include a companion provision that specifies that a requester's "refusal . . . to reasonably modify the scope of a request or arrange for

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[136] 547 F.2d 605 (D.C. Cir. 1976).

[137] Id. at 616.

[138] Electronic FOIA Amendments of 1996, Pub. L. No. 104-231, § 7(c), 110 Stat. 3048 (codified as amended at 5 U.S.C. § 552(a)(6)(C)(ii)).

[139] See, e.g., Gov't Accountability Project v. HHS, 568 F. Supp. 2d 55, 60 (D.D.C. 2008) (holding that "allowing a mere showing of a normal backlog of requests to constitute 'exceptional circumstances' would render the concept and its underlying Congressional intent meaningless"); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 259 n.4 (D.D.C. 2005) ("An agency must show more than a great number of requests to establish[] exceptional circumstances under the FOIA."); Donham v. DOE, 192 F. Supp. 2d 877, 882 (S.D. Ill. 2002) (refusing to accept agency's argument that its backlog qualifies as "exceptional circumstances" because "then the 'exceptional circumstances' provision would render meaningless the twenty-day response requirement"); Al-Fayed v. CIA, No. 00-2092, slip op. at 5 (D.D.C. Jan. 16, 2001) ("Rather than overturn Open America, the 1996 amendments merely explain that predictable agency workload and a backlog alone, will not justify a stay."), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); Eltayib v. U.S. Coast Guard, No. 99-1033, slip op. at 3 (D.D.C. Nov. 11, 1999) (explaining intent of Electronic FOIA amendments' modification of FOIA's "exceptional circumstances" provision), aff'd on other grounds, 53 F. App'x 127 (D.C. Cir. 2002) (per curiam).

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

an alternative time frame for processing . . . shall be considered as a factor in determining whether exceptional circumstances exist."[141]

In Open America, the D.C. Circuit ruled that the "due diligence" requirement in the FOIA may be satisfied by an agency's good faith processing of all requests on a "first-in/first-out" basis and that a requester's right to have his request processed out of turn requires a particularized showing of "exceptional need or urgency."[142] In so ruling, the D.C. Circuit rejected the notion that the mere filing of a lawsuit was a basis for such expedited treatment.[143] The Electronic FOIA amendments modified this first in/first out rule by explicitly allowing agencies to establish "multitrack" processing for requests,

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[141] 5 U.S.C. § 552(a)(6)(C)(iii); see also Sierra Club v. DOJ, 384 F. Supp. 2d 1, 31 (D.D.C. 2004) (finding that plaintiff's refusal to reasonably modify "extremely broad" request or to arrange alternate time frame for disclosure constituted "unusual circumstances" and relieved agency of statutory timeliness requirements); Peltier v. FBI, No. 02-4328, slip op. at 8 (D. Minn. Aug. 15, 2003) (granting stay and explaining that plaintiff's refusal "to modify the scope of his request supports a finding of exceptional circumstances"); Al-Fayed, No. 00-2092, slip op. at 6, 12 (D.D.C. Jan. 16, 2001) (granting stay and characterizing plaintiffs' ostensible efforts to limit scope of their requests as "more symbolic than substantive"), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001). But see Elec. Frontier Found., 517 F. Supp. 2d 111, 118 (D.D.C. 2007) (finding plaintiff's refusal to narrow scope of request, in and of itself, would not justify grant of stay because agency did not provide plaintiff with sufficient information to make informed modification of request).

[142] See Open Am., 547 F.2d at 616; Nat'l Sec. Archive v. SEC, 770 F. Supp. 2d 6, 6 (D.D.C. 2011) (granting twelve-month stay and finding agency exercised due diligence to reduce backlog by adopting first-in-first-out processing system, "implement[ing] new technology to streamline and expedite the processing of FOIA requests and [making] agency records available on [agency's] public website"); see also Gov't Accountability Project, 568 F. Supp. 2d at 63-64 (denying stay and noting that although agency's efforts towards improving FOIA request processing suggest generalized due diligence, agency's handling of plaintiff's request "cannot be described as a model of due diligence").

[143] Open Am., 547 F.2d at 615 ("We do not think that Congress intended, by fixing a time limitation on agency action and according a right to bring suit when the applicant has not been satisfied within the time limits, to grant an automatic preference by the mere action of filing a case in United States district court."); see also Fiduccia v. DOJ, 185 F.3d 1035, 1040-41 (9th Cir. 1999) (refusing to approve automatic preference for FOIA requesters who file suit, because it "would generate many pointless and burdensome lawsuits"); Cohen, 831 F. Supp. at 854 ("[L]ittle progress would result from allowing FOIA requesters to move to the head of the line by filing a lawsuit. This would do nothing to eliminate the FOIA backlog; it would merely add to the judiciary's backlog."); cf. Hunsberger v. DOJ, No. 94-0168, 1994 U.S. Dist. LEXIS 6060, at *1-2 (D.D.C. May 3, 1994), summary affirmance granted, No. 94-5234 (D.C. Cir. Apr. 10, 1995) (prohibiting requester from circumventing Open America stay by filing new complaint based on same request).

based on the amount of time and/or work involved in a particular request.[144] The amendments specified that creation of multiple tracks "shall not be considered to affect the requirement . . . to exercise due diligence."[145]

When the requirements of the statute and Open America are met, courts have granted agency motions to stay judicial proceedings to allow for additional time to complete the administrative processing of a request.[146] By contrast, such motions have

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

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

[146] See, e.g., Democracy Forward Found. v. DOJ, 354 F. Supp. 3d 55, 60-61 (D.D.C. 2018) (granting stay and holding that "[defendant's] Declaration establishes that the uptick in FOIA demands over the last two years is a significant departure from the rate of increase seen over the prior decade" and also "describes what steps OIP has taken to address the recent rise in such requests"); Eakin v. DOD, No. 16-00972, 2017 WL 3301733 (W.D. Tex. Aug. 2, 2017) (granting stay after finding four conditions necessary to grant stay were satisfied because of the sheer volume of plaintiff's request and defendant's execise of due diligence); Elec. Frontier Found. v. DOJ, 563 F. Supp. 2d 188, 195 (D.D.C. 2008) (granting stay because enormous workload, coupled with diminished workforce, demonstrates exceptional circumstances, and agency "has [also] demonstrated both due diligence in processing the FOIA requests submitted to it and is making reasonable progress in reducing its backlog"); CareToLive v. FDA, No. 08-cv-005, 2008 WL 2201973, at *9 (S.D. Ohio May 22, 2008) (awarding stay because exceptional circumstances exist and agency is exercising due diligence in processing FOIA requests); Ctr. for Pub. Integrity v. U.S. Dep't of State, No. 05-2313, 2006 WL 1073066, at *5 (D.D.C. Apr. 24, 2006) (finding exceptional circumstances where agency experienced unpredictable "increase in the number of FOIA requests for the two most recent fiscal years and also the unforeseen increase in . . . [its FOIA staff's] other information access duties"); Elec. Privacy Info. Ctr. v. DOJ, No. 02-0063, 2005 U.S. Dist. LEXIS 18876, at *12-17 (D.D.C. Aug. 31, 2005) (approving stay where FBI faced "unanticipated amount of lengthy FOIA requests," showed "reasonable progress" in reducing its backlog, and demonstrated due diligence by adopting three-tiered processing system, as well as certain electronic processing techniques); Bower v. FDA, No. 03-224, 2004 WL 2030277, at *3 (D. Me. Aug. 30, 2004) (granting stay where FDA faced "enormous litigation demands" and demonstrated reasonable progress with its FOIA backlog); Appleton v. FDA, 254 F. Supp. 2d 6, 10-11 (D.D.C. 2003) (approving an Open America stay generally, but requiring parties to confer about precise scope of plaintiff's request and to propose appropriate length of stay); Cooper v. FBI, No. 99-2305, slip op. at 2, 4 (D.D.C. June 28, 2000) (granting defendant's stay motion for "at least" four months); Judicial Watch, Inc. v. U.S. Dep't of State, No. 99-1130, slip op. at 2 (D.D.C. Feb. 17, 2000) (approving ten-month stay because "unanticipated workload, the inadequate resources of the agency, and the complexity of many of the requests" constitute exceptional circumstances), appeal dismissed as interlocutory, No. 00-5095 (D.C. Cir. June 2, 2000); Emerson v. CIA, No. 99-0274, 1999 U.S. Dist. LEXIS 19511, at *3-4 (D.D.C. Dec. 16, 1999) (granting two-year stay because of "extraordinary circumstances" and multiple agency efforts to alleviate FOIA backlog); Summers v. CIA, No. 98-1682, slip op. at 4 (D.D.C. July

proven unsuccessful when agencies have failed to set forth sufficient facts to demonstrate the propriety of such a stay.[147] In some instances, courts have agreed that some additional

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26, 1999) (finding that FBI's FOIA procedures are "fair and expeditious" and that exceptional circumstances exist, warranting six-month stay of proceedings); Judicial Watch, Inc. v. DOJ, No. 97-2869, slip op. at 6-8 (D.D.C. Aug. 25, 1998) (finding that agency exercised due diligence when both parties agreed that exceptional circumstances existed and requester failed to show exceptional need for records); Narducci v. FBI, No. 98-0130, slip op. at 1 (D.D.C. July 17, 1998) (ordering thirty-four-month stay because of "deluge[]" of requests coupled with "reasonable progress" in reducing backlog). But see Donham v. DOE, 192 F. Supp. 2d 877, 882 (S.D. Ill 2002) (finding the Open America standard "inconsistent with the plan [sic] language of FOIA, especially in light of the 1996 Amendments").

[147] See, e.g., Fiduccia, 185 F.3d at 1042 (overturning stay of proceedings granted by district court because "slight upward creep in the caseload" does not constitute exceptional circumstances); Elec. Privacy Info. Ctr. v. FBI, 933 F. Supp. 2d 42, 48-49 (D.D.C. 2013) (finding that while "[t]he amount of classified material involved in [plaintiff's] request as well as [plaintiff's] refusal to narrow its request" do support a stay, "considering the record as a whole, exceptional circumstances do not exist" because "the FBI did not provide the Court with sufficient information from which it could conclude that the overall complexity of the FBI's workload has increased over time"); Buc v. FDA, 762 F. Supp. 2d 62, 70-72 (D.D.C. 2011) (denying stay, in part, because agency failed to establish that it made reasonable progress in reducing its backlog and that its resources were inadequate to address both volume and complexity of requests); Gov't Accountability Project, 568 F. Supp. 2d at 60-61 (concluding that agency's "declining workload of FOIA cases does not, in and of itself, establish the type of exceptional circumstances necessary to warrant a stay"); Elec. Frontier Found. v. DOJ, 517 F. Supp. 2d 111, 118 (D.D.C. 2007) (explaining that "the fact that the FBI faces obligations in other litigations is not, in and of itself, sufficient to establish exceptional circumstances"); Weinberg v. Von Eschenbach, No. 07-1819, 2007 WL 5681722, at *2 (D.N.J. Oct. 10, 2007) (denying stay because steady decrease in number of FOIA requests received constitutes predictable agency workload); Bloomberg L.P. v. FDA, 500 F. Supp. 2d 371, 375-76 (S.D.N.Y. 2007) (determining that stay is unwarranted because agency has merely shown manageable workload flow coupled with actions demonstrating pattern "of unresponsiveness, delays, and indecision that suggest an absence of due diligence"); Leadership Conference on Civil Rights, 404 F. Supp. at 259 (rejecting agency's stay request predicated on "large backlog of pending FOIA requests, including 16 requests which take much longer to process than other[s]," reallocation of resources to respond to court orders, and "personnel issues"); The Wilderness Soc'y v. U.S. Dep't of the Interior, No. 04-0650, 2005 WL 3276256, at *10 (D.D.C. Sept. 12, 2005) (denying stay because agency failed to present any evidence to support claim that it faced unanticipated volume of FOIA requests); Los Alamos Study Group v. DOE, No. 99-201, slip op. at 4-5 (D.N.M. Oct. 26, 1999) (declining to approve stay of proceedings predicated on agency's need to review sensitive materials, because such review "is part of the predictable agency workload of requests"); Gilmore v. DOE, 4 F. Supp. 2d 912, 925 (N.D. Cal. 1998) ("Where a pattern and practice of late responses is alleged, courts have held that a normal, predictable workload cannot constitute 'exceptional circumstances,' at least without a showing that the agency unsuccessfully sought more FOIA resources from Congress or attempted to redirect its existing resources."), dismissed per stipulation, No. 95-0285 (N.D. Cal. Apr. 3, 2000); cf. Hall v. CIA, No. 04-0814, 2005 WL 850379, at *5 (D.D.C. Apr. 13, 2005) (refusing to accept

processing time is appropriate, but have ordered stays for less time than requested by the agency.[148]

While the Open America decision itself does not address the additional time needed by an agency to justify nondisclosure of any withheld records once they are processed, courts have, as a practical matter, tended to merge the record-processing and declaration-preparation stages of a case when issuing stays of proceedings under Open America.[149] And when there is a large volume of responsive documents that have not been processed, a court may grant a stay of proceedings that provides for interim or "timed" releases and/or interim status reports on agency processing efforts.[150]

CIA's argument that stay was warranted while agency awaited "final guidance from the Court" on plaintiff's previous lawsuit); Homick v. DOJ, No. 98-00557, slip op. at 2 (N.D. Cal. Oct. 27, 2004) (denying FBI's motion for stay because it "repeatedly failed to meet various [court imposed] deadlines . . . over more than two years"). But cf. Nat'l Sec. Archive v. U.S. Dep't of the Air Force, No. 05-571, 2006 WL 1030152, at *5 (D.D.C. Apr. 19, 2006) (finding that agency failed to process plaintiff's requests with due diligence, but declining to order immediate disclosure of unprocessed documents because they first had to be reviewed for declassification and declaring that "[r]elease of classified documents cannot be ordered without such review no matter how dilatory an agency might be").

[148] See Elec. Frontier Found., 563 F. Supp. 2d at 196 (granting stay until August 1, 2008, instead of February 2013); Hendricks v. DOJ, No. 05-05-H, slip op. at 13 (D. Mont. Aug. 18, 2005) (concluding that FBI did not demonstrate exceptional circumstances sufficient to warrant stay for full length of time requested); Bower, 2004 WL 2030277, at *3 (approving seven-month stay, rather than leaving FDA "to its own, unmonitored devices" for full two-and-one-half-year period that it had requested); Ruiz v. DOJ, No. 00-0105, slip op. at 3 (D.D.C. Sept. 27, 2001) (acknowledging that agency made "a satisfactory showing that a stay . . . is warranted," but reducing the stay's length from requested thirty-three months to only seven months); Beneville v. DOJ, No. 98-6137, slip op. at 8 (D. Or. Dec. 17, 1998) (declining to approve full stay of proceedings requested by FBI regarding Unabomber files); Grecco v. DOJ, No. 97-0419, slip op. at 2 (D.D.C. Aug. 24, 1998) (granting two-year stay rather than four-year stay that was requested by FBI); see also Peralta v. FBI, No. 94-760, slip op. at 2 (D.D.C. June 6, 1997) (reducing Open America stay by four months because of enactment of Electronic FOIA amendments, and requiring that agency justify additional time needed for processing on basis of new statutory standard), vacated & remanded on other grounds, 136 F.3d 169 (D.C. Cir. 1998); cf. Donham, 192 F. Supp. 2d at 884 (refusing to set processing deadline, but also refusing to grant open-ended stay of proceedings).

[149] See, e.g., Lisee v. CIA, 741 F. Supp. 988, 989-90 (D.D.C. 1990) ("Open America" stay granted for both processing records and preparing Vaughn Index); Ettlinger v. FBI, 596 F. Supp. 867, 878-79 (D. Mass. 1984) (same); Shaw v. Dep't of State, 1 Gov't Disclosure Serv. (P-H) ¶ 80,250, at 80,630 (D.D.C. July 31, 1980) (same).

[150] See, e.g., Elec. Frontier Found., 517 F. Supp. 2d at 121 (awarding stay but ordering agency to provide plaintiff with interim releases and to file status reports with Court every ninety days); Al-Fayed v. CIA, No. 00-2092, slip op. at 12 (D.D.C. Jan. 16, 2001) (granting stays for four agencies, but requiring status reports every sixty days), aff'd on other grounds, 254

An "Open America" stay may be denied when the requester can show an "exceptional need or urgency" for having his request processed out of turn.[151] Such a showing has been found if the requester's life or personal safety, or substantial due process rights, would be jeopardized by the failure to process a request immediately.[152] (For further discussion of expedited processing, see Procedural Requirements, Expedited Processing, above.)

Adequacy of Search

In many FOIA suits, the defendant agency will face challenges not only to its reliance on particular exemptions, but also to the nature and extent of its search for

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F.3d 300 (D.C. Cir. 2001); Raulerson v. Reno, No. 95-2053, slip op. at 1 (D.D.C. Sept. 11, 1998) (approving thirty-month stay to process over 19,000 pages, but ordering four interim status reports); Samuel Gruber Educ. Project v. DOJ, No. 90-1912, slip op at 6 (D.D.C. Feb. 8, 1991) (granting nearly two-year stay, but requiring six-month progress reports); cf. Bower, 2004 WL 2030277, at *3 (requiring FDA to produce status report at end of seven-month stay, which included estimated time by which document production would be completed).

[151] See Open Am., 547 F.2d at 616 (suggesting that stay of proceedings which would allow for processing on first-in, first-out basis could be denied where "exceptional need or urgency is shown" for requested records); see also Edmonds v. FBI, No. 02-1294, 2002 WL 32539613, at *4 (D.D.C. Dec. 3, 2002) (denying motion for Open America stay even though it was justified by exceptional circumstances, and ordering expedited processing); Aguilera v. FBI, 941 F. Supp. 144, 149-52 (D.D.C. 1996) (finding initially that FBI satisfied "exceptional circumstances-due diligence test" warranting eighty-seven-month delay, but subsequently granting expedited access due to exigent circumstances), appeal dismissed, No. 98-5035 (D.C. Cir. Mar. 18, 1998).

[152] See, e.g., Ferguson v. FBI, 722 F. Supp. 1137, 1143 (S.D.N.Y. 1989) (denying stay, even though agency "nominally" satisfies "due diligence-exceptional circumstances" test set forward in Open America, because "plaintiff's liberty interests require expedition"); cf. Gilmore v. FBI, No. 93-2117, slip op. at 1, 3 (N.D. Cal. July 26, 1994) (expediting request despite showing of due diligence and exceptional circumstances, based upon finding that "[p]laintiff has sufficiently shown that the information he seeks will become less valuable if the FBI processes his request on a first-in, first-out basis"). Compare Freeman v. DOJ, No. 92-557, slip op. at 6 (D.D.C. Oct. 2, 1992) (vacating order granting stay and granting expedited processing when scope of request was limited, when Jencks Act material was unavailable in state prosecution, and when information useful to plaintiff's criminal defense might have been contained in requested documents), with Freeman v. DOJ, No. 92-557, 1993 WL 260694, at *5 (D.D.C. June 28, 1993) (denying further expedited treatment when processing "would require a hand search of approximately 50,000 pages, taking approximately 120 days").

responsive documents. Sometimes, that is all that a plaintiff will dispute.[153] (For discussions of administrative considerations in conducting searches, see Procedural Requirements, Searching for Responsive Records, above.) To prevail in a FOIA action where the adequacy of the search is at issue, the agency must show that it made "'a good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'"[154] The fundamental question is not "'whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'"[155] In

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[153] See, e.g., Iturralde v. Comptroller of Currency, 315 F.3d 311, 313 (D.C. Cir. 2003) (explaining that adequacy of agency's search is at issue); Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (noting that plaintiff contested only adequacy of search); People for the Ethical Treatment of Animals v. BIA, 800 F. Supp. 2d 173, 177 (D.D.C. 2011) ("The only issue on appeal is the adequacy of defendant's search, since plaintiff does not contest the exemptions invoked by defendant.").

[154] Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990)); see, e.g., Stalcup v. CIA, 768 F.3d 65, 74 (1st Cir. 2014) (noting that resolution of search claim "turns on whether the agency made a good faith, reasonable effort 'using methods which can be reasonably expected to produce the information requested'" (quoting Oglesby, 920 F.2d at 68)); Morley v. CIA, 508 F.3d 1108, 1114 (D.C. Cir. 2007) ("'[t]he court applies a 'reasonableness' test to determine the 'adequacy' of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure'" (quoting Campbell v. DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998))); Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993) (noting that "crucial" search issue is whether agency's search was "'reasonably calculated to discover the requested documents'" (quoting SafeCard Servs. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991))); Gerstein v. CIA, No. 06-4643, 2008 WL 4415080, at *3 (N.D. Cal. Sept. 26, 2008) ("'The adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor.'" (quoting Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995))).

[155] Steinberg v. DOJ, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting Weisberg v. DOJ, 745 F.2d 1476, 1485 (D.C. Cir. 1984)); see Citizens Comm'n on Human Rights, 45 F.3d at 1328 (same); Nation Magazine, 71 F.3d at 892 n.7 (explaining that "there is no requirement that an agency [locate] all responsive documents"); Ethyl Corp. v. EPA, 25 F.3d 1241, 1246 (4th Cir. 1994) ("In judging the adequacy of an agency search for documents the relevant question is not whether every single potentially responsive document has been unearthed."); In re Wade, 969 F.2d 241, 249 n.11 (7th Cir. 1992) (declaring that issue is not whether other documents might exist, but whether search was adequate); Edelman v. SEC, 239 F. Supp. 3d 45, 51 (D.D.C. 2017) (holding that "the mere fact [plaintiff] has located complainants who assert that they made complaints that do not appear in the SEC's production does not, on its own, cast doubt on the efficacy of the SEC's search."); Vest v. Dep't of the Air Force, 793 F. Supp. 2d 103, 120 (D.D.C. 2011) (finding that "the FOIA does not mandate a 'perfect' search, only an 'adequate' one"); Sephton v. FBI, 365 F. Supp. 2d 91, 101 (D. Mass. 2005) (explaining that FOIA does not require review of "every single file that might conceivably contain responsive information"), aff'd, 442 F.3d 27 (1st Cir. 2006). But cf. Immigrant Def. Project v. ICE, No. 14-6117, 2017 WL 2126839 at *2 (S.D.N.Y. May 16,

other words, "the focus of the adequacy inquiry is not on the results."[156] In some situations, such as when an agency neither confirms nor denies the existence of records, or the records are categorically exempt,[157] the Court of Appeals for the District of Columbia Circuit has held that no search is required.[158]

2017) ("Plaintiffs point to 'tangible evidence' of outstanding materials at the field offices in question, indicating that Defendants' earlier search of these offices was not complete.").

[156] Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 28 (D.D.C. 2003), aff'd, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); see Mobley v. CIA, 806 F.3d 568, 581 (D.C. Cir. 2015) (finding agency search is "not unreasonable simply because it fails to produce all relevant material" (quoting Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986))); Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) ("'[T]he factual question . . . is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.'" (quoting SafeCard Servs., 926 F.2d at 1201)); In re Wade, 969 F.2d at 249 n.11 (declaring that issue is not whether other documents may exist, but whether search was adequate); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d. 479, 498 (S.D.N.Y. 2010) (noting that discovery of two additional responsive documents "in an area that the CIA determined would probably not lead to uncovering responsive documents does not render the CIA's search inadequate"); Blanck v. FBI, No. 07-0276, 2009 WL 728456, at *7 (E.D. Wis. Mar. 17, 2009) ("[T]he fact that the defendant's search failed to turn up the document(s) does not render the search inadequate; the adequacy of the search is determined by the appropriateness of the method."); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 294 (D.D.C. 2007) (explaining that although agency uncovered 5000 responsive records, adequacy of search judged by "appropriateness of the methods used to carry out search" rather than by "fruits of the search" (quoting Iturralde, 315 F.3d at 315)); Judicial Watch v. Rossotti, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) ("Perfection is not the standard by which the reasonableness of a FOIA search is measured."); Garcia v. DOJ, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("The agency is not expected to take extraordinary measures to find the requested records."); Citizens Against UFO Secrecy, Inc. v. DOD, No. 99-00108, slip op. at 8 (D. Ariz. Mar. 30, 2000) (declaring that "[a] fruitless search result is immaterial if [d]efendant can establish that it conducted a search reasonably calculated to uncover all relevant documents"), aff'd, 21 F. App'x 774 (9th Cir. 2001). But see Raulerson v. Reno, No. 96-120, slip op. at 5 (D.D.C. Feb. 26, 1999) (suggesting that agency's failure to locate complaints filed by plaintiff, existence of which agency did not dispute, "casts substantial doubt" on adequacy of agency's search), summary affirmance granted, No. 99-5300 (D.C. Cir. Nov. 23, 1999).

[157] See Boyd v. EOUSA, No. 16-5133, 2016 U.S. App. LEXIS 17066, at *2 (D.C. Cir. 2016) ("It was not necessary for EOUSA to conduct a search for records pertaining to third parties because these records were categorically exempt pursuant to FOIA Exemption 7(C)").

[158] See Elec. Priv. Info. Ctr. v. NSA, 678 F. 3d 926, 933 (D.C. Cir. 2012) (finding no agency obligation under FOIA to even conduct search if agency properly asserted Glomar response); see also Moore v. Nat'l DNA Index Sys., 662 F. Supp. 2d 136, 139 (D.D.C. 2009) (finding that where search for records is "literally impossible for the [agency] to conduct - not searching satisfies the FOIA requirement of conducting a search that is reasonably calculated to uncover responsive documents").

The adequacy of any FOIA search is necessarily "dependent upon the circumstances of the case."[159] For example, when a requester has limited the scope of his request, either at the administrative stage or in the course of litigation, he cannot subsequently challenge the adequacy of the search on the ground that the agency limited its search accordingly.[160] However, courts have held that a search is not reasonable if the agency itself interprets the scope of the request too narrowly.[161]

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[159] Davis v. DOJ, 460 F.3d 92, 103 (D.C. Cir. 2006) ("The 'adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case.'" (quoting Schrecker v. DOJ, 349 F.3d 657, 663 (D.C. Cir. 2003))); accord Truitt v. Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (same); Rugiero v. DOJ, 257 F.3d 534, 547 (6th Cir. 2001) ("The FOIA requires a reasonable search tailored to the nature of the request."); Maynard, 986 F.2d at 559 (explaining that adequacy of search "depends upon the facts of each case"); People for the Am. Way Found., 503 F. Supp. 2d at 293 ("Because the adequacy of an agency's search is 'dependent upon the circumstances of the case,' . . . , there is no uniform standard for sufficiently detailed and nonconclusory affidavits."); see also Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *7 (D. Minn. Oct. 24, 2005) (finding agency's search sufficient "in light of the facts of this case"), reconsideration denied, 2006 WL 208783 (D. Minn. Jan. 26, 2006).

[160] See McClanahan v. DOJ, 712 F. App'x 6, 8 (D.C. Cir. 2018) (finding agency's narrow search for investigative files adequate and stating that, contrary to requester's aguments in litigation, "the opening paragraph and the subjects of . . ." original request limited records sought to investigative records) (unpublished disposition); Ramstack v. Dep't of Navy, 607 F. Supp. 2d 94, 108 (D.D.C. 2009) (holding that defendants properly confined searches to central databases and plaintiff's argument that records in Baltimore or Philadelphia be searched was irrelevant because "plaintiff failed to direct the defendants to these particular sources of information in his FOIA requests"); Truesdale v. DOJ, 803 F. Supp. 2d 44, 49 (D.D.C. 2011) ("In light of plaintiff's clarification of his request – that is, his insistence that records he seeks were or should have been maintained by the Attorney General – defendant's decision to limit its search to the official records repository for the Office of the Attorney General was reasonable"); Jarvik v. CIA, 741 F. Supp. 2d 106, 117 (D.D.C. 2010) (finding CIA's search adequate when requester agreed to CIA's offer to narrow scope of initial request and CIA limited its search to that narrowed scope); Lechliter v. DOD, 371 F. Supp. 2d 589, 595 (D. Del. 2005) ("A requestor may not challenge the adequacy of a search after an agency limits the scope of a search in response to direction from the requestor."), aff'd, 182 F. App'x 113 (3rd Cir. 2006).

[161] See Pub. Emps. for Envtl. Resp. v. U.S. Int'l Boundary & Water Comm'n, 842 F. Supp. 2d 219, 225 (D.D.C. 2012) (determining that agency did not meet search obligation when it narrowly interpreted request "as a call for the agency's opinion on a question and to produce some records supporting that unsolicited opinion"); Charles v. Office of Armed Forces Med. Exam'r, 730 F. Supp. 2d 205, 216 (D.D.C. 2010) ("[T]o allow an agency to restrict the number of documents that it deems responsive during a FOIA search based on its interpretation of the plaintiff's purpose in making the request constitutes an unreasonable limitation.").

Courts have addressed what constitutes a reasonable lead that agencies should follow when conducting their searches.[162] At the same time. the D.C. Circuit has held that when the subject of a request is involved in several separate matters, but the request seeks information regarding only one of them, an agency is not obligated to extend its search to other files or to other documents that are referenced in records retrieved in response to the initial search, so long as that initial search was reasonable and complete in and of itself.[163] Additionally, the D.C. Circuit has held that the reasonableness standard "would be undermined" if "a requester [were] allowed to dictate, through search instructions, the scope of an agency's search[.]"[164]

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[162] See, e.g., Reporters Comm. for Freedom of the Press v. FBI, 877 F.3d 399, 407 (D.C. Cir. 2017) (holding that while rare case, lead located in records must be pursued "where a record reveals an agency office directly and conspicuously weigh[ed] in on a pointedly relevant, highly public controversy to which a FOIA request expressly refers."); Mobley v. CIA, 806 F.3d 568, 583 (D.C. Cir. 2015) (finding that "a request for an agency to search a particular record system - without more - does not invariably constitute a 'lead' that an agency must pursue"); Kowalczyk v. DOJ, 73 F.3d 386, 389 (D.C. Cir. 1996) (despite finding that agency did not need to follow particular lead at issue, noting that "[t]his is not to say that the agency may ignore what it cannot help but know"); Pinson v. DOJ, 61 F. Supp. 3d 164, 179 (D.D.C. 2015) (determining that although some disclosed records reference other documents not disclosed, that "standing alone, does not foreclose a grant of summary judgment to the government).

[163] Morley, 508 F.3d at 1121 ("'[M]ere reference to other files does not establish the existence of documents that are relevant to [a] FOIA request. If that were the case, an agency responding to FOIA requests might be forced to examine virtually every document in its files, following an interminable trail of cross-referenced documents like a chain letter winding its way through the mail.'" (quoting Steinberg, 23 F.3d at 552); see also Albers v. FBI, No. 16-05249, 2017 WL 736042, at *4 (W.D. Wash. Feb. 24, 2017) (finding cross-reference search not required where requester sought all records "pertaining to" subject because "it is not unreasonable to interprete 'pertaining to' in such a way as to search only for the primary subject of a particular matter."); Lewis v. DOJ, 867 F. Supp. 2d 1, 13 (D.D.C. 2011) (finding no agency obligation "to locate or retrieve files from another federal government agency [or] to retriev[e] documents which have been filed in [a] sealed case"); Canning v. DOJ, 848 F. Supp. 1037, 1050 (D.D.C. 1994) (holding that adequacy of search not undermined by fact that requester has received additional documents mentioning subject through separate request, when such documents are "tagged" to name of subject's associate).

[164] Mobley, 806 F.3d at 581; see also Dibacco v. U.S. Army, 795 F.3d 178, 190 (D.C. Cir. 2015) (finding that "[defendant's] burden was to show that its search efforts were reasonable and logically organized to uncover relevant documents; it need not knock down every search design advanced by every requester" (citing SafeCard, 926 F.2d at 1201); McClanahan v. DOJ, 204 F. Supp. 3d 30, 44 (D.D.C. 2016) (determining that "the reasonableness of a search is not measured against the scope dictated by a requester's search instructions, particularly when those instruction do not provide 'clear and certain' leads" (citing Mobley, 806 F.3d at 582)), aff'd, 712 F. App'x 6 (D.C. Cir. 2018); Media

To prove the adequacy of its search, as in sustaining its use of exemptions, an agency relies upon its declarations, which should be "relatively detailed and nonconclusory and submitted in good faith."[165] However, a search declaration "need not set forth with meticulous documentation the details of an epic search for the requested records,"[166] but such declarations should show "that the search method was reasonably calculated to uncover all relevant documents."[167] This is ordinarily accomplished by a

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Research Ctr. v. DOJ, 818 F. Supp. 2d 131,at 140 (D.D.C. 2011) (noting that there is "no bright-line rule requiring agencies to use the search terms proposed in a FOIA request").

[165] Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981) (citing Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978)); accord Pollack v. BOP, 879 F.2d 406, 409 (8th Cir. 1989); see Freedom Watch, Inc. v. NSA, 783 F.3d 1340, 1345 (D.C. Cir. 2015) (noting that "'an agency may establish the adequacy of its search by submitting reasonably detailed, nonconclusory affidavits describing its efforts'" (quoting Baker & Hostetler LLP v. Dep't of Commerce, 473 F.3d 312, 318 (D.C. Cir. 2006))); Havemann v. Colvin, 629 F. App'x 537, 539 (4th Cir. 2015) (same); Perry, 684 F.2d at 127 ("[A]ffidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA."); Triestman v. DOJ, 878 F. Supp. 667, 672 (S.D.N.Y. 1995) ("[A]ffidavits attesting to the thoroughness of an agency search of its records and its results are presumptively valid.").

[166] Murray v. BOP, 741 F. Supp. 2d 156, 163 (D.D.C. 2010) ("While the affidavits or declarations submitted by the agency need not set forth with meticulous documentation the details of an epic search for the requested records, they must describe what records were searched, by whom, and through what processes, and must show that the search was reasonably calculated to uncover all relevant documents." (quoting Defenders of Wildlife v. U.S. Border Patrol, 623 F. Supp. 2d 83, 92 (D.D.C. 2009))); see also Gatson v. FBI, No. 15-5068, 2017 WL 3783696, at *6 (D.N.J. Aug. 31, 2017) (noting that "the relevant inquiry is not whether the Government conducted the most expansive search possible or a perfect search" but rather whether search was "reasonably calculated" to uncover responsive records).

[167] Oglesby, 920 F.2d at 68 (declaring that although agency was not required to search "every" record system, "[a]t the very least, [it] was required to explain in its affidavit that no other record system was likely to produce responsive documents"); see, e.g., Hamdan v. DOJ, 797 F.3d 759, 772 (9th Cir. 2015) ("Plaintiffs were entitled to a reasonable search for records, not a perfect one[,]" "[a]nd a reasonable search is what they got"); Wadhwa v. VA, 446 F. App'x 516, 520 (3rd Cir. 2011) (remanding on search where neither declaration submitted by agency discussed search methodology used) (unpublished table decision); Church of Scientology v. IRS, 792 F.2d 146, 151 (D.C. Cir. 1986) (ruling that agency affidavit should describe general structure of agency's file system, which makes further search difficult); Edelman, 239 F. Supp. 3d at 51 (stating that for search to be adequate agency "is not required to 'search every record system' in response to a FOIA request; it is only obligated to 'us[e] methods which can be reasonably expected to produce the information requested.'" (quoting Oglesby, 920 F.2d at 68)); Ferranti v. ATF, 177 F. Supp. 2d 41, 47 (D.D.C. 2001) ("Affidavits that include search methods, locations of specific files searched,

declaration that identifies the types of files that an agency maintains, states the search terms that were employed to search through the files selected for the search, and contains an averment that all files reasonably expected to contain the requested records were, in

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descriptions of searches of all files likely to contain responsive documents, and names of agency personnel conducting the search are considered presumptively sufficient."), summary affirmance granted, No. 01-5451, 2002 WL 31189766, at *1 (D.C. Cir. Oct. 2, 2002); see also Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002) (reversing grant of summary judgment because "nothing in the record certif[ies] that all the records . . . have been produced"); Steinberg, 23 F.3d at 552 (finding description of search inadequate when it failed "to describe in any detail what records were searched, by whom, and through what process"); Bryant v. CIA, 742 F. Supp. 2d 90, 94-95 (D.D.C. 2010) (finding CIA's declaration sufficient when it described records maintained, general FOIA request processes, steps taken to respond to plaintiff's request, and search terms used); Budik v. Dep't of Army, 742 F. Supp. 2d 20, 31 (D.D.C. 2010) (recognizing agency's declaration "go[es] beyond simply averring that all files likely to include responsive documents were searched"); Judicial Watch v. FDA, 407 F. Supp. 2d 70, 74 (D.D.C. 2005) (finding that agency declarations sufficiently described search by detailing "scope and method used" to search for records and by providing "details about the specific offices" searched), aff'd in pertinent part, rev'd in other part & remanded on other grounds, 449 F.3d 141 (D.C. Cir. 2006); Tarullo v. DOD, 170 F. Supp. 2d 271, 274 (D. Conn. 2001) (deciding that absence in agency's declaration of description of scope and nature of search "makes it impossible" to find that search was reasonable).

fact, searched.[168] By contrast, agency declarations have been found inadequate when they do not contain sufficiently detailed descriptions of the search.[169]

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[168] See, e.g., Mobley, 806 F.3d at 581 (noting courts may rely on affidavits that are reasonably detailed and aver "'that all files likely to contain responsive records (if such records exist) were searched'" (quoting Oglesby, 920 F.2d at 68)); Iturralde, 315 F.3d at 313-14 (explaining requirements for adequate search); Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999) (same); Bonfilio v. OSHA, 320 F. Supp. 3d 152, 156 (D.D.C. 2018) (finding search description adequate although agency did not specifically state "that it looked for tapes, photos, videos, hard drives, thumb drives, emails, and notebooks . . ." because "FOIA does not require this level of specificity"); Judicial Watch v. DOJ, 319 F. Supp. 3d 431, 439-40 (D.D.C. 2018) (finding agency declarations "provide[d] sufficient detail about the scope and method [of] the [agency's] search for responsive records, the type of searches performed, who performed the searches, and what search terms were used."); Schotz v. DOJ, No. 14-1212, 2016 WL 1588491, at *6 (D.D.C. Apr. 20, 2016) (finding agency's "declarant has satisfactorily described the files that were searched, the search methods employed and explained why those files were the only ones likely to contain responsive records."); Bartko v. DOJ, 164 F. Supp. 3d 55, 64 (D.D.C. 2016) (finding that "[defendant] has . . . fully described that methodology in two affidavits and, most importantly, has incanted the 'magic words' concerning the adequacy of the search – namely, the assertion that [it] searched all locations likely to contain responsive documents"); Our Children's Earth Found. v. Nat. Marine Fisheries Serv., No. 14-4365, 2015 WL 6331268, at *2 (N.D. Cal. Oct. 21, 2015) (finding declaration adequate where it provide precise search terms used, explained "in detail how [the agency] determined which folders, files, and emails were selected"); Am. Mgmt. Servs., LLC v. Dep't of the Army, 842 F. Supp. 2d 859, 869-72 (E.D. Va. Jan. 23, 2012) (determining search reasonable where agency's declaration describes in detail procedures used, divisions searched, and results of those efforts), aff'd, 703 F.3 724 (4th Cir. 2013); Moffat v. DOJ, No. 09-12067, 2011 WL 3475440, at *7-11 (D. Mass. Aug. 5, 2011) (same), aff'd, 716 F.3d 244 (1st Cir. 2013); Kubik v. BOP, No. 10-6078, 2011 WL 4372188, at *2 (D. Or. Sept. 19, 2011) (finding search adequate where declaration "described the search methods employed – including the electronic search terms used, the location of the files searched and the method in which the searched files were created"); Dolin, Thomas & Solomon LLP v. DOL, 719 F. Supp. 2d 245, 255 (W.D.N.Y. 2010) (determining search adequate where "DOL has attested to multiple thorough searches for responsive documents, describing in detail the scope of the search, and listing files and persons from whom information was sought"), modified on other grounds by, Dolin, Thomas & Solomon LLP v. DOL, 2010 WL 5342821 (W.D.N.Y. Nov. 5, 2010); Schwarz v. DOJ, No. 10-0562, 2010 WL 2836322, at *4 (E.D.N.Y. July 14, 2010) (concluding agency search adequate where "[t]he affidavit of each agency demonstrates a thorough, careful search in every place where documents responsive to plaintiff's request might have been located"), aff'd, 417 F. App'x 102 (2d Cir. 2011); Rodriguez v. McLeod, No. 08-0184, 2008 WL 5330802, at *5 (E.D. Cal. Dec. 18, 2008) (determining that agency's declaration was sufficiently detailed because it described "locations searched, and manner and procedure for selecting and searching files"); Schmidt v. DOD, No. 3:04-1159, 2007 WL 196667, at *2 (D. Conn. Jan. 23, 2007) (finding that agency conducted adequate search based on agency's affidavits which detailed "the timeliness of the search, the manner in which the search was conducted, the specific places that were searched, and the retrieval of the relevant documents"); Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, 66 (D.D.C. 2003) (finding search affidavit to be sufficient because it "identifi[ed] the affiants and their roles in

the agency, discuss[ed] how the FOIA request was disseminated with their office and the scope of the search, which particular files were searched, and the chronology of the search"); see also Harrison v. BOP, 611 F. Supp. 2d 54, 65 (D.D.C. 2009) (holding as frivolous plaintiff's claim that BOP's searches were inadequate because it did not identify, by individual name, who was conducting the search"); cf. James Maddison Project v. DOJ, 267 F. Supp. 3d 154, 161 (D.D.C. 2017) ("Although a reasonable search of electronic records *may* necessitate the use of search terms in some cases, FOIA does not demand it in all cases involving electronic records.").

[169] See, e.g., Reporters Comm. for Freedom of the Press, 877 F.3d at 404 (remanding case because agency declaration was "utterly silient" on which record systems were searched, how searches were conducted, or what search terms were used); Aguiar v. DEA, 865 F.3d 730, 736 (D.C. Cir. 2017) (remanding because "declaration appears to conclude as a matter of law that the software is not in the agency's 'possession or control,' rather than to explain as a matter of fact that the software was not found"); Morley, 508 F.3d at 1121-22 (remanding case because agency's declaration did not sufficiently describe scope and method of search conducted); Pulliam v. EPA, 292 F. Supp. 3d 255, 262 (D.D.C. 2018) (finding declaration inadequate because it did not provide rationale for searching certain locations and not others); Crt. for Biological Diversity v. EPA, 279 F. Supp. 3d 121, 140-44 (D.D.C. 2017) (finding decleration insufficient because it did not justify agency's search cut-off dates, not all relevant custodians were searched, nor did agency search "instant messages, text messages, or other electronic communications."); Mattachine Soc'y of Washington, D.C. v. DOJ, 267 F. Supp. 3d 218, 226 (D.D.C. 2017) (holding that "[t]he locations searched and search techniques employed" were sufficient but agency's complete failure to search for specific subject and limited search terms used renedered search inadequate); Shapiro v. DOJ, 214 F. Supp. 3d 73, 78 (D.D.C. 2016) (explaining that search cannot be found adequate because "at no point in [its] declarations does [defendant] ever 'aver[] that all files likely to contain responsive materials (if such records exist) were searched.'"); Navigators Ins. Co. v. DOJ, 155 F. Supp. 3d 157, 170 (D. Conn. 2016) (finding agency's declaration insufficient beacause it did not discuss whether paper or electronic files were searched, which databases were searched, who conducted the search, or what search terms were used); Pinson v. DOJ, 145 F. Supp. 3d 1, 12-13 (D.D.C. 2015) (finding agency's declaration insufficient because it was "so general that it could describe virtually any search undertaken in response to a FOIA request"); Nat'l Day Laborer Organizing Network v. U.S. Immigr. & Customs Enforcement Agency, 877 F. Supp. 2d 87, 106 (S.D.N.Y. 2012) ("It is impossible to evaluate the adequacy of an electronic search for records without knowing what search terms have been used."); Banks v. DOJ, 700 F. Supp. 2d 9, 15 (D.D.C. 2010) (finding that because agency "does not explain sufficiently its interpretations of plaintiff's FOIA requests[]" it has not "demonstrate[d] that it has searched the files or systems of records most likely to contain records responsive to plaintiff's FOIA requests"); Davis v. DOD, No. 07-492, 2010 WL 1837925, at *5 (W.D.N.C. May 6, 2010) (finding agency declaration insufficient when it failed to "make clear whether the particular locations searched [were] the only places where responsive information is likely to be located"); Murray v. BOP, 741 F. Supp. 2d 156, 163 (D.D.C. 2010) (determining BOP's affidavit inadequate for failing "to establish that the systems of records actually searched were those most likely to contain records responsive to plaintiff's FOIA request" and for failing to describe "'with particularity the files that were searched [or] the manner in which they were searched'" (quoting Steinberg, 23 F.3d at 552)); Rodriguez v. McLeod, No. 08-0184, 2008

It is not necessary that the agency employee who actually performed the search supply an affidavit describing the search; rather, the affidavit of an official responsible for supervising or coordinating the search efforts has been found to satisfy the "personal knowledge" requirement of Rule 56(e) of the Federal Rules of Civil Procedure.[170] (For a

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WL 5156653, at *4 (E.D. Cal. Dec. 9, 2008) (holding that agency's declaration was conclusory and failed to provide description of files searched and search procedure); Wiesner v. FBI, 577 F. Supp. 2d 450, 457-58 (D.D.C. 2008) (holding agency's declaration to be inadequate because agency failed to explain why it did not use additional search terms provided by plaintiff), aff'd, No. 10-5013, 2010 WL 3734097 (D.C. Cir. Sept. 23, 2010); Bonaparte v. DOJ, 531 F. Supp. 2d 118, 122 (D.D.C. 2008) (denying agency's motion for summary judgment because agency failed to "describe the filing systems searched, the search methods employed and the search terms utilized, nor has [it] averred that all files likely to contain responsive records were searched"); People for the Am. Way Found., 503 F. Supp. 2d at 294 (finding agency's declaration insufficient because neither search terms nor reasons for limiting search were provided); Friends of Blackwater v. U.S. Dep't of Interior, 391 F. Supp. 2d 115, 122 (D.D.C. 2005) (concluding that agency's failure to locate documents known to exist, when combined with affidavit that did not specify terms used in conducting search, rendered search inadequate); Maydak v. DOJ, 362 F. Supp. 2d 316, 326 (D.D.C. Mar. 30, 2005) (finding agency's declaration to be inadequate where it contained "no information about the search terms and the specific files searched" and failed to specifically aver that "all files likely to contain responsive records were searched").

[170] See, e.g., DiBacco v. Dep't of Army, 926 F.3d 827, 833 (D.C. Cir. 2019) (holding that although some information was relayed to declarant by subordinates, declarations in FOIA cases may include such information without running afoul of Rule 56); Carney v. DOJ, 19 F.3d 807, 814 (2d Cir. 1994) ("An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e); there is no need for the agency to supply affidavits from each individual who participated in the actual search."); Maynard, 986 F.2d at 560 (same); SafeCard, 926 F.2d at 1202 (ruling that employee "in charge of coordinating the [agency's] search and recovery efforts [is] most appropriate person to provide a comprehensive affidavit"); see also Patterson v. IRS, 56 F.3d 832, 841 (7th Cir. 1995) (holding appropriate declarant's reliance on standard search form completed by his predecessor); Holt v. DOJ, 734 F. Supp. 2d 28, 38 (D.D.C. 2010) (accepting agency's affidavits where "each declarant has stated his or her familiarity with the component's procedures for handling FOIA and Privacy Act requests, and each declaration is based on the declarant's review of the component's official files"); Hersh & Hersh v. HHS, No. 06-4234, 2008 WL 901539, at *4 (N.D. Cal. Mar. 31, 2008) (explaining that agency's declaration meets personal knowledge requirement when "the supervisor in charge of coordinating the agency's search effort, or responsible for same, has submitted an affidavit describing the search"); Lewis v. EPA, No. 06-2660, 2006 WL 3227787, at *3 (E.D. Pa. Nov. 3, 2006) (holding agency employee's declaration admissible because employee's "statements [were] based either on 'personal examination' of the responsive documents or on information provided to him by employees under his supervision"); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 160-61 (D.D.C. 2004) (ruling that declarations from employee who coordinated agency's searches satisfied personal knowledge requirement); Kay v. FCC, 976 F. Supp. 23, 33 n.29 (D.D.C. 1997) ("Generally, declarations accounting for searches of documents that contain hearsay are acceptable."),

further discussion of this "personal knowledge" requirement, see Litigation Considerations, Summary Judgment, below.)

While the initial burden rests with an agency to demonstrate the adequacy of its search,[171] once that obligation is satisfied, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith,"[172] because agency

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aff'd, 172 F.3d 919 (D.C. Cir. 1998) (unpublished table decision); cf. Lahr v. NSTB, 569 F.3d 964, 989 (9th Cir. 2009) ("[T]he court does not need to have an affidavit from each person engaged in the search; such a practice would be exceptionally cumbersome on the government, and needlessly so."; Rosenfeld v. DOJ, No. 07-3240, 2008 WL 3925633, at *12 (N.D. Cal. Aug. 22, 2008) (concluding that declarant's statements with respect to field offices were inadmissible because no evidence was provided that declarant directly supervises field offices); Bingham v. DOJ, No. 05-0475, 2006 WL 3833950, at *3-4 (D.D.C. Dec. 29, 2006) (concluding that declarant had sufficient knowledge of subject matter and, "therefore, need not have been employed by the responding agency at the time of the facts underlying the requested records"); Homer J. Olsen, Inc. v. U.S. Dep't of Transp. Fed. Transit Admin., No. 02-00673, 2002 WL 31738794, at *5 n.4 (N.D. Cal. Dec. 2, 2002) (sustaining objection to declaration from employee who had no personal knowledge about what records were produced by regional office in response to request); Katzman v. CIA, 903 F. Supp. 434, 438-39 (E.D.N.Y. 1995) (finding declaration from agency's FOIA coordinator inadequate when agency initially misidentified requester's attorney as subject of request, and requiring declarations from supervisors in each of agency's three major divisions attesting that search was conducted for correct subject).

[171] See Havemann, 629 F. App'x at 538 (noting that agency has burden to establish adequacy of search); Patterson, 56 F.3d at 840 (recognizing that agencies have initial burden to demonstrate that search was reasonable and adequate); Maynard, 986 F.2d at 560 (same); Miller v. Dep't of State, 779 F.2d 1378, 1378 (8th Cir. 1986) (same); Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (same); Kean v. NASA, 480 F. Supp. 2d 150, 156 (D.D.C. 2007) ("The burden of proof is on the government to show that its search was reasonably calculated to uncover all relevant documents."); see also Santos v. DEA, 357 F. Supp. 2d 33, 37 (D.D.C. 2004) ("Conclusory statements that the agency has reviewed the relevant files are insufficient to support summary judgment."); Bennett v. DEA, 55 F. Supp. 2d 36, 40 (D.D.C. 1999) (pointing out that affidavit must provide details of scope of search; "simply stating that 'any and all records' were searched is insufficient").

[172] Maynard, 986 F.2d at 560 (citing Miller, 779 F.2d at 1383); see, e.g., Weisberg, 705 F.2d at 1351-52 (rejecting plaintiff's bad faith argument after finding that defendant demonstrated an adequate search); Brown v. FBI, 873 F. Supp. 2d 388, 400 (D.D.C. 2012) ("Because plaintiff's pleading simply states that defendant 'has unlawfully refused and/or withheld records,' the Court has no difficulty finding that defendant's search was adequate."); Mosby v. Hunt, No. 07-492, 2010 WL 1837925, at *3 (D.D.C. May 5, 2010) (stating that plaintiff's "general criticism" is not enough to establish that agency's search not done in good faith); Fischer v. DOJ, 723 F. Supp. 2d 104, 108-09 (D.D.C. 2010) (ruling that "mistakes do not imply bad faith" and, "[i]n fact, the agency's cooperative behavior of notifying the Court and plaintiff that it had discovered a mistake, if anything, shows good faith"); Ford v. DOJ, No. 07-1305, 2008 WL 2248267, at *4 (D.D.C. May 29, 2008) (explaining that "[i]t is plaintiff's burden in challenging the adequacy of an agency's search

declarations are "entitled to a presumption of good faith."[173] Consequently, "the failure of a search to produce particular documents, or 'mere speculation that as yet uncovered documents might exist,' does not undermine the adequacy of a search."[174] Similarly,

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to present evidence rebutting the agency's initial showing of a good faith search"); Graves v. EEOC, No. 02-6842, slip op. at 11 (C.D. Cal. Mar. 26, 2004) (declaring that once agency demonstrates adequacy of its search, burden shifts to plaintiff "to supply direct evidence of bad faith" to defeat summary judgment), aff'd, 144 F. App'x 626 (9th Cir. 2005); Windel v. United States, No. 02-306, 2004 WL 3363406, at *3 (D. Alaska Sept. 30, 2004) (concluding that plaintiff's "mere recitation" that several individuals should have been contacted as part of agency's search did not constitute evidence of bad faith); Tota v. United States, No. 99-0445E, 2000 WL 1160477, at *2 (W.D.N.Y. Jul. 31, 2000) (explaining that to avoid summary judgment in favor of agency, plaintiff must show "bad faith," by "presenting specific facts showing that documents exist" that were not produced); cf. Accuracy in Media, Inc. v. NTSB, No. 03-00024, 2006 WL 826070, at *9-10 (D.D.C. Mar. 29, 2006) (reasoning that "a requester cannot challenge the adequacy of a search based on the underlying actions that are the subject of the request, [and that] it may challenge the adequacy of a search by arguing that the search itself, rather than the underlying agency actions, was conducted in bad faith"); Brophy v. DOD, No. 05-360, 2006 WL 571901, at *8 (D.D.C. Mar. 8, 2006) (finding that agency's search was conducted in good faith, even though the agency "was deplorably tardy in releasing the documents that were found"); Judicial Watch, Inc., 337 F. Supp. 2d at 161 (finding that plaintiff's attempt to discredit search with its own declaration was "insufficient to overcome the personal knowledge-based" declarations submitted by agency, which fully described its search; concluding further that any failings associated with the agency's first search did not undermine its second search, which was "sufficient under the law").

[173] Chilingirian v. EOUSA, 71 F. App'x 571, 572 (6th Cir. 2003) (citing U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991)); Carney, 19 F.3d at 812 (holding that "[a]ffidavits submitted by an agency are 'accorded a presumption of good faith,' (quoting Safecard, 926 F.2d at 1200)); see, e.g., Havemann, 629 F. App'x at 539 ("The court is entitled to accept the credibility of such affidavits, so long as it has no reason to question the good faith of the agency."); Coyne v. United States, 164 F. App'x 141, 142 (2d Cir. 2006) (per curiam) (reiterating that agency affidavits are entitled to presumption of good faith) (citing Grand Cent. P'ship, 166 F.3d at 489); Peltier v. FBI, No. 03-905, 2005 WL 735964, at *4 (W.D.N.Y. Mar. 31, 2005) (same) (citing Carney, 19 F.3d at 812); Butler v. SSA, No. 03-0810, slip op. at 5 (W.D. La. June 25, 2004), (same), aff'd on other grounds, 146 F. App'x 752, 753 (5th Cir. 2005); Wood v. FBI, 312 F. Supp. 2d 328, 340 (D. Conn. 2004) (same (citing Carney, 19 F.3d at 812)), aff'd in part, rev'd in part on other grounds & remanded, 432 F.3d 78 (2d Cir. 2005); Piper, 294 F. Supp. 2d at 24 (same (citing Ground Saucer Watch, Inc., 692 F.2d at 771)).

[174] Lasko v. DOJ, No. 10-5068, 2010 WL 3521595, at *1 (D.C. Cir. Sept. 3, 2010) (quoting Wilber v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004))); see, e.g., Assassination Archives Research Ctr. v. CIA, No. 18-5280, 2019 WL 691517, at *1 (D.C. Cir. Feb. 15, 2019) (finding search adequate notwithstanding fact that agency did not use precise search terms suggested by requester and did not locate several records requester speculated existed); Clemente v. FBI, 867 F.3d 111, 118 (D.C. Cir. 2017) (holding search adequate although requester believes that additional records exist); Reporters Comm. for Freedom of the Press,

877 F.3d at 408 (finding search inadequate for other reasons but noting "[t]hat a few responsive documents [which] may have slipped through the cracks does not, without more, call into question the search's overall adequacy."); Dibacco, 795 F.3d at 190-91 (finding that "adequacy – not perfection – is the standard that FOIA sets" and stating that requester's argument that agency's search was inadequate because it failed to turn up certain records was "losing claim put to bed twenty-five years ago and age has not improved it" (citing Oglesby, 920 F.2d at 67 n.13)); Pub. Emp. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, 740 F.3d 195, 200 (D.C. Cir. 2014) (noting that "an agency's failure to turn up every responsive document in an initial search is not necessarily evidence of bad faith"); Steinberg, 23 F.3d at 552 (noting that requester's "'[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search'" for them (quoting SafeCard, 926 F.2d at 1201)); Kucernak v. FBI, 129 F.3d 126, 126 (9th Cir. 1997) ("Mere allegations that the government is shielding or destroying documents does [sic] not undermine the adequacy . . . of the search.") (unpublished table decision); Citizens for Responsibility & Ethics in Wash. v. DOJ, 292 F. Supp. 3d 284, 288 (D.D.C. 2018) (finding agency's search reasonable although requester believes additional records exist); Attkisson v. DOJ, 205 F. Supp. 3d 92, 95 (D.D.C. 2016) (same); Pinson v. DOJ, 61 F. Supp. 3d 164, 179 (D.D.C. 2015) (finding that "the fact that additional documents responsive to [the] requests may exist, or that the agency's searches have been imperfect, does not mean that the searches were inadequate"); Kintzi v. Office of the Att'y Gen., No. 08-5830, 2010 WL 2025515, at *6 (D. Minn. May 20, 2010) ("No evidence before the court indicates that the document [plaintiff] seeks exists. Therefore, the court determines that the [agency] conducted a reasonable search and properly denied [the] request."); Kromrey v. DOJ, No. 09-376, 2010 WL 2633495, at *1 (W.D. Wis. June 25, 2010) ("While plaintiff alleges that there must be more records, he has produced no evidence that there are any additional records, nor does he dispute the fact that the FBI conducted a search reasonably designed to yield documents responsive to his request."), aff'd, 423 F. App'x 624 (7th Cir. 2011); Clemente v. FBI, 741 F. Supp. 2d 64, 79 (D.D.C. 2010) (finding that plaintiff "cannot demonstrate that the FBI's search was inadequate by listing hypothetical documents that she believes could and should have been located and released to her"); Citizens for Responsibility & Ethics in Wash. v. DOJ, 405 F. Supp. 2d 3, 5 (D.D.C. 2005) (rejecting plaintiff's assertion that additional documents must exist "given the magnitude of the [alleged] scandal" that was subject of its request); Flowers v. IRS, 307 F. Supp. 2d 60, 67 (D.D.C. 2004) (stating that "'purely speculative claims about the existence and discoverability of other documents'" are not enough to rebut presumption of good faith (quoting SafeCard, 926 F.2d at 1200)); Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State, 818 F. Supp. 1291, 1295 (N.D. Cal. 1992) ("Plaintiff's incredulity at the fact that no responsive documents were uncovered . . . does not constitute evidence of unreasonableness or bad faith."); cf. Students Against Genocide v. Dep't of State, 257 F.3d 828, 839 (D.C. Cir. 2001) ("[T]hat the Department gave SAGE more information than it requested does not undermine the conclusion that its search was reasonable and adequate."). But see Meyer v. BOP, 940 F. Supp. 9, 14 (D.D.C. 1996) (reference to responsive pages in agency memorandum, coupled with equivocal statement in declaration that it "appears" responsive pages do not exist, requires further clarification by agency); Katzman v. Freeh, 926 F. Supp. 316, 320 (E.D.N.Y. 1996) (because additional documents were referenced in released documents, summary judgment was withheld "until defendant releases these documents or demonstrates that they either are exempt from disclosure or cannot be located").

courts have held that an agency's belated discovery of documents does not undermine the search adequacy.[175] Indeed, when an agency does subsequently locate additional documents initially believed to have been lost or destroyed, courts generally have accepted this as evidence of the agency's good-faith efforts.[176]

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[175] Am. Oversight v. DOJ, No. 18-0319, 2019 WL 3430667, at *6 (D.D.C. July 30, 2019) (finding that "the fact that an agency discovers an error in its earlier representations, and thereafter changes course, does not alone displace the good-faith presumption courts accord its declarations"); Lamb v. Millennium Challenge Corp., 334 F. Supp. 3d 204, 212-13 (D.D.C. 2018) (finding defendant's search adequate following supplemental declaration filed by defendant which explained inadvertent omission of document in prior release to plaintiff); Ireland v. IRS, No. 16-02855, 2017 WL 1731679, at *5 (C.D. Cal. May 1, 2017) (holding that fact that some documents were not discovered until second, more exhaustive, search does not mean that original search was inadequate); 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 (D.C. Cir. 2001).

[176] See Maynard, 986 F.2d at 565 ("Rather than bad faith, we think that the forthright disclosure by the INS that it had located the misplaced file suggests good faith on the part of the agency."); Meeropol, 790 F.2d at 953 (rejecting argument that later-produced records call the adequacy of search into question, because "[i]t would be unreasonable to expect even the most exhaustive search to uncover every responsive file"); Goland, 607 F.2d at 370 (refusing to undermine validity of agency's prior search because one week following decision by court of appeals agency had discovered numerous, potentially responsive, additional documents several months earlier); Kalwasinski v. BOP, No. 08-9593, 2010 WL 2541159, at *1 (S.D.N.Y. Mar. 15, 2010) (magistrate's recommendation), adopted, (S.D.N.Y. June 23, 2010) (finding BOP's prior search reasonable although it did not initially locate responsive records); Richardson v. DOJ, 730 F. Supp. 2d 225, 231-32 (D.D.C. 2010) (holding that EOUSA's search was adequate even though it did not initially locate any records responsive to plaintiff's request); Nat'l Inst. of Military Justice v. DOD, 404 F. Supp. 2d 325, 333-34 (D.D.C. 2005) (stating that "[a]lthough the agency was not initially diligent, that alone does not demonstrate bad faith, especially in light of the subsequent efforts to search for responsive records"); Corbeil v. DOJ, No. 04-2265, 2005 WL 3275910, at *3 (D.D.C. Sept. 26, 2005) ("[A]n agency's prompt report of the discovery of additional responsive materials may be viewed as evidence of its good faith efforts to comply with its obligations under FOIA."); Lechliter, 371 F. Supp. 2d at 593 (finding that agency acted in good faith by locating additional documents after error associated with its initial search was corrected); Landmark Legal Found., 272 F. Supp. 2d at 63 (emphasizing that "continuing discovery and release of documents does not provide that the original search was inadequate, but rather shows good faith on the part of the agency that it continues to search for responsive documents"); Campaign for Responsible Transplantation v. FDA, 219 F. Supp. 2d 106, 111

Moreover, courts have held that delays in responding to requests do not amount to a showing of bad faith or demonstrate that a search was unreasonable.[177] Even when a requested document indisputably exists or once existed, summary judgment is not generally defeated by an unsuccessful search for the document, so long as the search was diligent.[178] It has been held that "[n]othing in the law requires the agency to document

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(D.D.C. 2002) (suggesting that discovery of fifty-five additional documents amounted to "proverbial 'drop in the bucket'" in light of the voluminous number of documents located during agency's search); Torres v. CIA, 39 F. Supp. 2d 960, 963 (N.D. Ill. 1999) (rejecting adequacy of search challenge when "a couple of pieces of paper – having no better than marginal relevance" – were uncovered during additional searches); Gilmore v. NSA, No. 92-3646, 1993 U.S. Dist. LEXIS 7694, at *27 (N.D. Cal. Apr. 30, 1993) (finding that acceptance of plaintiff's "'perverse theory that a forthcoming agency is less to be trusted in its allegations than an unyielding agency'" would "'work mischief in the future by creating a disincentive for the agency to reappraise its position'" (quoting Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981))), aff'd, 76 F.3d 386 (9th Cir. 1995) (unpublished table decision); cf. Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1257 (11th Cir. 2008) (concluding that with respect to disclosure of additional documents not found at time of initial search, district court correctly did not draw adverse inference against agency based on agency's adequate explanation for late production of records); North v. DOJ, 774 F. Supp. 2d 217, 223 (D.D.C. 2011) ("T]he agency's previous failure to demonstrate that it conducted an adequate search does not call into question the validity of its new search for responsive records."); Fischer v. DOJ, 723 F. Supp. 2d 104, 108 (D.D.C. 2010) (rejecting plaintiff's arguments that "defendant's failure to produce documents until after it changed its disclosure policies, or until after litigation commenced, evidences bad faith or an inadequate search."); Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 583 (D.D.C. 2005) (concluding that EPA conducted reasonable searches despite discovery of documents not initially found; stating that while EPA's initial searches were flawed, EPA had remedied such preliminary deficiencies).

[177] See Navigators Ins. Co., 155 F. Supp. 3d at 169 ("The touchstone of the reasonableness inquiry appears to be simply the thoroughness of the search, notwithstanding the tardiness of the results." (quoting S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., No. 06-2845, 2008 WL 2523819, at *16 (E.D. Cal. June 20, 2008)); Calvert v. U.S., 715 F. Supp. 2d 44, 47 (D.D.C. 2010) (dismissing plaintiff's argument that delay in producing responsive records demonstrated that search was not done in good faith); Budik v. Dep't of Army, 742 F. Supp. 2d 20, 31-35 (D.D.C. 2010) (finding that Army's delay in responding to requests, discrepancies concerning page counts, lack of notice to plaintiff regarding her right to administratively appeal, and improper redaction of signature block are not sufficient to demonstrate bad faith).

[178] See Kuzma v. DOJ, 692 F. App'x 30, 32-33 (2d Cir. 2017) (holding that search was reasonable despite fact that agency could not find record that its search suggested existed); Kohake v. Dep't of Treasury, 630 F. App'x 583, 588 (6th Cir. 2015) (finding that "the fact that the IRS may have destroyed certain records pursuant to its policy does not render the search at issue unreasonable"); Stalcup, 768 F.3d at 74 ("The omission of a single document in this case does not negate what is otherwise a reasonable inquiry."); Whitfield v. Dep't of Treasury, 255 F. App'x 533, 534 (D.C. Cir. 2007) (per curiam) ("[T]he agency's failure to turn up specific documents does not undermine the determination that the agency

conducted an adequate search for the requested records."); Twist v. Gonzales, 171 F. App'x 855, 855 (D.C. Cir. 2005) (ruling that failure to locate specific documents does not render search inadequate or demonstrate that search was conducted in bad faith); Nation Magazine, 71 F.3d at 892 n.7 ("Of course, failure to turn up [a specified] document does not alone render the search inadequate."); Citizens Comm'n on Human Rights, 45 F.3d at 1328 (adequacy of search not undermined by inability to locate 137 out of 1000 volumes of responsive material, absent evidence of bad faith, and when affidavit contained detailed, nonconclusory account of search); Maynard, 986 F.2d at 564 ("'The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it.'" (quoting Miller, 779 F.2d at 1385)); Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of the Fed. Reserve Sys., 762 F. Supp. 2d 123, 134 (D.D.C. 2011) (determining search adequate even though agency's search failed to locate responsive record previously posted on agency's website); McGehee v. DOJ, 800 F. Supp. 2d 220, 230 (D.D.C. 2011) (determining that although some enclosures and attachments are missing from production it is not enough "in the context of the FBI's search and the size of its production . . . to render the FBI's search inadequate"); Dorsey v. EEOC, No. 09-519, 2010 WL 3894590, at *3 (S.D. Cal. Sept. 29, 2010) (finding that plaintiff's "conclusory statement" that EEOC "lost or destroyed" responsive records "does not raise an issue of fact precluding summary judgment" in favor of agency), appeal dismissed, 481 F. App'x 417 (9th Cir. 2012); Elliott v. NARA, No. 06-1246, 2006 WL 3783409, at *3 (D.D.C. Dec. 21, 2006) ("An agency's search is not presumed unreasonable because it fails to find all the requested information."); Judicial Watch v. DOT, No. 02-566, 2005 WL 1606915, at *7 (D.D.C. July 7, 2005) (upholding search even though some responsive records, which once existed, were destroyed prior to plaintiff's request); People for the Ethical Treatment of Animals v. USDA, No. 03-195, 2005 WL 1241141, at *4 (D.D.C. May 24, 2005) (rejecting plaintiff's argument that search was inadequate simply because disclosed documents refer to others that were not produced or listed in Vaughn Index); Allen v. U.S. Secret Serv., 335 F. Supp. 2d 95, 99 (D.D.C. 2004) ("[T]he fact that plaintiff [independently] discovered one document that possibly should have been located by the Service does not render the search process unreasonable."); Grace v. Dep't of Navy, No. 99-4306, 2001 WL 940908, at *4 (N.D. Cal. Aug. 13, 2001) (finding "more than reasonably adequate" agency's search for misplaced personnel records), aff'd, 43 F. App'x 76 (9th Cir. 2002); Kay, 976 F. Supp. at 33 (explaining that search not inadequate simply because plaintiff received in discovery documents not produced in response to FOIA request; discovery "may differ from FOIA disclosure procedures"); cf. Santana v. DOJ, 828 F. Supp. 2d 204, 209 (D.D.C. 2011) (determining FOIA provides no remedy in situation where records sought are no longer within government's possession); Callaway v. U.S. Dep't of the Treasury, 824 F. Supp. 2d 153, 157 (D.D.C. 2011) (noting that Court's "authority is limited to the release of non-exempt agency records in existence at the time the agency receives the FOIA request").

the fate of documents it cannot find."[179] On occasion, though, some courts have required agencies to provide additional details about why particular records could not be found.[180] The Court of Appeals for the District of Columbia Circuit has required an agency to seek out the assistance of an employee closely related to specific records when those records could not be found,[181] but at the same time, the District Court for the District of Columbia has held that individual components within an agency are under no obligation to seek out additional information held by other components to aid in the processing of the request.[182]

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[179] Roberts v. DOJ, No. 92-1707, 1995 WL 356320, at *2 (D.D.C. Jan. 28, 1993); see, e.g., Miller, 779 F.2d at 1385 ("Thus, the Department is not required by the Act to account for documents which the requester has in some way identified if it has made a diligent search for those documents in places in which they might be expected to be found."); Gerstein, 2008 WL 4415080, at *5 ("[A]n agency's failure to identify a specific document in its search does not alone render a search inadequate."); West v. Spellings, 539 F. Supp. 2d 55, 62 (D.D.C. 2008) ("While four files were missing, FOIA does not require [the agency] to account for them, so long as it reasonably attempted to located them."); Ferranti v. DOJ, No. 03-2385, 2005 WL 3040823, at *2 (D.D.C. Jan. 28, 2005) (rejecting plaintiff's "contention that EOUSA should account for previously possessed records").

[180] See Boyd v. U.S. Marshals Serv., No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *4 (D.D.C. March 15, 2002) (stating that agency's declaration should have explained why particular report, which was known to exist, was not located, and requiring agency to "explain its failure to locate this report in a future motion"); Trentadue v. FBI, No. 04-772, slip op. at 5-6 (D. Utah May 5, 2004) (finding search insufficient in light of specific evidence proffered by plaintiff that certain documents do exist and were not found through FBI's automated search); Tran v. DOJ, No. 01-0238, 2001 U.S. Dist. LEXIS 21552, at *12-13 (D.D.C. Nov. 20, 2001) (finding that "it is not enough for [an agency] to simply state that [the] documents are destroyed or missing" without providing more explanation), motion for summary judgment granted, No. 01-0238, 2002 WL 535815 (D.D.C. Mar. 12, 2002); Kronberg v. DOJ, 875 F. Supp. 861, 870-71 (D.D.C. 1995) (requiring government to provide additional explanation for absence of documentation required by statute and agency regulations to be created, when plaintiff presented evidence that other files, reasonably expected to contain responsive records, were not identified as having been searched).

[181] See Valencia-Lucena, 180 F.3d at 328 (suggesting that unless it would be "fruitless" to do so, agency is required to seek out employee responsible for record "when all other sources fail to provide leads to the missing record" and when "there is a close nexus . . . between the person and the particular record").

[182] White v. DOJ, 840 F. Supp. 2d 83, 90 (D.D.C. 2012) (rejecting argument that Valencia-Lucena required search of other components within same agency because in Valencia-Lucena "court concluded that interviewing the [agency] employee was a necessary step because the [agency] had 'no responsibility under FOIA to make inquiries of other law enforcement agencies . . . for documents no longer within its control or possession'" and, therefore, "Valencia-Lucena supports the conclusion that the USAO was under no obligation to seek additional information from the FBI in order to perform an adequate search in the

Mootness and Other Grounds for Dismissal

If during the course of a FOIA lawsuit it is determined that all documents responsive to the underlying FOIA request have been released in full to the requester, courts generally dismiss the suit as moot because there is no justiciable case or controversy.[183] However, in instances where an agency has released documents, but other related issues remain unresolved, courts frequently will not dismiss the action.[184]

USAO record system in response to [the] request"), aff'd, No. 12-5067, 2012 WL 3059571, at *1 (D.C. Cir. July 19, 2012).

[183] See, e.g., Heily v. DOD, No. 13-5055, 2013 WL 5975876, at *1 (D.C. Cir. Oct. 16, 2013) (affirming dismissal of plaintiff's claims as moot after plaintiff received the requested documents while case was pending); Williams & Connolly v. SEC, 662 F.3d 1240, 1240 (D.C. Cir. 2011) (affirming judgment of district court that controversy is moot with respect to eleven sets of documents that were provided to plaintiff in full in connection with criminal prosecution); Cornucopia Inst. v. USDA, 560 F.3d 673, 675-78 (7th Cir. 2009) (concluding that agency's production of documents, completeness of which was uncontested, mooted plaintiff's claims); Brown v. DOJ, 169 F. App'x 537, 540 (11th Cir. 2006) (holding that FOIA claim became moot when documents were released); N.Y. Times Co. v. FBI, 822 F. Supp. 2d 426, 431 (S.D.N.Y. 2011) (granting defendant's motion to dismiss for lack of subject matter jurisdiction where FBI provided an unredacted copy of requested report); Von Grabe v. DHS, No. 09-2162, 2010 WL 3516491, at *4 (M.D. Fla. Sept. 3, 2010) (dismissing FOIA claim as moot where requested record was released during course of litigation), aff'd on other grounds, 440 F. App'x 687 (11th Cir. 2011); cf. Feinman v. FBI, 598 F. App'x 15, 15-16 (D.C. Cir. 2015) (finding plaintiff's request for search moot where FBI subsequently searched and located no responsive records); Haji v. ATF, No. 03-847, 2004 WL 1783625, at *2-3 (S.D.N.Y. Aug. 10, 2004) (holding that plaintiff's request is moot because requested files, if ever in existence, were destroyed at World Trade Center during attacks of September 11, 2001).

[184] See Cause of Action v. FTC, 799 F.3d 1108, 1114 (D.C. Cir. 2015) (holding that plaintiff's fee waiver claim was not moot "[b]ecause the FTC has not produced without charge all the non-exempt documents [plaintiff] sought"); Marin Inst. for the Prevention of Drug & Other Alcohol Probs. v. HHS, 229 F.3d 1158, 1158 (9th Cir. 2000) (finding no mootness when release of document at issue was "surreptitious[ ]" and not necessarily the document plaintiff had requested) (unpublished disposition); Judicial Watch, Inc. v. U.S. Air Force, No. 11-932, 2012 WL 1190297, at *1-3 (D.D.C. Apr. 10, 2012) (concluding that defendant's production of document in one format does not moot plaintiff's claim for metadata underlying another document format); McKinley v. FDIC, 756 F. Supp. 2d 105, 111 (D.D.C. 2010) (refusing to dismiss plaintiff's claims on mootness grounds where FDIC responded to his requests, but issues as to adequacy of agency's search for responsive documents and validity of its claims of exemption remained); Nw. Univ. v. USDA, 403 F. Supp. 2d 83, 86 (D.D.C. 2005) (finding no mootness despite belated release of documents because plaintiff challenged adequacy of defendant's document production); Hudson v. FBI, No. 04-4079, 2005 WL 2347117, at *1-2 (N.D. Cal. Sept. 26, 2005) (refusing to dismiss plaintiff's complaint as moot because, although disputed documents were released and FOIA claims

The mootness doctrine can also arise in the fee context whereby an agency's decision to waive fees at issue in the litigation renders moot a FOIA plaintiff's claims concerning fee waivers or requests for a preferred fee status.[185]

In cases where a FOIA plaintiff's complaint only alleged an unreasonable delay in responding to a FOIA request and the agency subsequently responded by processing the requested records, courts have dismissed the FOIA lawsuit as moot.[186] However, the

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were resolved, related Privacy Act access claims had yet to be adjudicated); cf. Newport Aeronautical Sales v. U.S. Dep't of the Air Force, 684 F.3d 160, 163-64 (D.C. Cir. July 17, 2012) (concluding that release of unredacted copies of requested records pursuant to DOD directive rather than FOIA did not moot plaintiff's claim alleging continuing injury due to agency's "pattern of denying FOIA requests for [that type] of data" and "requiring [plaintiff] to seek the data under restrictive terms" of directive); Yonemoto v. VA, 686 F.3d 681, 689-92 (9th Cir. 2012) (determining that plaintiff's FOIA claim with respect to certain emails is not moot where VA offered those records to plaintiff in unredacted form in his capacity as agency employee, but placed restrictions on his ability to distribute them); Furrow v. BOP, 420 F. App'x 607, 610 (7th Cir. 2011) (vacating district court's decision dismissing action on mootness grounds where agency permitted plaintiff to inspect records but plaintiff still maintained that agency "has not provided everything [he] wants, and he disputes the validity of the exemptions [that] the BOP claims"); Anderson v. HHS, 907 F.2d 936, 941 (10th Cir. 1990) (declaring that although plaintiff had already obtained all responsive documents in private civil litigation, albeit subject to protective order, plaintiff's FOIA litigation to obtain documents free from any such restriction remained viable).

[185] See, e.g., Hall v. CIA, 437 F.3d 94, 99 (D.C. Cir. 2006) (finding that agency's release of documents without seeking payment mooted plaintiff's "arguments that the district court's denial of a fee waiver was substantively incorrect"); Inst. for Pol'y Stud. v. CIA, 885 F. Supp. 2d 120, 153 (D.D.C. 2012) (denying as moot plaintiff's request for declaratory relief where defendant initially denied fee waiver but ultimately waived fees as matter of administrative discretion because "the fact that plaintiff might at some point in the future file another FOIA claim and that defendant might then refuse to waive fees is no more than speculative"); Hall v. CIA, 668 F. Supp. 2d 172, 195 (D.D.C. 2009) (holding that issue as to plaintiff's fee status is moot where CIA decided as matter of administrative discretion to accord plaintiff same treatment "'as what representatives of the news media receive'"); Schoenman v. FBI, 573 F. Supp. 2d 119, 135-36 (D.D.C. 2008) (finding fee waiver issue moot where agency waived search fees and copying costs and declining to hold that defendant's initial refusal to waive fees was incorrect because "'such a declaration would be an advisory opinion'"); cf. Citizens for Resp. & Ethics in Wash. v. Dep't of Educ., 593 F Supp. 2d 261, 268-69 (D.D.C. 2009) (concluding that plaintiff's fee waiver request is moot with respect to set of documents that were included as part of defendant's search in another case involving same parties).

[186] See, e.g., Yonemoto, 686 F.3d at 689 (noting that "the production of all nonexempt material, 'however belatedly, moots FOIA claims'" (quoting Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002))); Voinche v. FBI, 999 F.2d 962, 963 (5th Cir. 1993) (dismissing case as moot because only issue in case was "tardiness" of agency response, which was made moot by agency disclosure determination); Atkins v. DOJ, 946 F.2d 1563, 1563 (D.C.

Court of Appeals for the District of Columbia Circuit, in Payne Enterprises v. United States,[187] held that when records are routinely withheld at the initial processing level, but consistently released after an administrative appeal and this situation results in continuing injury to the requester, a lawsuit challenging that practice is ripe for adjudication and is not subject to dismissal on the basis of mootness.[188] Moreover,

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Cir.1991) ("The question whether DEA complied with the [FOIA's] time limitation in responding to [plaintiff's] request is moot because DEA has now responded to this request.") (unpublished table decision); Tijerina v. Walters, 821 F.2d 789, 799 (D.C. Cir. 1987) ("'[H]owever fitful or delayed the release of information, . . . if we are convinced appellees have, however belatedly, released all nonexempt material, we have no further judicial function to perform under the FOIA.'" (quoting Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982))); Bonilla v. DOJ, No. 11-20450, 2012 WL 204202, at *2 (S.D. Fla. Jan. 24, 2012) (granting defendant's motion to dismiss where agency released all non-exempt documents and plaintiff's complaint only asserted claims alleging untimely disclosure of requested records); Davidson v. BOP, No. 11-309, 2012 WL 5421161, at *3 (E.D. Ky. Nov. 6, 2012) (holding that in light of response by agency, plaintiff's claim was moot because even though "more than two years have passed since [plaintiff] first submitted his FOIA request," plaintiff's complaint only sought response to his FOIA request); Meyer v. Comm'r of IRS, No. 10-767, 2010 U.S. Dist. LEXIS 114758, at *15 (D. Minn. Sept. 27, 2010) (dismissing any claim "based on the timeliness of the IRS's response" as moot in light of agency's response to plaintiff's request); Calvert v. United States, 715 F. Supp. 2d 44, 47-48 (D.D.C. 2010) (declaring that because plaintiff had not contested agency's withholdings or asserted any "facts beyond delay to call into question the adequacy of defendant's search for responsive records," "[t]he court's role in the process has thus come to an end"); United Transp. Union Local 418 v. Boardman, No. 07-4100, 2008 WL 2600176, at *8 (N.D. Iowa June 24, 2008) (dismissing plaintiff's FOIA claim as moot because although "defendants responded to the FOIA request almost a year later, nothing indicates the defendants exercised bad faith in responding"); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 112 (D.D.C. 2008) (declining to find "improper delay or withholding of documents" because issue became moot when agency produced all nonexempt records).

[187] 837 F.2d 486 (D.C. Cir. 1988).

[188] Id. at 488-93; see also Hajro v. U. S. Citizenship & Immigration Serv., 811 F.3d 1086, 1101 (9th Cir. 2015) (finding that "a pattern or practice claim is not necessarily mooted by an agency's production of documents"); Tipograph v. DOJ, 146 F. Supp. 3d 169, 174 (D.D.C. 2015) (finding that "[b]ecause [plaintiff] alleges that a policy or practice of the FBI will impact her lawful access to information in the future, her claim for prospective declaratory and injunctive relief is not moot simply because the FBI has now provided her with the records to which she is entitled"); Info. Network for Responsible Mining v. DOE, No. 06-2271, 2008 WL 762248, at *3 n.5 (D. Colo. Apr. 30, 2008) (noting that "when plaintiff alleges that the agency has engaged in a pattern or practice of withholding documents in response to FOIA requests, belated production will not moot the plaintiff's claims"); cf. Muttitt v. U.S. Cent. Command, 813 F. Supp. 2d 221, 230-31 (D.D.C. 2011) (permitting claim under FOIA's Section 552(a)(7)(B), which requires agencies to provide estimated date of completion for certain requests, to proceed against one defendant based on plaintiff's allegation that agency failed to respond to inquiries related to five separate requests on two different dates); Gilmore v. DOE, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998) (allowing

"voluntary cessation" of the practice may not moot the claim unless the agency can demonstrate that "'there is no reasonable expectation that the wrong will be repeated.'"[189] At the same time, when plaintiffs are unable to establish that an agency has engaged in any pattern or practice of not complying with its obligations under the FOIA, courts have consistently held that their claims are not ripe for adjudication.[190] (For a further

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discovery on "pattern and practice" claim of agency delay in processing FOIA requests), dismissed per stipulation, No. 95-0285 (N.D. Cal. Apr. 3, 2000). But cf. Pietrangelo v. U.S. Army, 334 F. App'x 358, 360 (2d Cir. 2009) (noting that "[t]his Court has not yet recognized or articulated the inquiry relevant to a pattern or practice claim in a FOIA context, but [finding] we need not do so here"); Nkihtaqmikon v. Bureau of Indian Aff., 672 F. Supp. 2d 154, 170 (D. Me. 2009) (declining to decide whether court "is authorized to issue a declaratory judgment condemning [agency's] pattern or practice of FOIA non-compliance").

[189] Payne Enters. Inc., 837 F.2d at 492.

[190] See, e.g., Walsh v. VA, 400 F.3d 535, 537 (7th Cir. 2005) (holding that theoretical possibility of plaintiff having to wait again for records in future FOIA request is insufficient to keep plaintiff's claim alive); Reg'l Mgmt. Corp. v. Legal Servs. Corp., 186 F.3d 457, 464-65 (4th Cir. 1999) (refusing to consider challenge to alleged policy of nondisclosure of documents relating to ongoing investigations because claim was not "ripe"); Gilmore v. Nat'l Sec. Agency, 76 F.3d 386, 386 (9th Cir. 1995) (refusing to grant injunction for alleged "systemic agency abuse" in responding to FOIA requests where system of handling requests was "reasonable" and records were "diverse and complex," requiring "painstaking review") (unpublished disposition); N.Y. Times Co. v. FBI, 882 F. Supp. 2d 426, 431 (S.D.N.Y. 2011) (dismissing plaintiff's "pattern or practice" claim where it has "failed to provide evidence of prior similar instances to support its claim"); Muttitt, 813 F. Supp. 2d at 231 (concluding that plaintiff's allegation that agency refused to provide estimated date of completion "only one time" "is insufficient as a matter of law to state a claim for relief based on a policy, pattern, or practice of violating FOIA"); Ctr. for Sustainable Econ. v. Dep't of the Treasury, No. 09-00848, slip op. at 6-7 (D.N.M. May 5, 2010) (finding that action challenging defendant's past practice regarding fee waiver requests is moot where defendant conceded error and took corrective action to avoid repetition); Hart v. HHS, 676 F. Supp. 2d 846, 855-56 (D. Ariz. 2009) (concluding that "[p]laintiffs have not presented sufficient evidence of a 'pattern' of delayed responses by [d]efendant" even though "[d]efendant did not comply with the timeliness requirements in this case"); O'Neill v. DOJ, No. 05-0306, 2008 WL 819013, at *14 (E.D. Wis. Mar. 25, 2008) (determining that because plaintiff failed to show that agency "had a policy of violating the FOIA, his claim is not ripe for judicial review"); Long v. DOJ, 450 F. Supp. 2d 42, 84-85 (D.D.C. 2007) (determining that plaintiff's claims regarding delay in processing fee waiver request and its status under fee waiver provisions of FOIA were moot because agency waived all fees in connection with request and also concluding that plaintiff's fee status with respect to future requests was not ripe for adjudication); Pub. Employees for Envtl. Resp. v. Dep't of the Interior, No. 06-182, 2006 WL 3422484, at *9-10 (D.D.C. Nov. 28, 2006) (denying injunctive relief as there is neither evidence of policy or practice violating FOIA, nor cognizable danger that alleged FOIA violation will recur); OSHA Data/CIH, Inc. v. Dep't of Labor, 105 F. Supp. 2d 359, 368 (D.N.J. 1999) (refusing to permit claim to go forward when no proof existed that agency would routinely refuse to release data for period of time), aff'd, 220 F.3d 153 (3d Cir. 2000); Swan View Coal. v. USDA, 39 F. Supp. 2d 42, 47 (D.D.C. 1999) (refusing to grant declaratory

discussion of FOIA Pattern-or-Practice claims, see Pattern-or-Practice Claims section, below.)

FOIA lawsuits have also been dismissed when the plaintiff fails to prosecute the suit,[191] records are publicly available under a separate statutory scheme upon payment of fees,[192] or the claims presented are not ripe.[193] Additionally, a FOIA plaintiff's status as a

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relief where agency's failure to timely respond was "an aberration"); Reg'l Mgmt. Corp. v. Legal Servs. Corp., 10 F. Supp. 2d 565, 573 (D.S.C. 1998) (refusing to permit further consideration of moot claim as there was no evidence of continuing injury to requester from "isolated event"), aff'd in part & remanded in part on other grounds, 186 F.3d 457 (4th Cir. 1999).

[191] See, e.g., Antonelli v. EOUSA, 25 F.3d 1053, 1053 (7th Cir. 1994) (affirming district court's dismissal of complaint when, seven months after plaintiff's complaint was found defective for lack of specificity, plaintiff had failed to amend) (unpublished disposition); Castro v. ATF, No. 11-2197, 2012 WL 1556248, at *1 (D.D.C. May 2, 2012) (granting defendant's motion for summary judgment as conceded where plaintiff failed to respond to agency's motion and was advised by court of consequences of failure to do so); Comer v. FBI, No. 09-2455, 2010 U.S. Dist. LEXIS 111558, at *2-3 (D.D.C. Oct. 20, 2010) (dismissing pro se plaintiff's FOIA action because he "failed to respond to the court's order to show cause and failed to prosecute the case").

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

[193] See, e.g., Petit-Frere v. U.S. Att'ys Off., 664 F. Supp. 2d 69, 72 (D.D.C. 2009) (holding that lawsuit is not ripe for adjudication because, while "exhaustion of administrative remedies is not jurisdictional," "as a prudential matter" lawsuit should be considered "premature and not ripe for adjudication" in part because not doing so would deprive court of "an adequate record for judicial review"); Love v. FBI, 660 F. Supp. 2d 56, 60 (D.D.C. 2009) (same); Jones v. DOJ, 653 F. Supp. 2d 46, 49-50 (D.D.C. 2009) (concluding that issues presented are not ripe where plaintiff has failed to pay assessed fees or to administratively appeal fee determination); O'Neill, 2008 WL 819013, at *14 (finding that claim was not ripe where plaintiff could not establish that agency had policy whereby it failed to search for records or refused to contact agency personnel with connection to responsive records); Long, 450 F. Supp. 2d at 85 (finding that question of plaintiff's fee status with respect to future requests was not ripe for adjudication); Odle v. DOJ, No. 05-2711, 2005 WL 2333833, at *2 (N.D. Cal. Sept. 22, 2005) (holding that, as defendants no longer assert "Glomar" defense, the plaintiff's claim regarding defendants' use of that defense became moot, and that plaintiff's contention that defendants were unlawfully withholding documents was not ripe for adjudication as defendants were in midst of reviewing and processing requested documents); Doe v. Veneman, 230 F. Supp. 2d 739, 746 (W.D. Tex. 2002) (dismissing claims regarding "other pending FOIA requests" as "too broad for the Court to effectively review because such requests are numerous, request a variety of

fugitive may warrant dismissal under the "fugitive disentitlement doctrine."[194] (For a further discussion of fugitives and their FOIA requests, see Procedural Requirements, FOIA Requesters, above). Notably, dismissal is not necessarily appropriate when a plaintiff dies, as a FOIA claim may be continued by a properly substituted party.[195]

A FOIA lawsuit may also be dismissed under the doctrine of res judicata, sometimes also referred to as "claim preclusion."[196] Res judicata precludes relitigation of an action when it is brought by a plaintiff against the same agency for the same documents, the withholding of which previously has been adjudicated.[197] However, res

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information, and are still pending with administrative agencies"), aff'd in part & rev'd in part on other grounds, 380 F.3d 807, 821 (5th Cir. 2004).

[194] See Maydak v. Dep't of Educ., 150 F. App'x 136, 138 (3d Cir. 2005) (affirming district court's dismissal of plaintiff's FOIA suit under "fugitive disentitlement doctrine" because "there was enough of a connection between Maydak's fugitive status and his FOIA case to justify application of the doctrine" (citing Ortega-Rodriguez v. United States, 507 U.S. 234, 246-49 (1993) (concluding that "absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during 'the ongoing appellate process,' the justifications advanced for dismissal of fugitives' pending appeals generally will not apply") (citation omitted))); cf. Lazaridis v. DOJ, 713 F. Supp. 2d 64, 69 (D.D.C. May 26, 2010) (denying agency's motion to dismiss based on fugitive disentitlement doctrine where "DOJ has not established the requisite connection between [plaintiff's] fugitive status and these proceedings"); Shannahan v. IRS, No. 08-542, 2009 U.S. Dist. LEXIS 52147, at *43-44 (W.D. Wa. Apr. 27, 2009) (declining to dismiss plaintiff's FOIA case under fugitive disentitlement doctrine without reviewing agency's Vaughn Index and filings), summ. j. granted in part, 2009 U.S. Dist. LEXIS 99666 (W.D. Wa. 2009).

[195] See Sinito v. DOJ, 176 F.3d 512, 515-16 (D.C. Cir. 1999) (finding that FOIA cause of action survives death of original requester, but restricting substitution of parties to successor or representative of deceased, pursuant to Rule 25 of Federal Rules of Civil Procedure); D'Aleo v. Dep't of the Navy, No. 89-2347, 1991 U.S. Dist. LEXIS 3884, at *2-4 (D.D.C. Mar. 27, 1991) (appointing deceased plaintiff's sister, who was executrix of his estate, as new plaintiff). But cf. Hayles v. DOJ, No. H-79-1599, slip op. at 3 (S.D. Tex. Nov. 2, 1982) (dismissing case upon death of plaintiff when no timely motion for substitution was filed).

[196] See New Hampshire v. Maine, 532 U.S. 742, 748 (2001) (defining claim preclusion as "the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit") (non-FOIA case).

[197] See Schwarz v. Nat'l Inst. of Corr., 161 F.3d 18, 18 (10th Cir. 1998) (affirming dismissal of case in accordance with doctrine of res judicata because, despite plaintiff's argument to the contrary, prior action involved same parties and same claims) (unpublished table decision); Wrenn v. Shalala, No. 94-5198, 1995 WL 225234, at *1 (D.C. Cir. Mar. 8, 1995) (affirming dismissal of requests that were subject of plaintiff's previous litigation, but reversing dismissal on "claims that were not and could not have been litigated in that prior action"); Hanner v. Stone, 1 F.3d 1240, 1240 (6th Cir. 1993) (holding that under doctrine of res

judicata does not bar a plaintiff from filing a lawsuit under the FOIA for records that were previously at issue in a non-FOIA case.[198] In addition, res judicata generally does not apply where there has been a change in the factual circumstances or legal principles pertinent to the lawsuit.[199]

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judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in a prior action") (unpublished table decision) (emphasis added); NTEU v. IRS, 765 F.2d 1174, 1177 (D.C. Cir. 1985) (refusing to consider successive FOIA suits for documents that were "identical except for the year involved"); Gonzalez-Lora v. DOJ, 169 F. Supp. 3d 46, 52 (D.D.C. 2016) (finding that "[p]laintiff cannot now relitigate the same cause of action or the issue of the DEA's compliance with the FOIA with respect to his 2000 FOIA request"); Pickering-George v. DEA Registration Unit, No. 09-2184, 2009 WL 4031223, at *1 (D.D.C. Nov. 19, 2009) (holding that plaintiff's claim is barred by doctrine of res judicata where court previously ruled against him for failure to exhaust administrative remedies in claim based on same facts); Kemp v. Grippen, No. 06-0076, 2007 WL 870123, at *6-8 (E.D. Wis. Mar. 20, 2007) (holding that plaintiff's FOIA and Privacy Act lawsuit was barred by res judicata because previous case involved same claims and same parties); Lane v. DOJ, No. 02-06555, 2006 WL 1455459, at *6 (E.D.N.Y. May 22, 2006) (holding that res judicata barred plaintiff's claims against FBI because claims had already been adjudicated and because plaintiff "failed to take the necessary action to contest that decision"); Tobie v. Wolf, No. 01-3899, 2002 WL 1034061, at *1 (N.D. Cal. May 8, 2002) (finding privity between "officers of the same government," and therefore dismissing suit, because plaintiff previously litigated same issues against component of agency named as co-defendant in later suit).

[198] See North v. Walsh, 881 F.2d 1088, 1093-95 (D.C. Cir. 1989) (deciding that claim for records under FOIA was not barred by prior discovery prohibition for same records in criminal case in which FOIA claim could not have been interposed); see also Lopez v. Huff, 508 F. Supp. 2d 71, 75-76 (D.D.C. 2007) (determining that res judicata does not apply where plaintiff failed to raise Privacy Act claim in previous FOIA action involving same records, because the two statutes create "distinct causes of action").

[199] See, e.g., Negley v. FBI, 169 F. App'x 591, 594 (D.C. Cir. 2006) (holding that res judicata was inapplicable because both lawsuits -- one to obtain records from Sacramento office and other to obtain records from San Francisco office -- did not involve same "nucleus of facts"; declaring further that "FOIA does not limit a party to a single request, and because the records maintained by an FBI office may change over time, a renewal of a previous request inevitably raises new factual questions"); Croskey v. U.S. Office of Special Counsel, 132 F.3d 1480, 1480 (D.C. Cir. 1997) (finding res judicata inapplicable because document was not in existence when earlier litigation was brought) (unpublished table decision); Hanner, 983 F.2d at 1066 (determining that present claim was not precluded under doctrine of res judicata when appellate court had previously adjudicated claim that was similar, but involved different issue); ACLU v. DOJ, 321 F. Supp. 2d 24, 34 (D.D.C. 2004) (finding res judicata inapplicable where changed circumstances, namely, Attorney General's decision to declassify records in question, altered legal issues surrounding plaintiff's FOIA request); Wolfe v. Froehlke, 358 F. Supp. 1318, 1319 (D.D.C. 1973) (stating that lawsuit was not barred where national security status had changed), aff'd, 510 F.2d 654 (D.C. Cir. 1974). But see Primorac v. CIA, 277 F. Supp. 2d 117, 120 (D.D.C. 2003) (dismissing case on basis of statute of limitations but notingres judicata would have otherwise barred plaintiff's claim

When parallel FOIA suits are brought by the same party for the same records, dismissal has been found appropriate by operation of the "first-filed" or "first-in time" rule.[200] This rule holds that generally "'[w]here there are two competing lawsuits, the first suit should have priority.'"[201] Although both rules advance the goals of minimizing redundant litigation and conserving judicial resources, the "first-filed" rule differs from res judicata because, in the latter, a case involving the same parties already has been decided, whereas in the former, the cases are still pending.[202]

Collateral estoppel, or "issue preclusion," which precludes a party from litigating issues that have been previously adjudicated, has also been found to foreclose further consideration of a FOIA suit.[203] For example, if an agency's search for records already

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because automatic declassification section of Executive Order 12,958 was unavailable to him in previous lawsuit for same records and fact that it was still unavailable because it was not yet effective); Bernson v. ICC, 635 F. Supp. 369, 371 (D. Mass. 1986) (refusing to accept argument that changed circumstances rendered inapplicable previous decision affirming invocation of FOIA exemption, and dismissing claim based on res judicata).

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

[201] Employers Ins. v. Fox Entm't Grp., Inc., 522 F.3d 271, 275 (2d Cir. 2008) (quoting First Nat'l Bank & Trust Co. v. Simmons, 878 F.2d 79, 79 (2d Cir. 1989)) (non-FOIA cases); see UtahAmerican Energy, Inc. v. U.S. Dep't of Labor, 685 F.3d 1118, 1123-25 (D.C. Cir. 2012) (reversing district court's decision and concluding that, pursuant to first-in time rule, district court abused its discretion where it ordered government to release records that are subject of separate FOIA litigation pending before another district court judge).

[202] See UtahAmerican Energy, Inc., 685 F.3d at 1124 (noting that "[t]he rationale for allowing the first court to proceed to its disposition" is that court "should not expend judicial resources – and potentially produce contradictory decisions – by allowing the same FOIA plaintiff multiple bites at the apple"); Employers Ins., 522 F.3d at 275 (explaining that first-filed rule "'embodies considerations of judicial administration and conservation of resources' by avoiding duplicative litigation and honoring the plaintiff's choice of forum" (quoting First Nat'l Bank, 878 F.2d at 80) (non-FOIA case)).

[203] See Martin v. DOJ, 488 F.3d 446, 454 (D.C. Cir. 2007) (defining elements of collateral estoppel: "'[1], the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case [; 2], the issue must have been actually and necessarily determined by a court of competent jurisdiction [; and 3] preclusion in the second case must not work a basic unfairness to the party bound by the first determination'" (quoting Yamaha Corp. of Am. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992))); Church of Scientology v. Dep't of the Army, 611 F.2d 738, 750-51 (9th Cir. 1980) (declaring that complete identity of plaintiff and document at issue precludes relitigation), overruled on other grounds, Animal Legal Def. Fund v. FDA, 836 F.3d 897 (9th Cir. 2016); cf. Cotton v. Heyman, 63 F.3d 1115, 1118 nn.1-2 (D.C. Cir. 1995) (holding that doctrine of direct estoppel, which precludes relitigating issue finally decided in "separate proceeding"

has been found to be adequate, a plaintiff is precluded from challenging the sufficiency of that same search in a subsequent action.[204] Similarly, FOIA plaintiffs have been precluded from challenging an agency's disclosure determinations or other matters that have already been litigated.[205] Collateral estoppel has not been applied in the FOIA context in those instances where there is not necessarily an expressed or implied legal relationship between the plaintiff in the first action and the plaintiff in the successive suit.[206] As with the doctrine of res judicata, collateral estoppel has been found to not be

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within same suit, prevented Smithsonian Institution from challenging district court determination that it is subject to FOIA in connection with appeal from award of attorney fees; however, "Smithsonian is free to relitigate the issue against another party in a separate proceeding"). But see North, 881 F.2d at 1093-95 (finding issue preclusion inapplicable when exemption issues raised in FOIA action differ from relevancy issues raised in prior action for discovery access to same records); Hall v. CIA, No. 04-00814, 2005 WL 850379, at *3 (D.D.C. Apr. 13, 2005) (holding doctrine of collateral estoppel inapplicable where plaintiff previously challenged adequacy of search and exemption's validity but in instant case, by contrast, sought immediate production of documents and reduction or waiver of fees).

[204] See, e.g., Allnutt v. DOJ, 99 F. Supp. 2d 673, 677 (D. Md. 2000) (refusing, "[i]n accord with basic res judicata principles," to reconsider adequacy of search issue that was decided by another court), aff'd per curiam sub nom. Allnut v. Handler, 8 F. App'x 225 (4th Cir. 2001).

[205] See Martin v. DOJ, 488 F.3d 446, 454-55 (D.C. Cir. 2007) (holding that plaintiff is collaterally estopped from challenging FDIC's withholding of report because issue was contested in prior case, which was decided by court of competent jurisdiction, and where plaintiff had "ample opportunity to have his challenge heard and [there were] no circumstances sufficient to exempt him from rules of preclusion"); Hall, 668 F. Supp. 2d at 179 (reiterating that, consistent with an earlier ruling in this case, collateral estoppel bars plaintiffs "from arguing that the Senate Committee's records are agency records").

[206] See Taylor v. Sturgell, 553 U.S. 880, 895-905 (2008) (disapproving theory of "virtual representation," whereby person could be bound by prior judgment if he was adequately represented by party to earlier proceeding, in favor of traditional notions of nonparty preclusion); Favish v. Off. of Indep. Counsel, 217 F.3d 1168, 1171 (9th Cir. 2000) (refusing to find that attorney who represented plaintiff in previous case was precluded from relitigating releasability of death-scene photographs of former Deputy White House Counsel, because identity of interests was viewed by second appellate court as only "an abstract interest in enforcement of FOIA") (internal quotations omitted), rev'd on other grounds sub nom. NARA v. Favish, 541 U.S. 157 (2004); Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 511 (D. Minn. 2008) (concluding that "defendants are not entitled to summary judgment based on the doctrines of res judicata or collateral estoppel" where there was "no basis for finding [current plaintiff] was acting in a representative capacity for plaintiff in the [prior] litigation"); cf. Doe v. Glickman, 256 F.3d 371, 380 (5th Cir. 2001) (permitting third-party intervention in reverse FOIA suit in order to avoid collateral estoppel effect of decision potentially adverse to third-party interests); Robertson v. DOD, 402 F. Supp. 1342, 1347 (D.D.C. 1973) (concluding that private citizen's interest in subsequent FOIA action was not

applicable to a subsequent lawsuit if there is an intervening, material change in the law or the facts.[207]

Pattern-or-Practice Claims

The Court of Appeals for the District of Columbia Circuit has held that "even though a party may have obtained relief as to a specific request under the FOIA, this will not moot a claim that an agency policy or practice will impair the party's lawful access to information in the future."[208] Courts have held that in order to demonstrate a pattern or

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protected by government in prior reverse FOIA suit over same documents, because interests were not "congruent").

[207] See, e.g., Croskey, 132 F.3d at 1480 (concluding that access to investigator's notes and impressions of witnesses adjudicated in prior proceeding was "sufficiently different" from witness statements themselves to bar application of collateral estoppel) (unpublished table decision); Minnis v. USDA, 737 F.2d 784, 786 n.1 (9th Cir. 1984) (declaring that "an intervening Supreme Court decision clarifying an issue that had been uncertain in the lower courts defeats collateral estoppel"), cert. denied, 471 U.S. 1053 (1985); McQueen v. United States, 264 F. Supp. 2d 502, 513-14 (S.D. Tex. 2003) (refusing to find that collateral estoppel prevented plaintiff from litigating "requests for information that may not be essentially identical," despite agency's argument that the contested documents were "the same kinds . . . but for different years"), aff'd, 100 F. App'x 964 (5th Cir. 2004); see also Horowitz v. Tschetter, No. 06-5020, 2007 WL 1381608, at *4-5 (N.D. Cal. May 8, 2007) (holding that a finding in FOIA action regarding the nature of certain records did not have preclusive effect on non-FOIA litigation because the cases concerned different issues of fact and law).

[208] Payne Enters., Inc. v. United States, 837 F.2d 486, 491 (D.C. Cir. 1988) ("The fact that the practice at issue is informal, rather than articulated in regulations or an official statement of policy, is irrelevant to determining whether a challenge to that policy or practice is moot."); see also Muckrock, LLC v. CIA, 300 F. Supp. 3d 108, 130-31 (D.D.C. 2018) (rejecting agency's argument that "plaintiff needs to point to a regulation that establishes the policy, or that the agency must concede the policy's existence as a threshold . . ." to bring pattern or practice claim); Brown v. U.S. Customs & Border Protection, 132 F. Supp. 3d 1170, 1172 (N.D. Cal. 2015) (finding plaintiffs do not need to "name a specific policy at the pleading stage to maintain a FOIA 'pattern or practice' claim"); Muttit v. U.S. Cent. Command, 813 F. Supp. 2d 221, 230 (D.D.C. 2011) (holding that "a formal policy or regulation is not required to sustain a claim for relief enjoining a pattern or practice of violating FOIA"); see also; cf. Scudder v. CIA, 281 F. Supp. 3d 124, 129 (D.D.C. 2017) (dismissing pattern or practice claim because plaintiffs "have not alleged any instance where the Defendant was found to have violated FOIA – or even a specific instance where the Defendant allegedly violated the FOIA – by failing to provide the requested information electronically where readily producible").

practice and adequately state a claim, the requester must allege more than one instance of unlawful behavior.[209]

While often dismissed for lack of standing or insuffiencient showing, pattern-or-practice claims have been brought for various types of alleged FOIA violations, including:

(1) unreasonable delay;[210]

(2) failing to provide an estimated date of completion;[211]

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[209] Hajro v. U.S. Citizenship & Immigration Serv., 811 F.3d 1086, 1104 (9th Cir. 2015) (remanding for determination as to whether "the agency's FOIA violation was not merely an isolated incident" and holding that plaintiff "can provide evidence that he has been subjected to a FOIA violation more than once . . . or a plaintiff can provide the court with affidavits of people similarly situated to the plaintiff who were also harmed by the pattern or practice"); People for the Ethical Treatment of Animals, Inc. v. Dep't of Agric., 285 F. Supp. 3d 307, 313 (D.D.C. 2018) (dismissing declaratory relief request because complaint "does not challenge any ongoing agency *policy* . . . it has always challenged a discrete agency *action* "); Cause of Action Inst. v. Eggleston, 244 F. Supp. 3d 63, 72 (D.D.C. 2016) ("Plaintiff cannot state a 'policy or practice' claim based on a single incident."); Muttit, 813 F. Supp. 2d at 230 (finding plaintiff stated claim against Department of State by alleging ten instances of failure to provide estimated dates of completion, but failed to state pattern and practice claim against Department of the Treasury by alleging single FOIA violation); Nkihtaqmikon v. BIA, 672 F. Supp. 2d 154, 170-71 (D. Me. 2009) (holding that "to draw general conclusions about . . . agency-wide patterns and practices from its handling of one case is a step too far"); Navigators Ins. Co. v. DOJ, 155 F. Supp. 3d 157, 168 (D. Conn. 2016) (refusing to draw general conclusions about agency-wide practices from its handling of one case).

[210] See Cmty. Ass'n for Restoration of the Env't, Inc., v. EPA, 36 F. Supp. 3d 1039, 1049-54 (E.D. Wa. 2014) (finding that "[p]laintiffs may bring a claim alleging a pattern and practice of unreasonable delay in responding to FOIA requests," but ultimately finding that single violation of a "delay of only a few days" was insufficient); Am. Ctr. for Law & Justice v. DOS, 249 F. Supp. 3d 275, 283 (D.D.C. 2017) (denying pattern or practice claim because "while tardiness would violate FOIA, it only becomes actionable when 'some policy or practice' undergirds it"); Cause of Action Inst., 244 F. Supp. 3d at 72 (noting that "delay alone, even reported delay, is not the type of illegal policy or practice that is actionable"); cf. Crt. for Study of Serv. v. HHS, 874 F.3d 287, 293 (D.C. Cir. 2017) (determining district court erred in granting injunction to prevent future delays citing parties' "agreement to a forward-looking procedure" of responding to similar future requests).

[211] See Muttit, 813 F. Supp. 2d at 230 (concluding that "based on the multiple alleged instances in which State failed to provide the plaintiff with an estimated completion date, the plaintiff has stated a viable pattern and practice claim") (claim dismissed by joint stipulation).

(3) invoking FOIA exemptions at the file level;[212]

(4) refusing to disclose documents until a suit is filed;[213]

(5) refusing to disclose documents until an administrative appeal is filed;[214]

(6) failure to promulgate a final regulation related to expedited processing;[215]

(7) denying FOIA requests for certain types of data under Exemption 3;[216]

(8) improperly denying FOIA fee waiver requests;[217]

(9) categorically refusing to recognize assignment of rights in FOIA cases;[218]

(10) requiring commitments to pay before conducting two free hours of search;[219]

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[212] See Tipograph v. DOJ, 146 F. Supp. 3d 169, 174-75 (D.D.C. 2015) (recognizing pattern-or-practice claim that defendant "maintain[s] a policy of invoking [an] exemption at the file level, rather than at the record level") (dismissed for lack of standing).

[213] See Long v. IRS, 693 F.2d 907, 910 (9th Cir. 1982) (adjudicating claim that agency had pattern of delaying release of documents until lawsuits are filed and remanding to district court to "weigh all the relevant factors and require compliance within a reasonable time").

[214] See Payne Enters., Inc., 837 F.2d at 495 (adjudicating pattern-or-practice claim that agency denied requests for "copies of bid abstracts" until appeal was filed and ultimately reversing and remanding with instructions to enter declaratory judgment for plaintiff and grant injunctive relief as appropriate).

[215] See Nat'l Whistleblower Ctr. v. HHS, 839 F. Supp. 2d 40, 42 (D.D.C. 2012) (challenging agency's failure to finalize expedited processing regulations because FOIA requires agencies to promulgate such regulations) (dismissed for lack of standing).

[216] See Newport Aeronautical Sales v. Dep't of the Air Force, 684 F.3d 160, 164 (D.C. Cir. 2012) (holding "practice of restricting disclosure of technical information that did not depict 'critical technology' did not violate FOIA").

[217] See Coleman v. DEA, 134 F. Supp. 3d 294, 306(D.D.C. 2015) (requesting injunctive relief and claiming that agency's "fee waiver denial is part of an unlawful agency pattern or practice") (dismissed for lack of standing).

[218] See Nat'l Sec. Counselors v. CIA, 960 F. Supp. 2d 101, 141 (D.D.C. 2013) (finding that because there is a possibility of assignment in limited circumstances, "a categorical policy of refusing to recognize assignments violates the FOIA").

[219] See, e.g., Nat'l Sec. Counselors v. CIA, 931 F. Supp. 2d 77, 84 (D.D.C. 2013) (alleging that agency maintained policy or practice of requiring commitment to pay applicable fees before conducting two free hours of search) (dismissed for lack of standing).

(11) refusing to provide records in electronic format;[220]

(12) invoking Exemption 3 without proper authorization.[221]

The viability of a pattern-or-practice claim as a separate cause of action under FOIA remains an unsettled issue. The Courts of Appeals for the District of Columbia[222] and the Ninth Circuit[223] have expressly recognized pattern-or-practice claims under FOIA. In addition, district courts within the First,[224] Second,[225] Seventh,[226] and Tenth Circuits,[227] have implicitly recognized the validity of pattern-or-practice claims under

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[220] See, e.g., id. (alleging "[defendant] admits that it has a blanket policy of considering every record 'not readily reproducible in electronic format'") (dismissed for lack of standing).

[221] See, e.g., id. (alleging policy or practice of invoking National Security Act, without proper authorization from Director of Central Intelligence) (dismissed for lack of standing).

[222] See, e.g., Payne Enters., Inc., 837 F.2d at 486 (allowing plaintiff to bring pattern-or-practice claim even after agency response).

[223] See, e.g., Hajro, 811 F.3d at 1086 (recognizing pattern-or-practice claim brought under the FOIA and outlining factors for lower court to consider on remand); Long, 693 F.2d at 907 (same).

[224] See, e.g., Nkihtaqmikon, 672 F. Supp. 2d at 170-71 (acknowledging that recognition of FOIA pattern-or-practice claims is unsettled but even "[a]ssuming the Court is authorized to issue a declaratory judgment condemning the BIA's pattern or practice of FOIA non-compliance, the evidence here does not warrant such a conclusion").

[225] See, e.g., Navigators Ins. Co., 155 F. Supp. 3d at 169 (finding that declaratory judgment was not warranted because "[p]laintiffs have not alleged a pattern or practice of delay . . . nor have Plaintiffs claimed they are likely to file another request for documents in the near future"); Pietrangelo v. U.S. Dep't of the Army, 06-170, 2007 WL 1874190, at *11 (D. Vt. June 27, 2007) (finding that there was no pattern or practice because "[defendant's] delays did not evidence bad faith or prolonged delay"), aff'd, 334 F. App'x 358, 360 (2d Cir. 2009) (affirming district courts grant of summary judgment but acknowledging that the Second Circuit "has not yet recognized or articulated the inquiry relevant to a pattern or practice claim in the FOIA context").

[226] See, e.g., LAF v. VA, No. 17-5035, 2018 WL 3148109, at *5 (N.D. Ill. June 27, 2018) (finding case was not moot and plaintiff had standing to bring pattern and practice claim).

[227] See, e.g., Liverman v. Office of Inspector Gen., 139 F. App'x 942, 944 (10th Cir. 2005) (finding that defendant agency did not engage in pattern of unreasonable delay); Smith v. ICE, 249 F. Supp. 3d 1203, 1210 (D. Colo. 2017) (finding plaintiff had standing to bring pattern or practice claim); Rocky Mountain Wild, Inc. v. U.S. Forest Serv., No. 15-0127,

FOIA by hearing and adjudicating such claims. A unique feature of pattern-or-practice claims is that they are not necessarily mooted by an agency's production of documents.[228] (For a further discussion see Litigation Considerations, Mootness and Other Grounds for Dismissal, above.)

As discussed above, in order to have standing to bring a cause of action under FOIA, a plaintiff must show that an agency has (1) "improperly," (2) "withheld," (3) "agency records" from them.[229] However, when a plaintiff seeks prospective declaratory or injunctive relief, courts have held that "allegations of past harms are insufficient."[230] Rather, in such cases a plaintiff "must show he is suffering an ongoing injury or faces an immediate threat of [future] injury."[231] In order to adequately plead a "threat of repetition," a plaintiff must make "more than a nebulous assertion of the existence of a 'policy,'" that violates the FOIA and that plaintiff is "likely to be subjected to the policy again."[232]

Generally, a plaintiff must have another FOIA request pending before the agency in order to satisfy the future threat of harm element.[233] District courts within the District

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2016 WL 362459, at *10-11 (D. Colo. Jan. 29, 2016) (applying law of Courts of Appeals in District of Columbia and Ninth Circuits).

[228] See Payne Enters., Inc., 837 F.2d at 491 (holding "even though a party may have obtained relief as to a specific request under the FOIA, this will not moot a claim that an agency policy or practice will impair the party's lawful access to information in the future").

[229] Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980).

[230] Nat'l Sec. Counselors, 931 F. Supp. 2d at 91 (citing Dearth v. Holder, 641 F.3d 499, 501 (D.C. Cir. 2011) (non-FOIA case)); see also Nat'l Whistleblower Ctr., 839 F. Supp. 2d at 45-46 (holding plaintiffs lacked standing to bring pattern-or-practice claim because plaintiffs "have identified no real support for their allegation that they have suffered and will likely in the future suffer a cognizable injury").

[231] Nat'l Sec. Counselors, 931 F. Supp. 2d at 91 (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (non-FOIA case)). But see Brown, 132 F. Supp. 3d at 1174 (finding that defendant's contention "that a pattern and practice claim requires specific allegations of future harm . . . is bereft of support").

[232] Hajro, 811 F.3d at 1103 (holding that plaintiffs must show that "the plaintiff himself has a sufficient likelihood of future harm by the policy or practice"); see also Gatore v. DHS, 327 F. Supp. 3d 76, 93-94 (D.D.C. 2018) (finding that plaintiff has standing as plaintiff has several pending requests and will continue to make future requests likely to be impacted by alleged policy or practice); Nat'l Whistleblower Ctr., 839 F. Supp. at 45-46 (finding plaintiff's allegation that agency's final rule "might . . . identify additional circumstances in which it would grant requests for expedition . . . speculative at best").

[233] See Nat'l Sec. Counselors, 931 F. Supp. 2d at 93 (holding that "where FOIA requesters challenge an alleged ongoing policy or practice and can demonstrate that they have pending

of Columbia have generally held that the requirement to demonstrate a future threat of harm cannot be supported by a requester's mere intention to file FOIA requests in the future.[234] However, when a plaintiff's entire business depends upon the filing FOIA requests, the D.C. Circuit has found that there is sufficient likelihood of future injury to confer standing.[235]

FOIA requests that are likely to implicate that policy or practice, future injury is satisfied"); see also Citizens for Responsibility & Ethics in Wash. v. SEC, 858 F. Supp. 2d 51, 60 (D.D.C. 2012) (noting that "outstanding FOIA requests that involve documents that likely will be unavailable due to the challenged policy" are sufficient to allege future injury); Citizens for Responsibility & Ethics in Wash. v. Executive Office of the President, 587 F. Supp. 2d 48, 60-61 (D.D.C. 2008) (holding that, because plaintiffs "each allege that they have FOIA requests for e-mails currently pending with the [defendant agencies]," their allegations of future injury were "real and immediate"); Nat'l Sec. Counselors v. CIA, 898 F. Supp. 2d 233, 260-63 (D.D.C. 2012) (holding that plaintiff had standing to pursue policy-or-practice claims when "it had already submitted fifteen FOIA requests to the CIA since filing the Complaints" which were "likely to implicate the claimed policies and practices at issue because the pending and future requests appear to be of the same character as the specific requests that form the basis of the plaintiff's current claims"); Coleman, 134 F. Supp. 3d at 306 (finding plaintiff lacked standing because he "has not averred that he has a pending FOIA request"); Gilmore v. DOE, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998) (holding plaintiff did have standing where he "attested that he has filed another FOIA request with [defendant]").

[234] See, e.g., Quick v. U.S. Dep't of Commerce, 775 F. Supp. 2d 174, 187 (D.D.C 2001) (finding plaintiff lacked standing where plaintiff "plan[ned] to file additional FOIA requests to the [defendant] in the future"); American Historical Ass'n v. NARA, 310 F. Supp. 2d 216, 228 (D.D.C. 2004) (finding no standing where "[p]laintiffs have no outstanding requests for presidential records"); Citizens for Responsibility & Ethics in Wash. v. DHS, 527 F. Supp. 2d 101, 106 (D.D.C. 2007) (finding plaintiff lacked standing because it failed to allege pending FOIA request and plaintiff's allegation that "it will continue to use the FOIA" too speculative and remote). But see Tipograph, 146 F. Supp. 3d 177 ("If a plaintiff does not have a separate FOIA request pending before the agency that would be subjected to the challenged policy or practice, then the specificity with which the plaintiff indicates its intent to file future FOIA requests is crucial.").

[235] Newport Aeronautical Sales, 684 F.3d at 164 (finding that plaintiff had standing where it showed that "its business depends on continually requesting and receiving documents that the policy permits [defendant] to withhold"); accord Smith, 249 F. Supp. 3d at 1210 (finding standing where filing FOIA requests for immigration records was "an integral part" of plaintiff's practice). But see Tipograph, 146 F. Supp. 3d 175 (finding that while plaintiff could plausibly file requests in the future that could implicate the alleged policy "due to the nature of [her] work—representing criminal defendants and activists" she had failed to "establish likely future injury that is both concrete and imminent"); Nat'l Sec. Counselors, 931 F. Supp. 2d at 93-94 (finding insufficient organization's allegation that it "stands to continue to be harmed . . . as it regularly files FOIA requests with [defendant] and will continue to do so in the future").

Vaughn Index/Declaration

A distinguishing feature of FOIA litigation is that the defendant agency bears the burden of sustaining its action of withholding records.[236] The most commonly used device for meeting this burden of proof is the Vaughn Index, fashioned by the Court of Appeals for the District of Columbia Circuit in a case entitled Vaughn v. Rosen.[237]

The Vaughn decision requires agencies to prepare an itemized index, correlating each withheld document (or portion thereof) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification.[238] Such an index allows the trial court "to make a rational decision [about] whether the withheld material must be produced without actually viewing the documents themselves . . . [and] to produce a

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[236] See 5 U.S.C. § 552(a)(4)(B) (2012 & Supp. V 2017); see also Natural Res. Def. Council v. NRC, 216 F.3d 1180, 1190 (D.C. Cir. 2000) (explaining that "FOIA itself places the burden on the agency to sustain the lawfulness of specific withholdings in litigation").

[237] 484 F.2d 820 (D.C. Cir. 1973); see, e.g., Canning v. DOJ, 848 F. Supp. 1037, 1042 (D.D.C. 1994) ("Agencies are typically permitted to meet [their] heavy burden by 'filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed.'" (quoting King v. DOJ, 830 F.2d 210, 217 (D.C. Cir. 1987))).

[238] See Vaughn, 484 F.2d at 827 (determining that agency's burden to demonstrate legality of withholdings with adequate specificity "could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the [agency's] refusal justification with the actual portions of the document"); accord King, 830 F.2d at 217.

record that will render [its] decision capable of meaningful review on appeal."[239] It also helps to "create balance between the parties."[240]

If a court finds that an index is not sufficiently detailed, it will often require one that is more detailed.[241] Alternatively, if a Vaughn Index is inadequate to support

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[239] King, 830 F.2d at 219; see, e.g., Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 65 (1st Cir. 2002) (noting that Vaughn Index allows court to determine if use of exemptions are "justified"); Rugiero v. DOJ, 257 F.3d 534, 544 (6th Cir. 2001) (explaining that Vaughn Index enables court to make "independent assessment" of agency's exemption claims),; Queen v. Gonzales, No. 96-1387, 2005 WL 3204160, at *2 (D.D.C. Nov. 15, 2005) (explaining that "[a]gency affidavits can satisfy Vaughn's requirements" if they are detailed sufficiently to permit de novo review); Campaign for Responsible Transplantation v. FDA, 219 F. Supp. 2d 106, 116 (D.D.C. 2002) ("Without a proper Vaughn index, a requester cannot argue effectively for disclosure and this court cannot rule effectively."); Cucci v. DEA, 871 F. Supp. 508, 514 (D.D.C. 1994) ("An adequate Vaughn index facilitates the trial court's duty of ruling on the applicability of certain invoked FOIA exemptions, gives the requester as much information as possible that he may use to present his case to the trial court and thus enables the adversary system to operate."); cf. Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., No. 02-126, 2003 WL 21146674, at *6 (M.D. Fla. May 13, 2003) ("'Vaughn indexes are most useful in cases involving thousands of pages of documents.'" (quoting Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993))), rev'd & remanded on other grounds, 116 F. App'x 251 (11th Cir. 2004) (unpublished table decision).

[240] Long v. DOJ, 10 F. Supp. 2d 205, 209 (N.D.N.Y. 1998); see, e.g., Judicial Watch, Inc. v. FDA, 449 F.3d 141, 146 (D.C. Cir. 2006) (noting that agency would have "a nearly impregnable defensive position" but for its burden to justify nondisclosure); Kozacky & Weitzel, P.C. v. United States, No. 07-2246, 2008 WL 2188457, at *6 (N.D. Ill. Apr. 10, 2008) ("[D]ue to the inadequacy of the affidavits submitted by the IRS, a Vaughn Index is required to enable [plaintiff] to argue the case adequately and to permit the Court to determine . . . whether the documents are appropriately withheld under the claimed exemptions."); Odle v. DOJ, No. 05-2711, 2006 WL 1344813, at *5 (N.D. Cal. May 17, 2006) (observing that Vaughn Index "afford[s] the person making a FOIA request a meaningful opportunity to contest the soundness of withholding"); Edmonds v. FBI, 272 F. Supp. 2d 35, 44 (D.D.C. 2003) (explaining that affidavits must "'strive to correct the asymmetrical distribution of knowledge that characterizes FOIA litigation'" (quoting King, 830 F.2d at 218)); cf. Fiduccia v. DOJ, 185 F.3d 1035, 1042 (9th Cir. 1999) (pointing out that Vaughn Index is not required where it is unnecessary to be particularly concerned about adversarial balance). But see Solers, Inc. v. IRS, 827 F.3d 323, 328 (4th Cir. 2016) ("A Vaughn index is 'designed to enable the district court to rule on a privilege without having to review the document itself' and thus functions as a 'surrogate for the production of documents for in camera review.'" (quoting Ethy; Corp. v. EPA, 25 F.3d 1241, 1249 (4th Cir. 1994))).

[241] See Davin v. DOJ, 60 F.3d 1043, 1065 (3d Cir. 1995) (remanding case for further proceedings and suggesting that another, more detailed Vaughn Index be required); Church of Scientology Int'l v. DOJ, 30 F.3d 224, 230-40 (1st Cir. 1994) (same); Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991) (same), cert. denied, 505 U.S. 1212 (1992); Isiwele v. HHS, 85 F. Supp. 3d 337, 356 (D.D.C. 2015) (noting that when "the record includes deficient declarations, 'the courts generally will request that the agency supplement its supporting

withholding, courts have sometimes utilized in camera review of the withheld material.[242] In a broad range of contexts, most courts have refused to require agencies to file public

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declarations'" (quoting Judicial Watch v. DOJ, 185 F. Supp. 2d 54, 65 (D.D.C. 2002))); Comptel v. FCC, 910 F. Supp. 2d 100, 127 (D.D.C. 2012) (determining Vaughn Index inadequate and stating that agency "cannot rely on bare and conclusory assertions to demonstrate" that information was properly redacted and ordering FCC to submit revised Vaughn); McGehee v. DOJ, 800 F. Supp. 2d 220, 238 (D.D.C. 2011) (finding Vaughn insufficiently detailed because it failed to provide information on missing pages and numerous redactions and requiring agency to provide updated Vaughn); Citizens for Responsibility & Ethics in Wash. v. DHS, 648 F. Supp. 2d 152, 157-58 (D.D.C. 2009) (declaring agency's Vaughn submission deficient because it was "vague, conclusory and inadequate" because there was "a dearth of 'reasonably specific detail'" and suggesting that agency supplement Vaughn); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 771 (E.D. Pa. Aug. 7, 2008) (holding that agency must amend Vaughn Index because "descriptions are too broad, and the reasons for withholding merely recite statutory language"); Hiken v. DOD, 521 F. Supp. 2d 1047, 1055 (N.D. Cal. 2007) (ordering agency to revise Vaughn Index in order to tie disclosure of information to specific harms); Keeper of the Mountains Found. v. DOJ, 514 F. Supp. 2d 837, 848 (S.D. W. Va. 2007) (directing parties to confer as to exclusion of certain documents from Vaughn Index and, to extent that disagreement remains, ordering agency to file supplemental Vaughn Index explaining exclusion of responsive records); Coleman v. FBI, 972 F. Supp. 5, 9 (D.D.C. 1997) (rejecting narratives on "deleted page sheets" that apply to multiple documents and requiring agency to redo index to "inform the court as to the contents of individual documents and the applicability of the various Exemptions").

[242] See, e.g., Solers, Inc., 827 F.3d at 328 (agreeing with district court that in camera review of records mooted any potential inadequacies of Vaughn Index); Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1082 (9th Cir. 2004) (acknowledging that "[u]nder certain limited circumstances, we have endorsed the use of in camera review of government affidavits as the basis for FOIA decisions"); Maynard v. CIA, 986 F.2d 547, 557 (1st Cir. 1993) ("Where, as here, the agency, for good reason, does not furnish publicly the kind of detail required for a satisfactory Vaughn index, a district court may review the documents in camera."); Simon v. DOJ, 980 F.2d 782, 784 (D.C. Cir. 1992) (holding that despite inadequacy of Vaughn Index, in camera review, "although admittedly imperfect . . . is the best way to [en]sure both that the agency is entitled to the exemption it claims and that the confidential source is protected"); see also Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988) ("[W]here a trial court properly reviewed contested documents in camera, an adequate factual basis for the decision exists."); High Country Citizens Alliance v. Clarke, No. 04-CV-00749, 2005 WL 2453955, at *8 (D. Colo. Sept. 29, 2005) (finding in camera review necessary due to insufficient descriptions of withheld documents in Vaughn Index); Twist v. Ashcroft, 329 F. Supp. 2d 50, 54 (D.D.C. 2004) ("[I]n camera review of the withheld documents (or of the portions withheld) is proper if the agency affidavits are insufficiently detailed to permit review of exemption claims[.]"), aff'd per curiam on other grounds, 171 F. App'x 855 (D.C. Cir. 2004); Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 30 (D.D.C. 2003) (commenting that while Vaughn Index description of documents was "slightly ambiguous," correctness of exemption claims was demonstrated through in camera examination), aff'd, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); cf. Judicial Watch, Inc. v. Dep't of the Army, 402 F. Supp. 2d 241, 249 & n.6 (D.D.C. 2005) (ordering in

Vaughn Indices that are so detailed as to reveal sensitive information the withholding of which is the very issue in the litigation.[243] Therefore, in camera affidavits are frequently

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camera inspection to review accuracy of agency's descriptions of withheld information after inadvertent disclosure revealed existence of discrepancies and inaccuracies in Vaughn Index), summary judgment granted in part, 435 F. Supp. 2d 81 (D.D.C. 2006); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1338 (S.D. Fla. 2005) (conducting in camera inspection "to satisfy an 'uneasiness' or 'doubt' that the exemption claim may be overbroad given the nature of the Plaintiff's arguments"); Hall & Assocs. v. EPA, 846 F. Supp. 2d 231, 246 (D.D.C. 2012) (denying plaintiff's request for in camera review where "Vaughn index and accompanying declaration are sufficiently detailed to permit a meaningful review of the Agency's exemption claims");. But see Wiener, 943 F.2d at 979 (suggesting that "[i]n camera review of the withheld documents by the [district] court is not an acceptable substitute for an adequate Vaughn index").

[243] See, e.g., Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004) ("The risk to intelligence sources and methods comes from the details that would appear in a Vaughn index"); Lion Raisins, 354 F.3d at 1084 (vouching that agency need not "disclose facts that would undermine the very purpose of its withholding"); Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1093 (9th Cir. 1997) ("Indeed we doubt that the agency could have introduced further proof without revealing the actual contents of the withheld materials."); Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996) ("The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document without actually disclosing information that deserves protection."); Maynard, 986 F.2d at 557 (emphasizing that although public declaration "lacked specifics, a more detailed affidavit could have revealed the very intelligence sources or methods that the CIA wished to keep secret"); Lewis v. IRS, 823 F.2d 375, 380 (9th Cir. 1987) ("[A] Vaughn index of the documents here would defeat the purpose of Exemption 7(A). It would aid [the requester] in discovering the exact nature of the documents supporting the government's case against him earlier than he otherwise would or should."); Curran v. DOJ, 813 F.2d 473, 476 (1st Cir. 1987) (agency should not be forced "to resort to just the sort of precise description which would itself compromise the exemption"); Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 742 (9th Cir. 1980) (recognizing that "the government need not specify its objections in such detail as to compromise the secrecy of the information"), overruled on other grounds, 836 F.3d 897 (9th Cir. 2016); Am. Mgmt. Servs., LLC v. Dept. of Army, 842 F. Supp. 2d 859, 874 (E.D. Va. 2012) (finding that "descriptive information need not be 'so detailed that it would serve to undermine the important deliberative processes protected by Exemption 5'" (quoting Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, at 368-69 (4th Cir. 2009))), aff'd, 703 F.3 724 (4th Cir. 2013); Baez v. FBI, 443 F. Supp. 2d 717, 723 (E.D. Pa 2006) ("[I]t is hard to see how the government could have provided . . . more information about the redactions without disclosing the redacted information itself."); Odle, 2006 WL 1344813, at *9 (explaining that Vaughn Index must "disclose 'as much as possible without thwarting the claimed exemption's purposes'" (quoting Wiener, 943 F.2d at 977)); Herrick's Newsletter v. USPB, No. 04-00377, 2005 WL 3274073, at *4 (D.D.C. Sept. 22, 2005) ("The Court will not require an agency to describe the withheld material with such specificity as to result in the constructive equivalent of actual disclosure."); Berman v. CIA, 378 F. Supp. 2d 1209, 1215-16 (E.D. Cal. 2005) (recognizing that because CIA's declaration "is part of the public record," it must of

utilized in Exemption 1 cases when public descriptions of responsive documents would compromise national security.[244] (For a further discussion of this point, see Litigation Considerations, In Camera Inspection, below.) This important principle also has been applied to other FOIA exemptions, for example in Exemption 5 cases,[245] in Exemption

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necessity support the withholding of intelligence sources and methods through the use of "terms that are general"), aff'd on other grounds, 501 F.3d 1136 (9th Cir. 2007).

[244] See, e.g., New York Times Co. v. DOJ, 756 F.3d 100, 122 (2d Cir. 2014) (ordering agency to submit classified Vaughn indices to lower court, for in camera review, on remand); Doyle v. FBI, 722 F.2d 554, 556 (9th Cir. 1983) (approving use of in camera affidavits in certain cases involving national security exemption); Mobley v. DOJ, 870 F. Supp. 2d 61, 69 (D.D.C. 2012) (holding that after in camera review, agency's (b)(1) withholdings were proper and "considerations of national security appropriately preclude the [agency] from publicly releasing additional information regarding the documents"); Peltier v. FBI, No. 03-905, 2006 WL 462096, at *1 (W.D.N.Y Feb. 24, 2006) (allowing submission of in camera Vaughn Index to justify withholding pursuant to Exemption 1), aff'd, 218 F. App'x 30 (2d Cir. 2007); Edmonds, 272 F. Supp. 2d at 46 (approving use of in camera affidavit because "extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed"). But cf. Peltier v. FBI, No. 03- 905, 2005 WL 735964, at *11 (W.D.N.Y. Mar. 31, 2005) (acknowledging that "in camera review is particularly frowned upon in the context of Exemption 1 withholdings . . . [h]owever, Defendant's insufficient Vaughn index leaves this Court with no choice but to conduct further review"), renewed mot. for summary judgment granted, 2006 WL 462096, at *2 (W.D.N.Y. Feb. 24, 2006), aff'd, 218 F. App'x 30 (2d Cir. 2007).

[245] See, e.g., Ethyl Corp. v. EPA, 25 F.3d 1241, 1250 (4th Cir. 1994) ("If the district court is satisfied that the EPA cannot describe documents in more detail without breaching a properly asserted confidentiality, then the court is still left with the mechanism provided by the statute -- to conduct an in camera review of the documents."); Wolfe v. HHS, 839 F.2d 768, 771 n.3 (D.C. Cir. 1988) (en banc) ("Where the index itself would reveal significant aspects of the deliberative process, this court has not hesitated to limit consideration of the Vaughn index to in camera inspection."); Am. Mgmt. Servs., LLC, 842 F. Supp. 2d at 874 (finding in camera inspection appropriate for records withheld under deliberative process privilege because any additional detail in publicly filed Vaughn Index could undermine deliberative processes protected by Exemption 5).

7(A) cases,[246] in Exemption 7(C) cases,[247] and in Exemption 7(D) cases.[248] However, in cases in which explanations for withholding are presented in camera, courts have found that the agency is obliged to ensure that it first has set forth on the public record an explanation that is as complete as possible without compromising the sensitive information.[249] (See the further discussion of this point under Litigation Considerations, In Camera Inspection, below.)

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[246] See, e.g., Int'l Union of Elevator Constructors Local 2 v. DOL, 747 F. Supp. 2d 976, 982 (N.D. Ill 2010) (denying motion for production of Vaughn Index because it would "compromise the [agency's] pending investigation"); Dickerson v. DOJ, No. 90-60045, 1991 WL 337422, at *3 (E.D. Mich. July 31, 1991) (same), aff'd, 992 F.2d 1426 (6th Cir. 1993); Alyeska Pipeline Serv. v. EPA, No. 86-2176, 1987 WL 17071, at *3 (D.D.C. Sept. 9, 1987) ("[R]equiring a Vaughn index in this matter will result in exactly the kind of harm to defendant's law enforcement proceedings which it is trying to avoid under exemption 7(A)."), aff'd on other grounds, 856 F.2d 309 (D.C. Cir. 1988).

[247] See Carpenter v. DOJ, 470 F.3d 434, 442 (1st Cir. 2006) (explaining that, in instant Exemption 7(C) case, "[e]ven if [plaintiff] had asserted a valid public interest, the appropriate method for a detailed evaluation of the competing interests would have been through an in camera review because a standard Vaughn index might result in disclosure of the very information that the government attempted to protect"); Canning v. DOJ, No. 01-2215, slip op. at 6 (D.D.C. May 27, 2005) (permitting agency to file portion of declaration in camera in order to avoid compromising Exemption 7(C) position).

[248] See, e.g., DOJ v. Landano, 508 U.S. 165, 180 (1993) (ruling that government can meet its burden with in camera affidavits in order to avoid identification of sources in Exemption 7(D) withholdings); Church of Scientology, 30 F.3d at 239 n.23 (same); Keys v. DOJ, 830 F.2d 337, 349 (D.C. Cir. 1987) (announcing that there is no requirement to produce Vaughn Index in "degree of detail that would reveal precisely the information that the agency claims it is entitled to withhold"); Doe v. DOJ, 790 F. Supp. 17, 21 (D.D.C. 1992) ("[A] meaningful description beyond that provided by the Vaughn code utilized in this case would probably lead to disclosure of the identity of sources.").

[249] See Lion Raisins, 354 F.3d at 1084 (overturning district court decision that relied on in camera review of sealed declaration, and remanding for creation of Vaughn Index); Armstrong v. Executive Office of the President, 97 F.3d 575, 580-81 (D.C. Cir. 1996) ("Case law in this Circuit is clear that when a district court uses an in camera affidavit, it must both make its reasons for doing so clear and make as much as possible of the in camera submission available to the opposing party." (citing Lykins v. DOJ, 725 F.2d 1455, 1465 (D.C. Cir. 1984))); Philippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976); cf. Al Najjar v. Ashcroft, No. 00-1472, slip op. at 7 (D.D.C. July 22, 2003) (rejecting agencies' overly broad in camera submissions, and requiring agencies to augment public record before any ruling is made on dispositive motions).

There is no set formula for a Vaughn Index; instead, courts have held that it is the function, not the form that is important.[250] Indeed, the D.C. Circuit has observed that "a Vaughn index is not a work of literature; agencies are not graded on the richness or evocativeness of their vocabularies."[251] Likewise, the sufficiency of a Vaughn Index is not determined by reference to the length of its document descriptions.[252] What "'is required is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure.'"[253] As the D.C. Circuit has explained:

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[250] See Jones v. FBI, 41 F.3d 238, 242 (6th Cir. 1994) (indicating that there is no "precise form . . . dictated for these affidavits"); Fiduccia, 185 F.3d at 1044 ("Any form . . . may be adequate or inadequate, depending on the circumstances."); Church of Scientology, 30 F.3d at 231 (agreeing that there is no set formula for Vaughn Index); Gallant v. NLRB, 26 F.3d 168, 172-73 (D.C. Cir. 1994) (holding that justification for withholding provided by agency may take any form as long as agency offers "reasonable basis to evaluate [it]s claim of privilege"); Vaughn v. United States, 936 F.2d 862, 867 (6th Cir. 1991) ("A court's primary focus must be on the substance, rather than the form, of the information supplied by the government to justify withholding requested information."); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 294 (D.D.C. 2007) ("The adequacy of a Vaughn Index is not defined by its form, but rather its substance."); Hornbeck v. U.S. Coast Guard, No. 04-1724, 2006 WL 696053, at *6 (D.D.C. Mar. 20, 2006) ("[T]he precise form of the agency's submission -- whether it be an index, a detailed declaration, or a narrative -- is immaterial."); Voinche v. FBI, 412 F. Supp. 2d 60, 65 (D.D.C. 2006) ("[I]t is the function of a Vaughn index rather than its form that is important, and a Vaughn index is satisfactory as long as it allows a court to conduct a meaningful de novo review of the agency's claim of exemption."), summary judgment granted, 425 F. Supp. 2d 134 (D.D.C. 2006), aff'd per curiam, No. 06-5130, 2007 WL 1234984 (D.C. Cir. Feb. 27, 2007); cf. People for the Ethical Treatment of Animals v. USDA, No. 03-195, 2005 WL 1241141, at *4 (D.D.C. May 24, 2005) (stating that the agency "may submit other materials to supplement its Vaughn index, such as affidavits, that give the court enough information to determine whether the claimed exemptions are properly applied" (citing Judicial Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 257 (D.D.C. 2004))).

[251] Landmark Legal Found. v. IRS, 267 F.3d 1132, 1138 (D.C. Cir. 2001); see Coldiron v. DOJ, 310 F. Supp. 2d 44, 52 (D.D.C. 2004) ("Rarely does the court expect to find in briefs, much less Vaughn indices, anything resembling poetry.").

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

[253] Manna v. DOJ, 832 F. Supp. 866, 873 (D.N.J. 1993) (quoting Hinton v. DOJ, 844 F.2d 126, 129 (3d Cir. 1988)), aff'd, 51 F.3d 1158 (3d Cir. 1995); see Jones, 41 F.3d at 242 (holding agency's Vaughn Index adequate when it "'enables the court to make a reasoned independent assessment of the claim[s] of exemption'" (quoting Vaughn, 936 F.2d at 866-67)); Pinson v. DOJ, 61 F. Supp. 3d 164, 185 (D.D.C. 2015) (finding agency's Vaughn Index adequate when it "notes the number of pages in the document and the FOIA request to which it applies, identifies the exemptions asserted and provides a 'description of the withheld information'"); Pub. Emps. for Envtl. Responsibility v. Office of Sci. and Tech., 881

> [The Vaughn Index's purpose is] 'to permit adequate adversary testing of the agency's claimed right to an exemption' and enable 'the District Court to make a rational decision whether the withheld material must be produced without actually viewing the document themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal.' Thus, when an agency seeks to withhold information, it must provide 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.' Specificity is the defining requirement of the Vaughn Index and affidavit. . .[254]

When a Vaughn Index meets these criteria, it is "'accorded a presumption of good faith.'"[255] It has been held that a Vaughn Index must provide "'a relatively detailed

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F. Supp. 2d 8, 13 (D.D.C. 2012) (finding Vaughn Index adequate when for each document agency provided "details about each document's sender, recipients, date and time, and subject" and "described the redacted portions of the documents, explained how that information is exempted from FOIA, and provided the relevant FOIA exemption for each piece of withheld information"); Smith v. Dep't of Labor, 789 F. Supp. 2d 274, 281 (D.D.C. 2011) (finding agency's Vaughn index adequate when it "describes the rationale of the exemptions invoked and provides the locations in the disclosed documents where redactions are made under those exemptions").

[254] King v. DOJ, 830 F.2d 210, 219 (D.C. Cir. 1987) (quoting Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973)); see also Skull Valley Band of Goshute Indians v. Kempthorne, No. 04-339, 2007 WL 915211, at *11 (D.D.C. Mar. 26, 2007) (finding Vaughn Index sufficiently detailed as it identifies "documents withheld in whole or in part by providing information about the date, author, recipient, and subject of each document" and it "indicates the specific portion withheld from each document, the FOIA exemption on which Defendants rely for each withholding, and the reasons justifying the withholding on the basis of the exemption invoked"); Cole v. DOJ, No. 05-674, 2006 WL 2792681, at *5 (D.D.C. Sept. 27, 2006) (noting that index specified: "(1) the type of document, (2) the exact location of the withheld information in the document, (3) the applicable FOIA exemptions for all withheld information, and (4) a brief description of the withheld information"); Edmonds Inst. v. U.S. Dep't of the Interior, 383 F. Supp. 2d 105, 109 (D.D.C. 2005) (explaining that Vaughn Index "should contain a short description of the content of each individual document sufficient to allow" its exemption use to be tested); Dorsett v. U.S. Dep't of the Treasury, 307 F. Supp. 2d 28, 34 (D.D.C. 2004) (describing adequate Vaughn Index); St. Andrews Park, Inc. v. U.S. Dep't of Army Corps of Eng'rs, 299 F. Supp. 2d 1264, 1271 (S.D. Fla. 2003) (same).

[255] Carney v. DOJ, 19 F.3d 807, 812 (2d Cir. 1994) (quoting SafeCard Servs. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991)); see, e.g., Jones, 41 F.3d at 242 (reiterating that agency affidavits are entitled to presumption of good faith); Am. Mgmt. Servs., LLC , 842 F. Supp. 2d at 870 (finding that initial errors, which were corrected by agency, were insufficient grounds for striking entire index or questioning good faith); Butler v. DEA, No. 05-1798,

justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'"[256]

A document specifically entitled "Vaughn Index" is not even essential, so long as the nature of the withheld information is adequately attested to by the agency in a declaration, or an index and declaration combined, or by in camera review.[257]

2006 WL 398653, at *2 (D.D.C. Feb. 16, 2006) (noting presumption of good faith is accorded to agency affidavits); Caton v. Norton, No. 04-CV-439, 2005 WL 3116613, at *11 (D.N.H. Nov. 21, 2005) (concluding that mistakes in processing FOIA request, which agency "convincingly explained," were not sufficient to overcome "presumption of good faith" given to its declaration); Dean v. FDIC, 389 F. Supp. 2d 780, 791 (D. Ky. 2005) (concluding that agency's Vaughn Index was entitled to presumption of good faith because it contained sufficient detail "to permit the court to make a fully informed decision" about propriety of the agency's nondisclosure); see also Church of Scientology, 30 F.3d at 233 (explaining that good-faith presumption is applicable only "when the agency has provided a reasonably detailed explanation for its withholdings . . . court may not without good reason second-guess an agency's explanation, but it also cannot discharge its de novo review obligation unless that explanation is sufficiently specific"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 962 (C.D. Cal. 2003) (explaining that plaintiff's disagreement with conclusions reached in Vaughn Index is not sufficient basis for challenging it, and observing that "such a challenge is . . . appropriate [only] when the defendant does not provide sufficient explanation of its position to allow for disagreement"), appeal dismissed voluntarily, No. 03-55833 (9th Cir. 2003).

[256] Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1258 (11th Cir. 2008) (quoting Mead Data Central, Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977)); see, e.g., Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 370 (4th Cir. 2009) (concluding that district court erred in finding Vaughn Index sufficiently detailed because lack of factual information, such as author and recipient of documents, made it impossible to determine whether documents fell under deliberative process privilege of Exemption 5); People for the Am. Way Found., 503 F. Supp. 2d at 295 (finding agency's Vaughn Index sufficiently detailed and explaining that need for detail "'is of particular importance . . . where the agency is claiming that the documents are protected by the deliberative process privilege under Exemption 5'" (quoting Edmonds Inst., 383 F. Supp. 2d at 108 n.1)); Odle, 2006 WL 1344813, at *9 (recognizing that "the detail required in a Vaughn index depends on the specific exemption claimed"); Coldiron, 310 F. Supp. 2d at 52 (explaining that repetition in Vaughn Index is to be expected, especially when "each redacted passage concerns the same, classified subject"); cf. Lardner v. DOJ, No. 03-0180, 2005 WL 758267, at *20 (D.D.C. Mar. 31, 2005) (finding that agency need not amend Vaughn Index to include names of clemency applicants who were subjects of withheld advisory letters, because that would shed no light on whether categorical withholding under Exemption 5 was proper).

[257] See, e.g., Missouri Coal. For the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1210 (8th Cir. 2008) (concluding that agency's Vaughn Index was adequate when combined with additional information provided in affidavits); Judicial Watch, Inc., 449 F.3d at 146 (stating that agency may "submit other measures in combination with or in lieu of the index itself," such as supporting affidavits, or seek in camera review of the

When voluminous records are at issue, courts have approved the use of Vaughn Indices based upon representative samplings of the withheld documents.[258] This special

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documents); Wishart v. Comm'r, 199 F.3d 1334, 1334 (9th Cir. 1999) (suggesting that Vaughn Index is unnecessary if declarations are detailed enough) (unpublished table decision); Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993) (deciding that separate document expressly designated as "Vaughn Index" is unnecessary when agency "declarations are highly detailed, focus on the individual documents, and provide a factual base for withholding each document at issue"); Argus Leader Media v. U.S. Dep't of Agric., 900 F. Supp. 2d 997, 1003 (D.S.D. 2012) (holding that Vaughn Index is not mandatory, but court may order agency to provide one if adequacy of exemptions cannot be determined without it), rev'd & remanded on other grounds, 740 F.3d 1172 (8th Cir. 2014); Zander v. DOJ, 885 F. Supp. 2d 1, 12 (D.D.C. 2012) (finding under circumstances, because of court's in camera review and plaintiff receiving full explanation of what documents were withheld and why, plaintiff no longer had right to Vaughn Index), appeal dismissed, No. 12-5270, 2013 WL 599184 (D.C. Cir. Feb. 13, 2013); Kozacky & Weitzel, P.C., 2008 WL 2188457, at *3 ("When the government's affidavits provide sufficient information for the court to evaluate the exemption claims, a Vaughn Index is not required."); Voinche, 412 F. Supp. 2d at 65 (explaining that agency "does not have to provide an index per se, but can satisfy its burden by other means, such as submitting the documents in question for an in camera review or by providing a detailed affidavit or declaration"); Tax Analysts v. IRS, 414 F. Supp. 2d 1, 4 (D.D.C. 2006) (concluding that agency need not justify withholdings on document-by-document basis because it invoked only one exemption); Doyharzabal v. Gal, No. 7:00-2995-24, 2004 WL 2444124, at *3 (D.S.C. Sept. 13, 2004) (finding agency's affidavit to be "equivalent" to Vaughn Index); Judicial Watch, 297 F. Supp. 2d at 257 (noting that agency may submit materials in "'any form'" as long as reviewing court has reasonable basis to evaluate exemption claim (quoting Gallant, 26 F.3d at 173)); Ferri v. DOJ, 573 F. Supp. 852, 856-57 (W.D. Pa. 1983) (holding that 6000 pages of unindexed grand jury testimony were sufficiently described); cf. Minier v. CIA, 88 F.3d 796, 804 (9th Cir. 1996) ("[W]hen a FOIA requester has sufficient information to present a full legal argument, there is no need for a Vaughn index.").

[258] See, e.g., Neely v. FBI, 208 F.3d 461, 467 (4th Cir. 2000) (suggesting that, on remand, district court "resort to the well-established practice . . . of randomly sampling the documents in question"); Solar Sources, Inc. v. U.S., 142 F.3d 1033, 1038-39 (7th Cir. 1998) (approving use of sample of 6000 pages out of five million); Jones, 41 F.3d at 242 (approving sample comprising two percent of total number of documents at issue); Meeropol v. Meese, 790 F.2d 942, 956-57 (D.C. Cir. 1986) (allowing sampling of every 100th document when approximately 20,000 documents were at issue); Weisberg v. DOJ, 745 F.2d 1476, 1490 (D.C. Cir. 1984) (approving index of sampling of withheld documents, with over 60,000 pages at issue, even though no example of certain exemptions was provided); Mullen v. U.S. Army Criminal Investigation Command, No. 10-262, 2011 WL 5870550, at *4 (E.D. Va. Nov. 22, 2011) (approving sample of every 84th page as representative sample for 39,575 pages at issue); Schoenman v. FBI, 604 F. Supp. 2d 174, 196 (D.D.C. 2009) ("As is particularly relevant here, '[r]epresentative sampling is an appropriate procedure to test an agency's FOIA exemption claims when a large number of documents are involved.'" (quoting Bonner v. Dep't of State, 928 F.2d 1148, 1151 (D.C. Cir. 1991))); Hornbeck, 2006 WL 696053, at *6 ("When dealing with voluminous records, a court will sanction an index or agency declaration that describes only a representative sample of the total number of

procedure "allows the court and the parties to reduce a voluminous FOIA exemption case to a manageable number of items" for the Vaughn Index and, "[i]f the sample is well-chosen, a court can, with some confidence, 'extrapolate its conclusions from the representative sample to the larger group of withheld materials.'"[259] Once a representative sampling of the withheld documents is agreed to, however, the agency's subsequent release of some of those documents may destroy the representativeness of the sample and thereby raise questions about the propriety of withholding other responsive documents that were not included in the sample.[260] The D.C. Circuit has held that an

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documents."); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1089 (C.D. Cal. 2005) (ordering parties to agree upon "representative sample" from more than 6500 documents that will provide basis for Vaughn Index); Piper v. DOJ, 294 F. Supp. 2d 16, 20 (D.D.C. 2003) (noting that parties agreed to sample of 357 pages out of 80,000 to be discussed in Vaughn Index). But see Martinson v. Violent Drug Traffickers Project, No. 95-2161, 1996 WL 571791, at *8 (D.D.C. Aug. 7, 1996) ("This Court does not believe that 173 pages of located documents is even close to being 'voluminous.'"), aff'd on other grounds, No. 96-5262, 1997 WL 634559 (D.C. Cir. 1997); SafeCard Servs. v. SEC, No. 84-3073, 1988 WL 58910, at *3-5 (D.D.C. May 19, 1988) (concluding that burden of indexing relatively small number of requested documents (approximately 200) was insufficient to justify sampling).

[259] Bonner, 928 F.2d at 1151 (quoting Fensterwald v. CIA, 443 F. Supp. 667, 669 (D.D.C. 1977)); see FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 612-13 (5th Cir. 2003) (per curiam) (approving use of representative sample that was offered to district court for in camera inspection, because sample was "adequate" to demonstrate that no reasonably segregable information could be extracted from withheld records); Clemente v. FBI, 854 F. Supp. 2d 49, 58 (D.D.C. 2012) ("The Court therefore examines the Vaughn index of the representative sample in order to determine whether it suggests that the entire set of responsive documents was properly processed under the legal standards applicable at the time of processing."); Campaign for Responsible Transplantation v. FDA, 180 F. Supp. 2d 29, 34 (D.D.C. 2001) (approving representative sampling of one of many applications for investigational new drugs, all of which are "essentially uniform," but allowing plaintiff to select one to be sampled); cf. Halpern v. FBI, No. 94-365, 2002 WL 31012157, at *14 (W.D.N.Y. Aug. 31, 2001) (magistrate's recommendation) (opining in dicta that sampling would be inappropriate for 116 pages at issue), adopted, (W.D.N.Y. Oct. 16, 2001).

[260] See Bonner, 928 F.2d at 1153-54 (explaining that sample should "uncover[] no excisions or withholdings improper when made," but also noting that "[t]he fact that some documents in a sample set become releasable with the passage of time does not, by itself, indicate any agency lapse"); Meeropol, 790 F.2d at 960 (finding error rate of twenty-five percent "unacceptably high"); Clemente, 854 F. Supp. 2d at 59-60 (ordering reprocessing of all documents "because the FBI has released certain types of information from the sample documents while withholding it from the rest"); Lardner v. FBI, 852 F. Supp. 2d 127, 137 (D.D.C. 2012) (ordering reprocessing of all records and finding agency's determination on many sample records that exemptions no longer applied "indicates that the sample is not an accurate illustration of the whole"); Schrecker v. DOJ, 14 F. Supp. 2d 111, 117 (D.D.C. 1998) (ordering reprocessing of all documents because of problems with representative sampling). But cf. Schoenman v. FBI, 763 F. Supp. 2d 173, 186 (D.D.C. 2011) (finding that selected

agency "must justify its initial withholdings and is not relieved of that burden by a later turnover of sample documents," and that "the district court must determine whether the released documents were properly redacted [when] initially reviewed."[261]

Some agencies use "coded" Vaughn Indices -- which break certain FOIA exemptions into several categories, explain the particular nondisclosure rationales for each category, and then mark the exemption and category on the particular documents at issue.[262] Courts have generally accepted the use of such "coded" indices when "[e]ach deletion was correlated specifically and unambiguously to the corresponding exemption . . . [which] was adequately explained by functional categories . . . [so as to] place[] each document into its historical and investigative perspective."[263] Innovative formats for

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sample still representative despite multiple errors in processing because FBI reprocessed all responsive records, not just those contained within representative sample).

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

[262] See, e.g., Jones, 41 F.3d at 242-43 (noting that coded indices "have become accepted practice"); Maynard, 986 F.2d at 559 & n.13 (noting use by FBI and explaining format); Queen, 2005 WL 3204160, at *2 (same); Hodge v. FBI, 764 F. Supp. 2d 134, 141 (D.D.C. 2011) ("Indeed, because the function, and not the form, of the index is dispositive, our Circuit has upheld similar agency declarations coupled with coded categories, in lieu of Vaughn indices."), aff'd on other grounds, 703 F.3d 575 (D.C. Cir. 2013); Blackwell v. FBI, 680 F. Supp. 2d 79, 95 (D.D.C. 2010) (finding FBI met its burden when it "category-coded the documents identified in the Vaughn Index, detailing the nature of the information withheld and which Exemption(s) applied"), aff'd, 646 F.3d 37 (D.C. Cir. 2011).

[263] Keys, 830 F.2d at 349-50; see, e.g., Morley, 508 F.3d at 1122 (affirming agency's use of coded Vaughn Index and explaining that there is no requirement for "'repetitive, detailed explanations for each piece of withheld information - that is, codes and categories may be sufficiently particularized to carry the agency's burden of proof'" (quoting Judicial Watch, Inc., 449 F.3d at 147)); Blanton v. DOJ, 64 F. App'x 787, 789 (D.C. Cir. 2003) (stating that "coding . . . adequately describes the documents and justifies the exemptions"); Maynard, 986 F.2d at 559 n.13 (explaining that "use of coded indices has been explicitly approved by several circuit courts"); Fischer v. DOJ, 596 F. Supp. 2d 34, 44 (D.D.C. 2009) (finding agency's coded declaration to be sufficient); Baez v. FBI, 443 F. Supp. 2d 717, 723 (E.D. Pa. 2006) (upholding use of coded Vaughn Index where agency "redacted only identifying information and administrative markings"); Garcia v. DOJ, 181 F. Supp. 2d 356, 370 (S.D.N.Y. 2002) (accepting adequacy of agency's coded Vaughn Index); Canning, 848 F. Supp. at 1043 ("[T]here is nothing inherently improper about the use of a coding system."); Steinberg v. DOJ, 801 F. Supp. 800, 803 (D.D.C. 1992), aff'd in pertinent part & remanded in part, 23 F.3d 548 (D.C. Cir. 1994) (refusing to find coded Vaughn Index inadequate); cf. Fiduccia, 185 F.3d at 1043-44 (observing that "[t]he form of disclosure is not critical" and that "redacted documents [can be] an entirely satisfactory (perhaps superior) alternative to a Vaughn index or affidavit performing this function"); Davin, 60 F.3d at 1051 ("While the

"coded" affidavits have been found acceptable, so long as they enhance the ultimate goal of overall "descriptive accuracy" of the affidavit.[264]

The D.C. Circuit has held that the district court judge's review of only the redacted documents -- an integral part of the "coded" affidavit -- was sufficient in a situation in which the applicable exemption was obvious from the face of the documents.[265] However, this approach has been found inadequate when the coded categories are too "far ranging" and more detailed subcategories could be provided.[266] Indeed, when numerous pages of records are withheld in full, a "coded" affidavit that does not specifically correlate multiple exemption claims to particular portions of the pages withheld has been found to be impermissibly conclusory.[267]

Lastly, courts have upheld Vaughn Indices where agencies have grouped similar documents into categories and provided descriptions of the withholdings based on those

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use of the categorical method does not per se render a Vaughn index inadequate, an agency using justification codes must also include specific factual information concerning the documents withheld and correlate the claimed exemptions to the withheld documents."), on remand, No. 92-1122, slip op. at 6 (W.D. Pa. Apr. 9, 1998) (approving revised coded Vaughn Index), aff'd, 176 F.3d 471 (3d Cir. 1999) (unpublished table decision). But see Wiener, 943 F.2d at 978-79 (rejecting coded affidavits on belief that such categorical descriptions fail to give requester sufficient opportunity to contest withholdings).

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

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

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

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

categories,[268] but have declined to accept Vaughn Indices which group documents into overly broad categories.[269]

Courts have permitted the withholding of records on a "generic" basis in cases involving Exemption 7(A).[270] While the outermost contours of what constitutes

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[268] See Judicial Watch, Inc., 449 F.3d at 148 (concluding that agency's "decision to tie each document to one or more claimed exemptions in its index and then summarize the commonalities of the documents in a supporting affidavit is a legitimate way of serving those functions"); Landmark Legal Found., 267 F.3d at 1138 (finding that repetitive nature did not make Vaughn Index deficient because it was "not the agency's fault that thousands of documents belonged in the same category, thus leading to exhaustive repetition"); Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (finding adequate, for responsive records consisting of 1000 volumes of 300 to 400 pages each, agency's volume-by-volume categorical summary when Vaughn Indices "specifically describe the documents' contents and give specific reasons for withholding them"); Vaughn, 936 F.2d at 868 (approving category-of-document approach when over 1000 pages were withheld under Exemptions 3, 5, 7(A), 7(C), 7(D), and 7(E)); Davis v. DOJ, 968 F.2d 1276, 1282 n.4 (D.C. Cir. 1992) (opining that precise matching of exemptions with specific withheld items "may well be unnecessary" when all government's generic categorical claims have merit); Mullen v. U.S. Army Crim. Investigation Command, No. 10-262, 2011 WL 5870550, *8 (E.D. Va. Nov. 22, 2011) (approving use of categorical Vaughn Index for those "documents that were withheld in full since those documents were all withheld on the same basis"); Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 142 (D.D.C. 2007) (concluding that "[w]hile there is some degree of repetition among entries within defendant's Vaughn Index, repetition is to be expected, especially when 'each redacted passage concerns the same . . . subject'" (quoting Coldiron, 310 F. Supp. 2d at 52)); Pully v. IRS, 939 F. Supp. 429, 433-38 (E.D. Va. 1996) (accepting categorization of 5624 documents into twenty-six separate categories protected under several exemptions).

[269] See Prison Legal News v. Samuels, 787 F.3d 1142, 1149 (D.C. Cir. 2015) (remanding for creation of new Vaughn Index and declaration because categories "included a wide range of claims covering various degrees of privacy concerns" and finding that categories must be "based on the individual's privacy interest or the public interest in disclosure"); Bloomgarden v. DOJ, No. 12-0843, 2016 WL 471251, at *1 (D.D.C. Feb. 5, 2016) (finding Vaughn Index "'useless [and] deficient' because it impermissibly lumped hundreds of pages together in a single entry, making it impossible to understand which claimed exemptions applied to which documents (and why)").

[270] See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 218-24 (1978) (endorsing government's position "that a particularized, case-by-case showing is neither required nor practical" and that language of Exemption 7(A) "appears to contemplate that certain generic determinations may be made"); Solar Sources, 142 F.3d at 1040 (reiterating that detailed Vaughn Index is not generally required in Exemption 7(A) cases); W. Journalism Ctr. v. Office of the Indep. Counsel, No. 96-5178, 1997 WL 195516, at *1 (D.C. Cir. Mar. 11, 1997) ("[A]ppellee was not required to describe the records retrieved in response to appellants' request, or the harm their disclosure might cause, on a document-by-document basis, as appellee's description of the information contained in the three categories it devised is sufficient to permit the court to determine whether the information retrieved is exempt

acceptable "generic" Exemption 7(A) Vaughn declarations are sometimes unclear,[271] it appears well established that if the agency has (1) defined its Exemption 7(A) categories functionally, (2) conducted a document-by-document review in order to assign documents to the proper category, and (3) explained how the release of each category of information would interfere with the enforcement proceedings, the description will be found sufficient.[272] When an agency invokes an exemption to protect a broad category of records, such as investigatory records pertaining to a third party,[273] a generic description

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from disclosure."); In re DOJ, 999 F.2d 1302, 1309 (8th Cir. 1993) (en banc) (ruling that to satisfy its burden under 7(A), agency is not required to "produce a fact-specific, document-specific, Vaughn index"); Dickerson v. DOJ, 992 F.2d 1426, 1428, 1433-34 (6th Cir. 1993) (approving FBI justification of Exemption 7(A) for documents pertaining to disappearance of Jimmy Hoffa on "category-of-document" basis by supplying "a general description of the contents of the investigatory files, categorizing the records by source or function"); Lewis v. IRS, 823 F.2d 375, 389 (9th Cir. 1987) ("The IRS need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings."); Bevis v. Dep't of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (stating that with respect to Exemption 7(A), it is sufficient for agency to take generic approach by grouping records into "relevant categories" that are distinct and which allow court to understand how release would interfere with investigation); Lawyers' Comm. for Civil Rights of S.F. Bay Area v. U.S. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *7 (N.D. Cal. Sept. 30, 2008) ("[W]hen a claimed FOIA exemption is based on a general exclusion, such as Exemption 7(A)'s criminal investigation exclusion, which is dependent on the category of the requested records rather than the individual subject matters contained within each document, a Vaughn Index is unnecessary."); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *3 (D. Minn. Oct. 24, 2005) (recognizing propriety of categorical approach to justify use of Exemption 7(A)) reconsideration denied, 2006 WL 208783 (D. Minn.. Jan. 26, 2006).

[271] Compare Curran v. DOJ, 813 F.2d 473, 476 (1st Cir. 1987) (approving category entitled "other sundry items of information" because "[a]bsent a 'miscellaneous' category of this sort, the FBI would, especially in the case of one-of-a-kind records, have to resort to just the sort of precise description which would itself compromise the exemption"), and May v. IRS, No. 90-1123-CV-W-2, 1991 WL 328041, at *2-3 (W.D. Mo. Dec. 9, 1991) (approving categories of "intra-agency memoranda" and "work sheets"), with Bevis, 801 F.2d at 1390 ("categories identified only as 'teletypes,' or 'airtels,' or 'letters'" held inadequate).

[272] See In re DOJ, 999 F.2d at 1389-90 (citing Bevis, 801 F.2d at 1389-90); Manna v. DOJ, 815 F. Supp. 798, 806 (D.N.J. 1993), aff'd, 51 F.3d 1158 (3rd Cir. 1995); see also Dickerson, 992 F.2d at 1433 (enumerating categories of information withheld); Judicial Watch, Inc. v. FBI, No. 00-745, 2001 WL 35612541, at *5 (D.D.C. Apr. 20, 2001) (same); Curran, 813 F.2d at 476 (same); May, 1991 WL 328041, at *3-4 (same); Docal v. Bennsinger, 543 F. Supp. 38, 44 n.12 (M.D. Pa. 1981) (enumerating categories of "interference"); cf. Curran, 813 F.2d at 476 (stating that FBI affidavit met Bevis test and therefore finding it unnecessary to determine whether Bevis test is too demanding).

[273] Reporters Comm. for Freedom of Press, 489 U.S. 749, 779-80 (1989) (authorizing "categorical" protection of information under Exemption 7(C)).

of the records withheld under that categorical basis has been found to satisfy an agency's Vaughn obligation.[274]

Courts have held that a Vaughn Index must address whether the agency has reviewed the documents to identify reasonably segregable information.[275]

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[274] See Gallant, 26 F.3d at 173 (finding government under no obligation to justify withholding of third party names on an individual-by-individual basis under FOIA Exemption 6); Church of Scientology, 792 F.2d at 152 (finding generic exemption under IRS Exemption 3 statute appropriate if "affidavit sufficiently detailed to establish that the document or group of documents in question actually falls into the exempted category"); Antonelli v. FBI, 721 F.2d 615, 617-19 (7th Cir. 1983) (holding that no index is required in third-party request for records when agency categorically neither confirmed nor denied existence of records on particular individuals absent showing of public interest in disclosure); Brown v. FBI, 658 F.2d 71, 74 (2d Cir. 1981) (concluding that itemized and indexed justification unnecessary with respect to third party request for records); Pully, 939 F. Supp. at 433-38 (noting that "[t]he detail outlined by the IRS in its supporting affidavits must provide sufficient justification that the claimed exemption applies to the requested document so that the requesting party may challenge the asserted exemption" and accepting categorical descriptions for documents protected under Exemptions 3, 5 (attorney-client privilege), 7(A), 7(C), and 7(E) – 5624 documents arranged into twenty-six categories); May, 1991 WL 328041, at *3-4 (denying plaintiff's request for index and finding that categorical description of records withheld under Exemptions 3 and 7(A) acceptable). But see McNamara v. DOJ, 949 F. Supp. 478, 483 (W.D. Tex. 1996) (rejecting apparent categorical indices for criminal files on third parties that were withheld under Exemptions 6 and 7(C) because "there is no way for the court to tell whether some, a portion of some, or all the documents being withheld fall within any of the exemptions claimed").

[275] See, e.g., Krikorian v. Dep't of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (remanding for segregability determination for "each of the withheld documents"); Milton v. DOJ, 842 F. Supp. 2d 257, 260 (D.D.C. 2012) (determining affidavit attesting that information is not segregable due to technical limitations is sufficient to satisfy segregability requirement), aff'd on other grounds, No. 12-5376, 2013 WL 6222921 (D.C. Cir. Nov. 15, 2013); Am. Mgmt. Servs., LLC, 842 F. Supp. 2d at 885 (finding Vaughn Index sufficient for segregability where agency provided "an individual segregability finding for each document, and where necessary, an accompanying rationale"); Schoenman v. FBI, 841 F. Supp. 2d 69, 84 (D.D.C. 2012) (finding segregability obligation met where Vaughn index demonstrated that agency conducted "a line-by-line review of each document in an attempt to identify and release non-exempt portions of each document"), appeal dismissed, No. 12-5079, 2012 WL 3244009 (D.C. Cir. July 31, 2012); Elec. Frontier Found. v. DOJ, 826 F. Supp. 2d 157, 175 (D.D.C. 2011) (suggesting that Vaughn Index should "'describe what proportion of the information in [the] document[s],' if any, 'is non-exempt and how that material is dispersed throughout the document[s]'"); Beltranena v. U.S. Dep't of State, 821 F. Supp. 2d 167, 178 (D.D.C. 2011) (determining agency discharged its segregability obligation when supplemental declaration "carefully outline[d], on a document-by-document basis, the process by which the [agency] conducted its segregability determinations"); Smith v. DOL, 798 F. Supp. 2d 274, 281 (D.D.C. 2011) (determining agency did not need to conduct segregability analysis where "redactions are themselves indicative that [agency] conducted a line-by-line review and segregation of the material"); Hall v. DOJ, 552 F. Supp. 2d 23, 31

With regard to the timing of the creation of a Vaughn Index, it is well settled that a requester is not entitled to receive one during the administrative process.[276] Once in litigation, efforts to compel the preparation of Vaughn Indices prior to the filing of an

(D.D.C. 2008) (finding that, due to inadequacy of Vaughn Index and to vast quantity of information withheld, it was impossible to determine whether all reasonably segregable information was released); Edmonds Inst., 383 F. Supp. 2d at 108 ("The Vaughn index should contain a description of the segregability analysis . . . ."); Nat'l Res. Def. Council, 388 F. Supp. 2d at 1105 (denying summary judgment because agency "completely fail[ed] to analyze segregability"); The Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) (rejecting "blanket declaration that all facts are so intertwined [as] to prevent disclosure under the FOIA" (citing Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 301-02 (D.D.C. 1999))).

[276] See, e.g., Bangoura v. U.S. Dep't of the Army, 607 F. Supp. 2d 134, 143 n.8 (D.D.C. 2009) (noting that agency not required to provide Vaughn Index prior to filing of lawsuit); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) ("[T]here is no requirement that an agency provide a . . . 'Vaughn' index on an initial request for documents."), summary affirmance granted, No. 00-5453, 2001 WL 674636 (D.C. Cir. May 10, 2001); Edmond v. U.S. Attorney, 959 F. Supp. 1, 5 (D.D.C. 1997) (rejecting, as premature, request for Vaughn Index when agency had not processed plaintiff's request).

agency's dispositive motion are often denied as premature,[277] but have been granted in some instances.[278]

"Reasonably Segregable" Requirements

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[277] See, e.g., Miscavige, 2 F.3d at 369 ("The plaintiff's early attempt in litigation of this kind to obtain a Vaughn Index . . . is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); Mullen, 2011 WL 5870550, at *4 (discussing generally timing of Vaughn Index production and ruling agency did not have to produce Vaughn until it filed its dispositive motion); Ioane v. C.I.R., No. 09-00243, 2010 WL 2600689, at *6 (D. Nev. Mar. 11, 2010) ("Generally, agencies should be given the opportunity to file dispositive motions and produce affidavits regarding claimed exemptions before they are ordered to produce Vaughn indices."); Gerstein v. CIA, No. 06-4643, 2006 WL 3462659, at *5 (N.D. Cal. Nov. 29, 2006) (denying plaintiff's request for Vaughn Index because agencies had not yet begun responding to plaintiff's FOIA requests); Bassiouni v. CIA, 248 F. Supp. 2d 795, 797 (N.D. Ill. 2003) (finding plaintiff's request for a Vaughn Index premature because the case was "only in the initial stages"); Pyne v. Comm'r, No. 98-00253, 1999 WL 112532, at *3 (D. Haw. Jan. 6, 1999) (denying motion to compel submission of Vaughn Index as "premature" when agency had not yet refused to release records or provided supporting affidavit for nondisclosure); Stimac v. DOJ, 620 F. Supp. 212, 213 (D.D.C. 1985) (denying as premature motion to compel Vaughn Index on ground that "filing of a dispositive motion, along with detailed affidavits, may obviate the need for indexing the withheld documents"); see also Payne v. DOJ, No. 95-2968, 1995 WL 601112, at *1 (E.D. La. Oct. 11, 1995) (refusing to order Vaughn Index at "nascent" stage of litigation, i.e., when defendants had not even answered plaintiff's Complaint); Cohen v. FBI, 831 F. Supp. 850, 855 (S.D. Fla. 1993) (confirming that Vaughn Index is not required when "Open America" stay is granted "because no documents have been withheld on the grounds that they are exempt from disclosure").

[278] See, e.g., People ex rel. Brown v. EPA, No. 07-02055, 2007 WL 2470159, at *2 (N.D. Cal. Aug. 27, 2007) (ordering agencies to submit Vaughn Indices prior to filing motions for summary judgment due to passage of time since submission of initial request; "it would be unfair to allow [agencies] months to prepare their case and then force Plaintiff to formulate its entire case within the two weeks it has to respond to the motion"); Keeper of Mountains Found. v. DOJ, No. 06-cv-00098, 2006 WL 1666262, at *3 (S.D. W. Va. June 14, 2006) (granting plaintiff's request for Vaughn Index prior to agency's dispositive motion, because production "at this stage of the litigation, rather than later at the summary judgment stage, is the more efficient and fair approach"); ACLU v. DOD, 339 F. Supp. 2d 501, 504-05 (S.D.N.Y. 2004) (ordering production of Vaughn Index prior to filing of defendants' dispositive motion, due to "glacial pace at which defendant agencies have been responding to the plaintiffs' requests," which evinces "an indifference to the commands of FOIA and fails to afford accountability of government"); Providence Journal Co. v. U.S. Dep't of the Army, 769 F. Supp. 67, 69 (D.R.I. 1991) (finding contention that Vaughn Index must await dispositive motion to be "insufficient and sterile" when agency "has not even indicated when it plans to file such a motion"); cf. Schulz v. Hughes, 250 F. Supp. 2d 470, 475 (E.D. Pa. 2003) (ruling that upon payment of fees, agency should prepare Vaughn Index for any documents it refuses to release).

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt."[279] Because of this requirement, added as part of the 1974 FOIA amendments,[280] an agency cannot "justify withholding an entire document simply by showing that it contains some exempt material."[281] Rather, this provision generally requires agencies to apply exemptions to specific segments of information within a record, instead of to the document as a whole.[282] At the same time, courts, including the Court of Appeals for the District of Columbia Circuit, have held that agencies need not "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[al] content" in order to comply with the segregation requirement.[283] Furthermore, courts have not required

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[279] 5 U.S.C. § 552(b) (2012 & Supp. V 2017) (sentence immediately following exemptions).

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

[281] Mead Data Cent., Inc. v. Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977); see Kimberlin v. DOJ, 139 F.3d 944, 950 (D.C. Cir. 1998).

[282] See Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1211-12 (8th Cir. 2008) (stating that "[e]ffectively, each document consists of 'discrete units of information,' all of which must fall within a statutory exemption in order for the entire document to be withheld" (quoting Billington v. DOJ, 233 F.3d 581, 586 (D.C. Cir. 2000))); Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C. Cir. 1992) ("'The focus in the FOIA is information not documents and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.'" (quoting Mead Data, 566 F.2d 242, 260 (D.C. Cir. 1977))), abrogated on other grounds by Milner v. Dep't of the Navy, 562 U.S. 562 (2011); see also OIP Guidance: Segregating and Marking Documents for Release in Accordance with the OPEN Government Act (posted 2008, updated 9/24/2014) (providing guidance regarding segregation of documents for release in light of statutory provisions of OPEN Government Act).

[283] Mead Data, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977); see, e.g., Covington v. McLeod, No. 09-5336, 2010 U.S. App. 14871, at *2 (D.C. Cir. July 16, 2010) (per curiam) (concluding that "because the exempt and non-exempt information in the [requested] grand jury material and proffer statement are 'inextricably intertwined,' any excision of exempt information would impose significant costs on the agency and produce edited documents with little informational value"); Am. Mgmt. Servs., LLC v. Dep't of Army, 842 F. Supp. 2d 859, 885 (E.D. Va. Jan 23, 2012) (same), aff'd, 703 F.3 724 (4th Cir. 2013); Brown v. DOJ, 734 F. Supp. 2d 99, 110-11 (D.D.C. 2010) (determining that "defendant need not expend substantial time and resources to 'yield a product with little, if any, informational value'" by releasing "plaintiff's name, cities, and file numbers on documents that are otherwise exempt from production" (quoting Assassination Archives & Res. Ctr. v. CIA, 177 F. Supp. 2d 1, 9 (D.D.C. 2001))); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 529 (S.D.N.Y. 2010) (concluding that "forcing the CIA to re-process all of the records for the sole purpose of releasing various words and phrases would be a waste of time and resources"); Asian Law Caucus v. DHS, No. 08-0842, 2008 WL 5047839, at *6 (N.D. Cal. Nov. 24, 2008) (holding that agency properly withheld records in full because they "contain small portions of non-

segregation where, due to the format of the requested record, it is not technically feasible to segregate the exempt information from the nonexempt information.[284]

Additionally, although as a general rule, "[t]he 'segregability requirement applies to all . . . documents and all exemptions in the FOIA,'"[285] the D.C. Circuit has held that there is no duty to segregate materials which are, by definition, wholly exempt from disclosure.[286] Procedurally, an agency must in its declaration demonstrate that the

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exempt information and these portions are inextricably intertwined with the exempt information"); Arizechi v. IRS, No. 06-5952, 2008 WL 539058, at *6 (D.N.J. Feb. 25, 2008) (finding that segregation requirement is "futile in the case of summonses issued to witnesses" because "releasing a blank summons would serve no purpose and is not required"); Thomas v. DOJ, No. 04-112, 2006 WL 722141, at *4 (E.D. Tex. Mar. 15, 2006) (noting that redacting telephone recordings for segregable information "would have left nothing meaningful to release"), aff'd, 260 F. App'x 677 (5th Cir. 2007).

[284] See, e.g., Milton v. DOJ, 842 F. Supp. 2d 257, 261 (D.D.C. 2012) (holding that BOP is not required to segregate plaintiff's side of telephone conversations where it lacks technological capability to do so), aff'd on other grounds, No. 12-5376, 2013 WL 6222921 (D.C. Cir. Nov. 15, 2013); Mingo v. DOJ, 793 F. Supp. 2d 447, 452-56 (D.D.C. 2011) (finding that BOP properly withheld disks containing video footage of an "altercation and images of 'at least 50 different inmates'" in full under Exemption 7(C) where it lacked technological capability to redact them).

[285] Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C. Cir. 1992)) (quoting Ctr. for Auto Safety v. EPA, 731 F.2d 16, 21 (D.C. Cir. 1984)), abrogated on other grounds by, Milner v. Dep't of the Navy, 562 U.S. 562 (2011); see, e.g., McSheffrey v. EOUSA, 13 F. App'x 3, 4 (D.C. Cir. 2001) (remanding with explicit instructions that district court "determine whether any portion of these documents can be segregated for release"); Mays v. DEA, 234 F.3d 1324, 1328 (D.C. Cir. 2000) (remanding to determine whether "any intelligible portion of the contested pages can be segregated for release").

[286] Judicial Watch, Inc. v. DOJ, 432 F.3d 366, 371 (D.C. Cir. 2005) (holding that "[i]f a document is fully protected as [attorney] work product, then segregability is not required"); accord Carter v. NSA, No 13-5322, 2014 WL 2178708, at *2 (D.C. Cir. Apr. 23, 2014) (finding no agency obligation under FOIA to conduct segregability analysis if agency properly asserted Glomar response); Pickard v. DOJ, 713 F. App'x 609, 610-11 (9th Cir. 2018) (determining that findings on segregability unnecessary "because Plaintiff is not legally entitled to any of the information.") (unpublished table decision); see. e.g., Surgick v. Cirella, No. 09-3807, 2012 U.S. Dist. LEXIS 43426, at *31 (D.N.J. Mar. 29, 2012) (determining that "FOIA's segregation requirement is not applicable in this case" because not only are the tax returns sought by plaintiffs "entirely exempt from disclosure [under the Exemption 3 in conjunction with Section 6103 of the Internal Revenue Code], but also . . . there is no form of non-exempt information in these documents which the IRS could segregate and disclose"); Beltranena v. Dep't of State, 821 F. Supp. 2d 167, 179 (D.D.C. 2011) (noting that segregability with regard to Exemption 3 "differs somewhat from the review conducted in relation to FOIA's other exemptions" because "the disclosure-prohibiting statute" controls what is withheld); Tamayo v. DOJ, No. 07-21299, slip op. at 6 (S.D. Fla.

withheld materials are wholly exempt from disclosure, "with reasonable specificity."[287] Courts have held that agencies should not base their segregability determination upon an assessment of the value of the information to the requester.[288] Courts have on occasion made their own segregability determinations, even in the absence of an adequate analysis in an agency's declaration,[289] at times after reviewing material in camera.[290]

June 18, 2011) (finding that because records withheld by FBI pursuant to Exemption 1 "were properly classified, none of the classified information is segregable and subject to disclosure").

[287] Armstrong v. Exec. Off. of the President, 97 F.3d 575, 580 (D.C. Cir. 1996); see Judicial Watch, Inc. v. DHS, 880 F. Supp. 2d 105, 113 (D.D.C. 2012) (holding that agency affidavits are sufficient to fulfill agency's obligation to show with reasonable specificity why records are exempt in full); Barnard v. DHS, 598 F. Supp. 2d 1, 25 (D.D.C. 2009) (finding agency's description of why records were fully exempt adequate after agency described proportion of non-exempt information and how it was dispersed throughout the withheld records); see also Elec. Privacy Info. Ctr. v. TSA, No. 03-1846, 2006 WL 626925, at *8 (D.D.C. Mar. 12, 2006) (explaining that in situations where records are wholly exempt, "line-by-line" review is not required as court considers "a variety of factors to determine if Defendants' segregability justifications [are] sufficiently detailed and reasonable, rather than requiring a specific checklist of form language").

[288] See Stolt-Nielsen Transp. Group Ltd. v. United States, 534 F.3d 728, 734 (D.C. Cir. 2008) (rejecting agency's assessment that "redacted documents without the names and dates would provide no meaningful information" because "FOIA mandates disclosure of information, not solely disclosure of helpful information"); Antonelli v. BOP, 623 F. Supp. 2d 55, 60 (D.D.C. 2009) (holding that declarant's statement that "'no meaningful portion [of the withheld documents] could be released without destroying the integrity" of document "is not significantly probative" as to whether all segregable non-exempt material was disclosed); Schoenman v. FBI, No. 04-2202, 2009 WL 763065, at *26 (D.D.C. Mar. 19, 2009) (concluding that agency's segregability analysis was correct and finding that it did not impermissibly base its determination on whether "the substantive content of the non-exempt information, although reasonably segregable, 'provid[ed] no meaningful information'" (quoting Stolt-Nielsen, 534 F.3d at 733-34)).

[289] See, e.g., Ferranti v. ATF, 177 F. Supp. 2d 41, 47 (D.D.C. 2001) (recognizing "substantial defect" in declaration that fails to refer explicitly to segregability, but nevertheless determining independently that the segregability requirement met by "narrow scope of the categorical withholdings[,] . . . the good faith declaration that only such properly withheld information was redacted, and a careful review of the actual documents that plaintiff submitted"), summary affirmance granted, No. 01-5451, 2002 WL 31189766, at *1 (D.C. Cir. Oct. 2, 2002); Campaign for Family Farms v. Veneman, No. 99-1165, 2001 WL 1631459, at *3 (D. Minn. July 19, 2001) (deciding sua sponte that zip codes and dates of signature entries on petition are not "reasonably segregable," because of "distinct possibility" that release of that information would thwart protected privacy interest).

[290] Bartko v. DOJ, 167 F. Supp. 3d 55, 73 (D.D.C. 2016) ("The Court, in an abundance of caution, . . . undertook its own in camera review[,]" and "[a]fter conducting such review, the Court is satisfied that no additional materials need be released, for '[t]he non-exempt

In Trans-Pacific Policing Agreement v. United States Customs Service, the D.C. Circuit treated the segregation obligation as a sua sponte requirement for the district court.[291] As a result of Trans-Pacific, even in the absence of a challenge by a FOIA plaintiff as to the issue of segregability, courts have denied an agency's motion for summary judgment when they found the declarations did not adequately demonstrate that all reasonably segregable, nonexempt information had been disclosed.[292] (For a further

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portions of these documents that have been redacted are inextricably intertwined with exempt portions and they need not be further segregated.'"); ACLU v. DOD, 389 F. Supp. 2d 547, 567-68 (S.D.N.Y. 2005) (granting the government's motion for summary judgment with regard to segregability based on in camera review of Vaughn Index and classified declarations); Rugiero v. DOJ, 234 F. Supp. 2d 697, 710 (E.D. Mich. 2002) (ordering in camera review because "plaintiff has raised enough doubt" about segregability issue).

[291] 177 F.3d 1022, 1027 (D.C. Cir. 1999) (reversing district court and indicating that district court had duty to consider reasonable segregability even though requester never sought segregability finding); see also Elliott v. USDA, 596 F.3d 842, 851 (D.C. Cir. 2010) (noting that although plaintiff did not challenge agency's segregability determination, the district court properly considered the issue sua sponte), cert. denied, 560 U.S. 973 (2010); Mo. Coal., 542 F.3d at 1212 ("In every case, the district court must make an express finding on the issue of segregability."); Morley v. CIA, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (stating that "'the district court [has] an affirmative duty to consider the segregability issues sua sponte'" (quoting Trans-Pac., 177 F.3d at 1028))); Isley v. EOUSA, 203 F.3d 52, 52 (D.C. Cir. 1999) (explaining that district court erred in failing to make segregability finding even though plaintiff failed to raise issue at trial) (unpublished table decision); Barnard, 598 F. Supp. 2d at 25 ("The segregability requirement is of such great import that this Court has an affirmative duty to engage in its own segregability analysis, regardless of Plaintiff's pleadings.").

[292] See, e.g., Am. Immigr. Laws. Ass'n v. DHS, 852 F. Supp. 2d 66, 80-81 (D.D.C. 2012) (ordering defendant to provide revised Vaughn submissions to address segregability where agency "fail[ed] to describe the portion of exempt to non-exempt information and fail[ed] to establish that any non-exempt information is 'inextricably intertwined' with exempt information"); Elec. Frontier Found. v. DOJ, 826 F. Supp. 2d 157, 174 (D.D.C. 2011) (finding "DOJ's description of its segregation efforts . . . too categorical for the Court to evaluate whether any factual material in the documents withheld in full is 'inextricably intertwined' with the deliberative material"); McGehee v. DOJ, 800 F. Supp. 2d 220, 238 (D.D.C. 2011) (concluding that FBI's submissions are "deficient and must be supplemented" where "the failure of the Vaughn Index to provide any specific information regarding the missing pages and numerous redactions renders it impossible to evaluate the FBI's conclusions that the pages had no segregable portions"); Gray v. U.S. Army Crim. Investigation Command, 742 F. Supp. 2d 68, 76 (D.D.C. 2010) (holding that agency's assertion that records were properly withheld in full because they "were compiled in the course of an ongoing investigation and disciplinary action [and] [t]herefore none of the materials were segregable" is insufficient "to establish that there were no segregable portions"); Ctr. for Biological Diversity v. OMB, No. 07-4997, 2008 WL 5129417, at *9 (N.D. Cal. Dec. 4, 2008) (requiring agency to provide more particularized affidavits because it used "boilerplate segregability language" to

discussion of summary judgment requirements, see Litigation Considerations, Summary Judgment, below.) Moreover, if the lower court initially failed to make a segregability finding, the court of appeals has at times remanded the matter to the district court.[293] This has happened even where the court of appeals ruled for the agency with respect to the substantive application of the FOIA exemptions.[294] Nevertheless, the appellate court can elect to make the segregation determinations itself.[295] (For a discussion of document

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describe records and failed to document any "inability on its part to parse records, such that incomplete segments of records would be rendered meaningless if disclosed"); United Am. Fin., Inc. v. Potter, 531 F. Supp. 2d 29, 41 (D.D.C. 2008) (determining that agency's conclusory assertions of segregability are not sufficient because they fail to explain "why purely factual material in the public domain . . . is not reasonably segregable"); Pa. Dep't of Pub. Welfare v. HHS, No. 05-1285, 2006 WL 3792628, at *17 (W.D. Pa. Dec. 21, 2006) (concluding that agency's declaration is too broad and fails to provide factual recitation as to segregability); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1106 (C.D. Cal. 2005) (finding that segregability analysis is not met based on a "boilerplate statement . . . , which conclusorily asserts [that] all reasonably segregable information has been released"); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *4 (D. Minn. Oct. 24, 2005) (ordering agency to provide detailed affidavits as record is insufficient to enable determination as to whether agency has sustained its burden of reasonable segregability), reconsideration denied, 2006 WL 208783 (D. Minn. Jan. 26, 2006).

[293] See Waterman v. IRS, 755 Fed.Appx. 26, 28 (2019) (holding that "[a] district court 'clearly errs when it approves the government's withholding of information under the FOIA without making an *express* finding on segregability' (quoting PHE Inc. v. Dep't of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993)); Hamdan v. DOJ, 797 F.3d 759, 779 (9th Cir. 2015) (finding reversible error and remanding where district court "approve[d] the withholding of a document without a segregability finding"); Callaway v. Dep't of Treasury, No. 08-5480, 2009 U.S. App. LEXIS 11941, at *5 (D.C. Cir. June 2, 2009) (per curiam) (remanding where "[t]here was insubstantial support for the district court's determination that the government has withheld only exempt material . . . [and] [t]he government's affidavits state only legal conclusions regarding segregability"); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1116 (D.C. Cir. 2007) (explaining that if district court approves agency's withholdings without making finding of segregability, then "remand is required even if the requester did not raise the issue of segregability before the court").

[294] See James Madison Project v. NARA, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (per curiam) (remanding, despite ruling in favor of the government on exemptions, for "more precise finding" on segregability).

[295] Juarez v. DOJ, 518 F.3d 54, 60 (D.C. Cir. 2008) (determining that district court's failure to address segregability was "reversible error," yet concluding that, based on its review of agency affidavits, "no part of the requested documents was improperly withheld" and accordingly finding that no remand was necessary); Carpenter v. DOJ, 470 F.3d 434, 443 (1st Cir. 2006) (concluding that, although district court failed to find expressly that there were no reasonably segregable portions, district court's in camera inspection afforded it an opportunity to make this determination); Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994) (finding remand unnecessary because judge "did not simply rely on IRS affidavits describing the documents, but conducted an in camera review").

segregation at the administrative level, see Procedural Requirements, "Reasonably Segregable" Obligation, above.)

In Camera Inspection

The FOIA specifically authorizes in camera examination of documents,[296] however, district courts have "broad discretion" to decide if this type of review "is necessary to determine whether the government has met its burden."[297] Courts typically exercise their discretionary authority to order in camera inspection in exceptional, rather than routine, cases because such review circumvents the adversarial process and may be burdensome for the court to conduct.[298]

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[296] See 5 U.S.C. § 552(a)(4)(B) (2012 & Supp. V 2017); see also S. Conf. Rep. No. 93-1200, at 9 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6287.

[297] Loving v. DOD, 550 F.3d 32, 41 (D.C. Cir. 2008) (citing Armstrong v. Exec. Off. of the President, 97 F.3d 575, 577-78 (D.C. Cir. 1996)); see NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) ("The in camera review provision is discretionary by its terms[.]"); Mobley v. CIA, 806 F.3d 568, 588 (D.C. Cir. 2015) (finding that "the district court, after reviewing *in camera* the FBI's classified declaration, acted within its sound discretion when it decided that it did not need to review the classified document *in camera* to conclude that the FBI withheld it as properly classified"); Hodge v. FBI, 703 F.3d 575, 582 (D.C. Cir. 2013) (finding that "case law has rejected the argument that district courts are required to conduct in camera review in FOIA cases"); Larson v. Dep't of State, 565 F.3d 857, 869-70 (D.C. Cir. 2009) (noting that "[i]n camera review is available to the district court if the court believes it is needed 'to make a responsible de novo determination on the claims of exception'"); Peltier v. FBI, 563 F.3d 754, 759 (8th Cir. 2009) (same); Rein v. U.S. Patent & Trademark Off., 553 F.3d 353, 377 n. 34 (4th Cir. 2009) (same); Juarez v. DOJ, 518 F.3d 54, 60 (D.C. Cir. 2008) ("If a district court believes that in camera inspection is unnecessary 'to make a responsible de novo determination on the claims of exemption,' it acts within its 'broad discretion' by declining to conduct such a review.") (citations omitted); Halpern v. FBI, 181 F.3d 279, 295 (2d Cir. 1999) (noting that in camera "review would have been appropriate," but leaving this to "the trial court's discretion on remand"), on remand, No. 94-365A, 2002 WL 31012157, at *14 (W.D.N.Y. Aug. 31, 2002) (magistrate's recommendation) (denying plaintiff's motion for in camera inspection), adopted, (W.D.N.Y. Oct. 17, 2002); Jernigan v. Dep't of the Air Force, 163 F.3d 606, 606 n.3 (9th Cir. 1998) ("Section 552(a)(4)(B) empowers, but does not require, a district court to examine the contents of agency records in camera") (unpublished table decision); Parsons v. FOIA Officer, 121 F.3d 709, 709 (6th Cir. 1997) (explaining that district court has discretion to conduct in camera inspection, but that it is neither "favored nor necessary" so long as adequate factual basis for decision exists) (unpublished table decision); Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993) (holding that in camera review "is discretionary and not required, absent an abuse of discretion").

[298] See, e.g., Robbins Tire, 437 U.S. at 224 (explaining that in camera review provision "is designed to be invoked when the issue before the District Court could not be otherwise resolved"); Ctr. for Biological Diversity v. Office of the U.S. Trade Rep., 450 F. App'x 605,

In camera review is generally not necessary when agencies meet their burden of proof by means of sufficiently detailed affidavits.[299] However, when agency affidavits are

608 (9th Cir. 2011) (reiterating that "'resort to in camera review is appropriate only after the government has submitted as detailed public affidavits and testimony as possible'" (quoting Weiner v. FBI, 943 F.2d 972, 979 (9th Cir. 1991))); Larson, 565 F.3d at 870 (noting that "[i]f the agency's affidavits 'provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted by the record, and there is no evidence in the record of agency bad faith, then summary judgment is appropriate without in camera review of the documents'" (quoting Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979))); Mo. Coal. v. U.S. Army Corp. of Eng'rs, 542 F.3d 1204, 1210 (8th Cir. 2008) (stating that "'in camera inspection should be limited as it is contrary to the traditional role of deciding issues in an adversarial context upon evidence produced in court'" (quoting Barney v. IRS, 618 F.2d 1268, 1272 (8th Cir. 1980))) (internal quotations and citation omitted); Lane v. Dep't of the Interior, 523 F.3d 1128, 1136 (9th Cir. 2008) ("In camera inspection is 'not a substitute for the government's burden of proof, and should not be resorted to lightly,' due to the ex parte nature of the process and the potential burden placed on the court." (quoting Church of Scientology v. Dep't of Army, 611 F.2d 738, 743 (9th Cir. 1979))); Jones v. FBI, 41 F.3d 238, 243 (6th Cir. 1994) (noting that the Court of Appeals for the Sixth Circuit has previously "suggested that in camera review is disfavored because it circumvents the adversarial process") (citing Vaughn v. United States, 936 F.2d 862, 866 (6th Cir. 1991)); PHE, Inc., 983 F.2d at 252-53 (observing that in camera review is generally disfavored, but permissible on remand arising from inadequate affidavit); Currie v. IRS, 704 F.2d 523, 530 (11th Cir. 1983) ("Thorough in camera inspection of the withheld documents where the information is extensive and the claimed exemptions are many . . . is not the preferred method of determining the appropriateness of the government agency's characterization of the withheld information."); Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978) ("In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt.'").

[299] See, e.g., Life Extension Found., Inc. v. IRS, 559 F. App'x 3, 3 (D.C. Cir. 2014) (finding that district court did not abuse its discretion in declining to order in camera review where "affidavits sufficiently described the material withheld"); Hull v. IRS, 656 F.3d 1174, 1196 (10th Cir. 2011) (determining that district court did not abuse its discretion in declining to order in camera review where agency demonstrated with "reasonable specificity" why records were exempt, and plaintiffs have not established bad faith); Wilner v. NSA, 592 F.3d 60, 76 (2d Cir. 2009) (holding in camera review not necessary where NSA's affidavits "sufficiently allege the necessity of the Glomar response"); Larson, 565 F.3d at 870 (concluding that district court did not abuse its discretion in declining to view withheld records or classified declaration where agency's public submissions were adequate); Mo. Coal., 542 F.3d at 1210 (finding that in camera review not necessary because agency affidavits and Vaughn Index contained sufficient detail); Juarez, 518 F.3d at 60 (concluding that when district court determined that agency affidavits "properly placed the withheld documents within the scope of Exemption 7(A)," it did not need to reach the question of in camera review); Nowak v. United States, 210 F.3d 384, 384 (9th Cir. 2000) (finding in camera review unnecessary where affidavits were sufficiently detailed) (unpublished table decision); Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992) (rejecting in camera inspection when affidavits and Vaughn Indices were sufficiently specific); Silets v. DOJ, 945 F.2d 227,

insufficiently detailed to permit meaningful review, in camera review remains an option available to courts to evaluate agency exemption claims.[300]

The District Court of the District of Columbia has noted that in camera review "may be appropriate" when "'the number of records involved is relatively small,'" "'a discrepancy exists between an agency's affidavit and other information that the agency has publicly disclosed,'" and "'when the dispute turns on the contents of the documents, and not the parties' interpretations of the documents.'"[301] Additionally, in cases involving

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229-32 (7th Cir. 1991) (en banc) (same); Vaughn, 936 F.2d at 869 (finding in camera review "neither favored nor necessary where other evidence provides adequate detail and justification").

[300] See, e.g., Islamic Shura Council of S. Cal. v. FBI, 635 F.3d 1160, 1166 (9th Cir. 2011) ("If the [agency's] affidavits are too vague, the court 'may examine the disputed documents in camera to make a first hand determination of their exempt status.'"); Spirko v. USPS, 147 F.3d 992, 997 (D.C. Cir. 1998) ("If the agency fails to provide a sufficiently detailed explanation to enable the district court to make a de novo determination of the agency's claims of exemption, the district court then has several options, including inspecting the documents in camera."); Quiñon v. FBI, 86 F.3d 1222, 1229 (D.C. Cir. 1996) ("[W]here an agency's affidavits merely state in conclusory terms that documents are exempt from disclosure, an in camera review is necessary."); In re DOJ, 999 F.2d 1302, 1310 (8th Cir. 1993) (en banc) ("If the [Vaughn Index] categories remain too general, the district court may also examine the disputed documents in camera to make a first hand determination."); City of Va. Beach v. Dep't of Commerce, 995 F.2d 1247, 1252 n.12 (4th Cir. 1993) ("By conducting an in camera review, the district court established an adequate basis for its decision."); Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988) ("[W]here a trial court properly reviewed contested documents in camera, an adequate factual basis for the decision exists.").

[301] People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 307 (D.D.C. 2007) (quoting Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 119 (D.D.C. 2005)); accord Quiñon, 86 F.3d at 1228 (suggesting that number of documents is "another . . . factor to be considered" when determining whether in camera review is appropriate); Maynard v. CIA, 986 F.2d 547, 558 (1st Cir. 1993) ("In camera review is particularly appropriate when the documents withheld are brief and limited in number."); see also Elec. Privacy Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 82-83 (D.D.C. 2008) (stating that in camera review is appropriate where agency affidavits are deficient with respect to segregability analysis and relatively few number of documents are at issue); Cole v. DOJ, No. 05-674, 2006 WL 2792681, at *5 (D.D.C. Sept. 27, 2006) (stating that in camera review is appropriate when "the affidavit is 'insufficiently detailed to permit meaningful review of exemption claims' . . . where there is evidence of bad faith on the part of the agency, or where the judge wishes to resolve an uneasiness about the government's 'inherent tendency to resist disclosure'") (citations omitted); Dean v. FDIC, 389 F. Supp. 2d 780, 789 (E.D. Ky. 2005) (stating that following factors should be considered when determining whether in camera review is appropriate: "'(1) judicial economy; (2) actual agency bad faith, either in the FOIA action or in the underlying activities that generated the records requested; (3) strong public interest;

a large number of documents, the court may conduct in camera review of a smaller subset.[302]

In camera review has also been utilized to evaluate whether the government waived its right to claim an exemption,[303] properly invoked a privilege,[304] or withheld information that was publicly available.[305] Further, in camera inspection has been used

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and (4) whether the parties request in camera review'" (quoting Rugiero v. DOJ, 257 F.3d 534, 543 (6th Cir. 2001))).

[302] See, e.g., Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 393 n.16 (D.C. Cir. 1987) (suggesting that for voluminous documents, "selective inspection of . . . documents [is] often an appropriate compromise"); Dickstein Shapiro LLP v. DOD, 730 F. Supp. 2d 6, 10 (D.D.C. 2010) (ordering in camera review of representative sample of five percent of responsive records to be chosen by both parties that "fairly and equally represent the particular FOIA exemptions at issue"); N.Y. Pub. Interest Res. Group v. EPA, 249 F. Supp. 2d 327, 331 (S.D.N.Y. 2003) (discussing fact that in camera review was conducted of representative sample of documents); Wilson v. CIA, No. 89-3356, 1991 WL 226682, at *3 (D.D.C. Oct. 15, 1991) (ordering fifty-document sample of approximately 1000 pages withheld in whole or in part, selected equally by parties, for in camera examination); Wilson v. DOJ, No. 87-2415, 1991 WL 120052, at *4 (D.D.C. June 18, 1991) (requiring sample of eight of approximately eighty withheld documents, to be selected equally by each side, for detailed in camera description).

[303] See, e.g., Tigue v. DOJ, 312 F.3d 70, 82 (2d Cir. 2002) (concluding, following in camera inspection, that "even the limited factual material admittedly in the public domain is too intertwined with evaluative and policy decisions to require disclosure"); ACLU v. DOJ, No. 12-794, 2015 WL 4470192, at *15 (S.D.N.Y. July 16, 2015) (finding that because "[i]t is not possible to ascertain whether the privileges with respect to some, or all, of [the documents] have been wavied . . . the court orders in camera review of these documents"), aff'd in pertinent part & remanded on other grounds, 844 F.3d 126 (2d Cir. 2016).

[304] See, e.g., McKinley v. Fed. Housing Fin. Agency, 789 F. Supp. 2d 85, 89-90 (D.D.C. 2011) (ordering agency to submit two documents for in camera review in order to ascertain applicability of attorney work-product privilege).

[305] See, e.g., Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (conducting in camera review to determine whether withheld information has been revealed in publicly available report published by agency).

to verify that an agency has released all reasonably segregable information,[306] and to ascertain whether a district court properly ruled on the merits of a case.[307]

Although mere allegations of bad faith have been found to be insufficient to justify use of in camera inspection,[308] the Court of Appeals for the District of Columbia Circuit has noted that such review may be appropriate if there were evidence of bad faith.[309] In

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[306] See, e.g., ACLU v. DOD, 543 F.3d 59, 85 (2d Cir. 2008) (noting that district court conducted in camera review of photographs in order to ensure the adequacy of proposed redactions), vacated on other grounds, 130 S. Ct. 777, 777 (2009); Allard K. Lowenstein Int'l Hum. Rts. Project v. DHS, 603 F. Supp. 2d 354, 360-61 (D. Conn. 2009) (determining that, based on in camera review, agency's applications of exemptions was appropriate and "there is no further reasonably segregable portion of any document at issue beyond which the Court has ordered disclosed"), aff'd, 626 F.3d 678 (2d Cir. 2010); Jefferson v. DOJ, No. 01-1418, slip op. at 31 n.13 (D.D.C. Mar. 31, 2003) (deciding to hold in abeyance segregability determination for documents claimed to be exempt on basis of Exemption 5 of the FOIA until in camera inspection is completed); Citizens Progressive Alliance v. U.S. Bureau of Indian Affs., 241 F. Supp. 2d 1342, 1359 (D.N.M. 2002) (noting that "all segregable portions of the documents have been released," a finding verified by in camera inspection).

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

[308] See Mobley, 806 F.3d at 588 (concluding that district court did not abuse its discretion by failing to conduct in camera review of classified documents where plaintiff did not show agency affidavits were insufficient and did not offer evidence of bad faith); ACLU v. DOD, 628 F.3d 612, 627 (D.C. Cir. 2011) (finding plaintiff's "claim that the government acted in bad faith . . . meritless" and concluding, on that basis, that "district court did not abuse its discretion by granting the government's motion for summary judgment without conducting in camera review"); Rugiero v. DOJ, 257 F.3d 534, 547 (6th Cir. 2001) (finding that requester failed to demonstrate "strong evidence of bad faith that calls into question the district court's decision not to conduct an in camera review"); Ford v. West, 149 F.3d 1190, 1190 (10th Cir. 1998), ("'[M]ere allegations of bad faith' should not 'undermine the sufficiency of agency submissions.'" (quoting Minier v. CIA, 88 F.3d 796, 803 (9th Cir. 1996))) (unpublished table decision); Silets, 945 F.2d at 231 (finding mere assertion, as opposed to actual evidence, of bad faith on part of agency insufficient to warrant court's in camera review); Hall v. CIA, 881 F. Supp. 2d 38, 75 (D.D.C. 2012) (declining to conduct in camera review even though plaintiff cited two instances of inadequate segregability because "[w]hen thousands upon thousands of pages of records are involved, it is inevitable that some unnecessary redactions will be made" and given that they are "minor" and there is no evidence of bad faith, in camera review is not necessary); Askew v. United States, No. 05-200, 2006 WL 3307469, at *7 (E.D. Ky. Nov. 13, 2006) (holding that "the plaintiff has not overcome the presumption of good faith attending the Vaughn Index and, thus, . . . a wholesale in camera inspection of the documents is not necessary").

[309] See Quiñon, 86 F.3d at 1228 (observing that "in camera review may be particularly appropriate when either the agency affidavits are insufficiently detailed to permit

camera inspection has also been undertaken based upon concerns regarding the underlying activities described in the documents.[310]

Finally, courts have permitted agencies leave to file in camera declarations once they have created as complete a public record as possible by means of their court submissions.[311] However, the D.C. Circuit has noted that in camera declarations are

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meaningful review of exemption claims or there is evidence of bad faith on the part of the agency").

[310] See Jones, 41 F.3d at 242-43 (reviewing, at request of both parties, documents compiled as part of FBI's widely criticized COINTELPRO operations during 1960s and 1970s because of "evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue"); Habeas Corpus Res. Ctr. v. DOJ, No. 08-2649, 2008 WL 5000224, at *1 (N.D. Cal. Nov. 21, 2008) (reviewing documents in camera where plaintiff alleged that "certain interests may have been permitted to exercise undue influence over the development of [a] regulation"); Hiken v. DOD, 521 F. Supp. 2d 1047, 1055-56 (N.D. Cal. 2007) (ordering in camera review to supplement agency declaration because "while the record does not support a finding of bad faith . . . defendants' underlying activities with respect to Iraq and the accuracy of government disclosures about activities in Iraq is sufficient to raise questions in the mind of the public as to the defendant's good faith or lack thereof"); see also Summers v. DOJ, 140 F.3d 1077, 1085 (D.C. Cir. 1998) (urging district court on remand to undertake in camera review of "Official and Confidential" files of former FBI Director J. Edgar Hoover "to fully understand the enormous public interest in these materials"). But see, e.g., Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 125 (D.C. Cir. 1999) (holding that alleged "evidentiary discrepancies" identified in published materials concerning highly publicized suicide of a former Deputy White House Counsel was not evidence of bad faith warranting in camera review of death-scene and autopsy photographs).

[311] See, e.g., Agrama v. IRS, No. 17-5270, 2019 WL 2064505, at *2 (D.C. Cir. Apr. 19, 2019) (holding that district court acted within its discretion in finding good cause for permitting *ex parte* submissions because "requiring the IRS to produce further 'public justification would threaten to reveal the very information for which a FOIA exemption is claimed'" (quoting Lykins v. U.S. Dep't of Justice, 725 F.2d 1455, 1463 (D.C. Cir. 1984))); Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1083 (9th Cir. 2004) (holding that "resort to in camera review is appropriate only after [agency] has submitted as much detail in the form of public affidavits and testimony as possible"); Elec. Privacy Info. Ctr. v. DEA, 14-317, 2019 WL 3592656, at *5 (D.D.C. Aug. 9, 2019) (finding in camera inspection appropriate after "a redacted version of [defendant's] declaration was filed on the public docket, and this redacted version explains the justifications for why the DEA submitted it *in camera*"); Pub. Citizen v. Dep't of State, 100 F. Supp. 2d 10, 27 (D.D.C. 2000) (explaining that "[w]hile . . . in camera declarations are disfavored as a first line of defense," the agency had already submitted "three public declarations" amounting to a "threshold showing on the public record"), aff'd in pertinent part & rev'd in part on other grounds, 276 F.3d 674 (D.C. Cir. 2002); see also Jarvik v. CIA, 741 F. Supp. 2d 106, 111-13 (D.D.C. 2010) (permitting agency leave to file in camera Vaughn declaration where court "cannot meaningfully review the defendant's actions based on the current public record and the CIA cannot provide further information on the public record" due to national security concerns); Barnard v. DHS, 598

generally "disfavored."[312] Regardless of whether the court inspects documents or receives testimony in camera, however, courts have found that counsel for the plaintiff ordinarily are not entitled to participate in these in camera proceedings.[313]

Summary Judgment

Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved,[314] because "in FOIA cases there is rarely any factual dispute . . . only a legal

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F. Supp. 2d 1, 16-17 (D.D.C. 2009) (explaining that court granted leave to submit in camera affidavit where agency could not release any additional information about investigation without revealing precise information that it sought to withhold); cf. Pub. Citizen Health Res. Group v. Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978) (ruling that district court should not have refused to examine affidavit proffered in camera in an Exemption 6 case, because affidavit was "the only matter available . . . that would have enabled [the court] to properly decide de novo the propriety of" the agency's exemption claim); cf. Armstrong, 97 F.3d at 580 (holding that district court "must both make its reasons for [relying on an in camera declaration] clear and make as much as possible of the in camera submission available to the opposing party" (citing Lykins, 725 F.2d at 1465)); Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (requiring "as complete a public record as is possible" before examining classified affidavits in camera).

[312] Armstrong, 97 F.3d at 580-81.

[313] See Solar Sources, Inc. v. United States, 142 F.3d 1033, 1040 (7th Cir. 1998) ("[T]he general rule is that counsel are not entitled to participate in in camera FOIA proceedings."); Arieff v. Dep't of Navy, 712 F.2d 1462, 1470-71 & n. 2 (D.C. Cir. 1983) (prohibiting participation by plaintiff's counsel even when information withheld was personal privacy information); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (finding no reversible error when court not only reviewed affidavit and documents in camera, but also received authenticating testimony ex parte); Salisbury v. United States, 690 F.2d 966, 973 n. 3 (D.C. Cir. 1982) (finding no error "in the decision of the District Court to exclude appellant's counsel from the *ex parte* proceedings"); Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) (holding District Court "was correct in following our directions and excluding counsel from the *in camera* viewing.").

[314] See World Publ'g Co. v. DOJ, 672 F.3d 825, 832 (10th Cir. 2012) ("In general FOIA cases are resolved on summary judgment"); Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1243 (11th Cir. 2008) ("'Generally, FOIA cases should be handled on motions for summary judgment, once the documents at issue are properly identified.'" (quoting Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993))); Wickwire Gavin, P.C. v. USPS, 356 F.3d 588, 591 (4th Cir. 2004) (declaring that FOIA cases are generally resolved on summary judgment); Cooper Cameron Corp. v. Dep't of Labor, 280 F.3d 539, 543 (5th Cir. 2002) ("Summary judgment resolves most FOIA cases."); Moore v. Bush, 601 F. Supp. 2d 6, 12 (D.D.C. 2009) ("FOIA cases are typically and appropriately decided on motions for summary judgment."); Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs, 183 F. Supp. 2d 1280, 1283 (D. Kan. 2001) ("FOIA cases . . . are especially amenable to summary judgment because the law, rather than the facts, is the only matter in dispute."); Sanderson v. IRS, No.

dispute over how the law is to be applied to the documents at issue."[315] Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which provides, in part, that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[316]

Courts have held that "summary judgment is available to a defendant agency where 'the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.'"[317] The FOIA provides that in litigation, the agency has the burden of justifying nondisclosure.[318] Agencies typically meet their burden by submitting detailed affidavits or declarations[319] that identify the documents at issue and explain why they fall under the claimed exemptions.[320] Relatedly, a defendant agency

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98-2369, 1999 WL 35290, at *2 (E.D. La. Jan. 25, 1999) (observing that summary judgment is the usual means for disposing of FOIA cases).

[315] Gray v. Sw. Airlines, Inc., 33 F. App'x 865, 869 n.1 (9th Cir. 2002) (citing Schiffer v. FBI, 78 F.3d 1405, 1409 (9th Cir. 1996)) (non-FOIA case); see Yonemoto v. VA, 686 F.3d 681, 688 (9th Cir. 2012).

[316] Fed. R. Civ. P. 56(a); see, e.g., Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 314 (D.C. Cir. 1988) (concluding that agency's affidavit "discharged its burden and that no genuine issue of material fact was presented"); Milton v. DOJ, 596 F. Supp. 2d 63, 66-67 (D.D.C. 2009) (granting defendant's motion for summary judgment on basis that there is no genuine issue of material fact because plaintiff failed to dispute any of defendant's factual assertions); Kuffel v. BOP, 882 F. Supp. 1116, 1122 (D.D.C. 1995) (holding that plaintiff's disagreement with application of exemptions does not constitute dispute as to material facts precluding summary judgment "because he does not put forth any facts to prove that they were wrongfully applied").

[317] Mo. Coal. v. U.S. Army Corp. of Eng'rs, 542 F.3d 1204, 1209 (8th Cir. 2008) (citing Miller v. Dep't of State, 779 F.2d 1378, 1382 (8th Cir. 1985)); see Media Res. Ctr. v. DOJ, 818 F. Supp. 2d 131, 137 (D.D.C. 2011) (same).

[318] See 5 U.S.C. § 552(a)(4)(B) (2012 & Supp. V 2017); see DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989); Campaign for Responsible Transplantation v. FDA, 511 F.3d 187, 190 (D.C. Cir. 2007); Wishart v. Comm'r, 199 F.3d 1334, 1334 (9th Cir. 1999) (unpublished table decision).

[319] See 28 U.S.C. § 1746 (2019) (providing for use of unsworn declarations under penalty of perjury); see also, e.g., Carney v. DOJ, 19 F.3d 807, 812 n.1 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994); Summers v. DOJ, 999 F.2d 570, 572-73 (D.C. Cir. 1993).

[320] See, e.g., ACLU v. DOJ, 681 F.3d 61, 69 (2d Cir. 2012); ACLU v. DOD, 628 F.3d 612, 619 (D.C. Cir. 2011); Wilner v. NSA, 592 F.3d 60, 73 (2d Cir. 2009); Berman v. CIA, 501 F.3d 1136, 1140 (9th Cir. 2007).

that has referred records to an originating agency for processing ordinarily satisfies its obligation by including with its own court submissions declarations from those originating agencies which address any withholdings made in the referred records.[321] (For a further discussion of agency referral and consultation practices, see Procedural Requirements, Consultations and Referrals, above.) Summary judgment may be granted solely on the basis of agency affidavits if they are clear, specific, reasonably detailed, describe the withheld information in a factual and nonconclusory manner, and there is no contradictory evidence on the record or evidence of agency bad faith.[322] By contrast, when agency declarations are not sufficiently detailed, courts have denied summary judgment.[323] (For a further discussion of Vaughn Indices, see Litigation Considerations, Vaughn Index, above.)

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[321] See, e.g., Fitzgibbon v. CIA, 911 F.2d 755, 757 (D.C. Cir. 1990) (noting that CIA asserted Exemptions 1, 3 and 6 with respect to records referred to it by FBI); Lewis v. DOJ, 867 F. Supp. 2d 1, 24 (D.D.C. 2011) (denying summary judgment on basis that defendant failed to account for results of its referral to another agency); King v. DOJ, 772 F. Supp. 2d 14, 20 (D.D.C. 2010) (finding that DEA justified its withholdings with respect to records referred to it by means of detailed declaration and Vaughn Index); Keys v. DHS, 570 F. Supp. 2d 59, 63-72 (D.D.C. 2008) (evaluating additional submissions from defendant agency showing how four other agencies processed referred records).

[322] See, e.g., ACLU, 681 F.3d at 69; ACLU, 628 F. 3d at 619; L.A. Times Commc'ns v. Dep't of the Army, 442 F. Supp. 2d 880, 899-900 (C.D. Cal. 2006) (granting summary judgment based on agency's detailed and nonconclusory declarations, and noting that agency's position "is not controverted by contrary evidence in the record or any evidence of agency bad faith"); Lane v. DOJ, No. 02-6555, 2006 WL 1455459, at *11 (E.D.N.Y. May 22, 2006) (granting summary judgment "because the defendants provide a detailed and non-conclusory affidavit that indicates there is no genuine factual dispute"); Assassination Archives & Res. Ctr. v. CIA, 177 F. Supp. 2d 1, 8 (D.D.C. 2001) (pointing out that "mere assertion of bad faith is not sufficient to overcome a motion for summary judgment" (citing Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979))), aff'd, 334 F.3d 55 (D.C. Cir. 2003); Barvick v. Cisneros, 941 F. Supp. 1015, 1018 (D. Kan. 1996) (declaring that summary judgment is available "when the agency offers adequate affidavits establishing that it has complied with its FOIA obligations").

[323] See, e.g., Rein v. U.S. Patent & Trademark Office, 55 F.3d 353, 367-71 (4th Cir. 2009) (reversing district court's grant of summary judgment with respect to application of Exemption 5 because Vaughn Index provided an insufficient factual basis); Niagara Mohawk Power Corp. v. DOE, 169 F.3d 16, 18 (D.C. Cir. 1999) (finding agency affidavits conclusory and denying summary judgment despite plaintiff's failure to controvert agency assertions by remaining silent); Kamman v. IRS, 56 F.3d 46, 49 (9th Cir. 1995) (finding that agency failed to satisfy burden of proof and awarding summary judgment to plaintiff when agency affidavits "are nothing more than 'conclusory and generalized allegations'"); Lombard v. U.S. Dep't of State, No. 11-2755, 2012 WL 3780455, at *2 (E.D. La. Aug. 31, 2012) (denying agency's motion for summary judgment because "conclusory allegations that [the defendant] made an appropriate response are insufficient to merit summary relief"); Voinche v. FBI, 46 F. Supp. 2d 26, 30 (D.D.C. 1999) (denying summary judgment when agency provided conclusory affidavit to support invocation of Exemption 7(A)).

The affidavit or declaration of an agency official who is knowledgeable about the way in which information is processed and is familiar with the documents at issue has been found to satisfy the personal knowledge requirement for summary judgment declarations.[324] Similarly, in instances in which an agency's search is challenged, an affidavit of an agency employee responsible for coordinating the search efforts has been

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[324] See, e.g., Spannaus v. DOJ, 813 F.2d 1285, 1289 (4th Cir. 1987) (holding that declarant's attestation "to his personal knowledge of the procedures used in handling [the] request and his familiarity with the documents in question" is sufficient); Adamowicz v. IRS, 402 F. App'x 648, 650 (2d Cir. 2010) (rejecting plaintiff's claim that declaration was based on hearsay where affiant "maintained supervisory responsibility over the first FOIA request and worked directly with IRS attorneys . . . the two individuals identified as potentially having relevant records – to compile and review responsive documents"); Flores v. DOJ, No. 17-0036, 2019 WL 3491226, at *5 (D.D.C. Aug. 1, 2019) (holding that although declarants were not personally involved in every part of search, declarations sufficiently establish declarants' personal knowledge of relevant FOIA procedures and search methods employed); Inst. for Pol'y Stud. v. CIA, 885 F. Supp. 2d 120, 134 (D.D.C. 2012) (denying plaintiff's motion to strike portions of agency's declarations for lack of personal knowledge because "[a] declarant is deemed to have personal knowledge if he has a general familiarity with the responsive records and procedures used to identify those records and thus is not required to independently verify the information contained in each responsive record"); Am. Mgmt. Servs., LLC v. Dep't of Army, 842 F. Supp. 2d 859, 867, (E.D. Va. Jan. 23, 2012) (finding declarant adequate where "it is apparent from [the declarant's] specific averments regarding personal knowledge, his position in the [agency], his role in this matter, and the contents of the declaration itself that [he] has personal knowledge of the procedures used in handling [plaintiff's] request and familiarity with the documents at issue"), aff'd, 703 F.3 724 (4th Cir. 2013); Barnard v. DHS, 598 F. Supp. 2d 1, 19 (D.D.C. 2009) (rejecting plaintiff's argument that declarations contained inadmissible hearsay, because "FOIA declarants may include statements in their affidavits based on information that they have obtained in the course of their official duties"); Gerstein v. DOJ, No. 03-04893, 2005 U.S. Dist. LEXIS 41276, at *13-14 (N.D. Cal. Sept. 30, 2005) (denying plaintiff's motion to strike agency's declaration, inasmuch as declarant permissibly included "facts relayed from individuals who had first-hand knowledge," and because declarant had "first-hand knowledge of what happens when a court seals a warrant"); Schrecker v. DOJ, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (rejecting argument that affidavit was hearsay because affiant was "responsible for the FBI's compliance with FOIA litigation and is therefore not merely speculating about the FBI activities"), aff'd, 349 F.3d 657 (D.C. Cir. 2003); Avondale Indus. v. NLRB, No. 96-1227, 1998 WL 34064938, at *3 (E.D. La. Mar. 23, 1998) (holding that there is no requirement that author of records prepare Vaughn Index); Cucci v. DEA, 871 F. Supp. 508, 513 (D.D.C. 1994) (finding that declarant "had the requisite personal knowledge based on her examination of the records and her discussion with a representative of the [state police]" to attest that information was provided with express understanding of confidentiality).

found to satisfy the personal knowledge requirement.[325] Likewise, in justifying the withholding of classified information under Exemption 1, courts have found that the affiant is required only to possess document-classification authority for the records in question, not personal knowledge of the particular substantive area that is the subject of the request.[326] Courts have disregarded legal conclusions contained in agency affidavits and denied summary judgment in instances where the agency declarant's statements are conclusory.[327]

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[325] See, e.g., Carney v. DOJ, 19 F.3d 807, 814 (2d Cir. 1994), aff'g in pertinent part, rev'g & remanding in part, No. 92-6204, slip op. at 12 (W.D.N.Y. Apr. 27, 1993) ("There is no basis in either the statute or the relevant case law to require that an agency effectively establish by a series of sworn affidavits a 'chain of custody' over its search process. The format of the proof submitted by defendant – declarations of supervisory employees, signed under penalty of perjury – is sufficient for purposes of both the statute and Fed. R. Civ. P. 56."); Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) ("[A]n agency need not submit an affidavit from the employee who actually conducted the search. Instead, an agency may rely on an affidavit of an agency employee responsible for supervising the search."); SafeCard Servs. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991) (finding that employee "in charge of coordinating the [agency's] search and recovery efforts [is the] most appropriate person to provide a comprehensive affidavit"); Nat. Res. Def. Council v. Wright-Patterson AFB, No. 10-3400, 2011 U.S. Dist. LEXIS 85387, at *11-12 (S.D.N.Y. Aug. 3, 2011) (concluding agency declarants are adequate where declarant supervised searches and processing, and reviewed administrative appeal); Griffin v. EOUSA, 774 F. Supp. 2d 322, 325 n.4 (D.D.C. 2011) (rejecting plaintiff's contention that declaration fails to meet "'personal knowledge' requirement" of Rule 56(c)(4) and finding that declarant "is competent to testify to the matters at hand" where he supervised search for, and release of, responsive records); Rosenfeld v. DOJ, No. 07-3240, 2010 WL 3448517, at *7 (N.D. Cal. Sept. 1, 2010) (dismissing plaintiff's argument that declarant is inadequate where he supervised FOIA searches, and "personally reviewed search notes, search slips, and other documentation regarding search results"); Willis v. DOJ, 581 F. Supp. 2d 57, 66 (D.D.C. 2008) (noting that agency affidavits "may be submitted by an official who coordinated the search, and need not be from each individual who participated in the search"); cf. Prison Legal News v. Lappin, 603 F. Supp. 2d 124, 127-28 (D.D.C. 2009) (requiring agency to conduct new search or to provide new search affidavit when affiant did not "outline search methods undertaken," identify "who would have conducted the searches," or "indicate how he is personally aware of the search procedures or that he knows they were followed by each of [BOP's] entities tasked with responding to [plaintiff's] request").

[326] See Wolf v. CIA, 473 F.3d 370, 375 n.5 (D.C. Cir. 2007) (finding that affidavit reflected personal knowledge as to "the classified nature of information related to the existence or nonexistence of records" where affiant held a position on document review panel chaired by official with original classification authority); Holland v. CIA, No. 92-1233, 1992 WL 233820, at *8-9 (D.D.C. Aug. 31, 1992).

[327] See, e.g., Callaway v. U.S. Dep't of Treasury, No. 08-5480, 2009 U.S. App. LEXIS 11941, at *5-6 (D.C. Cir. June 2, 2009) (per curiam) (remanding to district court for further proceedings where "government's affidavits state only legal conclusions regarding segregability, and the Vaughn index does not explain why responsive documents containing

The Court of Appeals for the District of Columbia Circuit has held that "purely speculative" claims raised by FOIA plaintiffs are not sufficient to overcome the presumption of good faith accorded to agency affidavits.[328] The D.C. Circuit has further held that "a motion for summary judgment adequately underpinned is not defeated simply by bare opinion or an unaided claim that a factual controversy persists."[329] For

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information such as names or administrative codes could not be redacted and released"); Kensington Res. & Recovery v. HUD, 620 F. Supp. 2d 908, 909 n.1 (N.D. Ill. 2009) (disregarding statements in agency's affidavits that "constitute legal conclusions or do not relate to HUD business"); Doolittle v. DOJ, 142 F. Supp. 2d 281, 285 n.5 (N.D.N.Y. 2001) (noting that "[t]he practice of submitting legal arguments through the declaration . . . is improper, and such arguments will not be considered.").

[328] SafeCard Servs. Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (finding plaintiff's "purely speculative" claims concerning adequacy of agency's search "support neither the allegation that [agency's] search procedures were inadequate, nor an inference that it acted in bad faith"); see, e.g., CareToLive v. FDA, 631 F.3d 336, 345 (6th Cir. 2011) ("'speculation that the information requested must exist also does not establish that the search was unreasonable'" (citing Steinburg v. DOJ, 23 F.3d 548, 552 (D.C. Cir. 1994)); In re Wade, 969 F.2d 241, 246 (7th Cir. 1992) ("Without evidence of bad faith, the veracity of the government's submissions regarding reasons for withholding the documents should not be questioned."); Hall v. CIA, 881 F. Supp. 2d 38, 62 (D.D.C. 2012) (granting in part agency's motion for summary judgment, finding that agency not required to search for records that plaintiffs speculate should have been created because no indication these records actually were created); Mingo v. DOJ, 793 F. Supp. 2d 447, 452 (D.D.C. 2011) ("An agency's declarations are 'accorded a presumption of good faith, which cannot be rebutted by purely speculative claims'" (quoting, in part, SafeCard Servs., 926 F.2d at 1200)); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 518 (S.D.N.Y. 2010) (noting that "[o]nce the adequacy of the Government's affidavits is established, they benefit from a presumption of good faith, which 'cannot be rebutted by purely speculative claims about the existence and discoverability of other documents'") (citation omitted); Sephton v. FBI, 365 F. Supp. 2d 91, 97 (D. Mass. 2005) (declaring that plaintiff's evidence "is insufficient to rebut the presumption of good faith" given to agency's affidavits), aff'd, 442 F.3d 27 (1st Cir. 2006); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 962 (C.D. Cal. 2003) ("Disagreeing with the [agency's] conclusion [concerning applicability of an exemption] is not a reason to challenge the Vaughn Index."), appeal dismissed voluntarily, No. 03-55833 (9th Cir. Aug. 26, 2003).

[329] Alyeska Pipeline, 856 F.2d at 314; see, e.g., Lee v. U.S. Att'y for the S. Dist. of Fla., 289 F. App'x 377, 381 (11th Cir. 2008) (determining that district court did not err in granting summary judgment because plaintiff "failed to show a genuine issue of material fact as to the reasonableness of the search for responsive records or defendants' good faith in conducting the search and providing responsive records"); Mace v. EEOC, 197 F.3d 329, 330 (8th Cir. 1999) ("[S]peculative claims about [the] existence of other documents cannot rebut [the] presumption of good faith afforded [to] agency affidavits." (citing SafeCard Servs., 926 F.2d at 1200)); Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978) ("Conclusory allegations unsupported by factual data will not create a triable issue of fact."); Span v. DOJ, 696 F. Supp. 2d 113, 119 (D.D.C. 2010) (determining that plaintiff's "boilerplate allegations

example, courts have granted summary judgment when the plaintiff merely raised unsupported claims that the agency was withholding information that already was in the public domain.[330]

Moreover, courts often take into account an agency's predictive judgment with respect to potential harm, particularly in cases in which disclosure would compromise national security.[331] Courts have consistently held that "'a requester's opinion disputing the risk created by disclosure is not sufficient to preclude summary judgment for the agency when the agency possessing the relevant expertise has provided sufficiently detailed affidavits.'"[332]

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of bad faith do not constitute the 'specific facts' required to threaten the good faith presumption" (quoting DOJ v. Tax Analysts, 492 U.S. 136, 142 (1989))); Hadden v. BOP, No. 07-8586, 2008 WL 5429823, at *8 (S.D.N.Y. Dec. 22, 2008) (finding that plaintiff's good faith belief and his conclusory allegations that videotape exists are not sufficient to withstand defendant's motion for summary judgment); Germosen v. Cox, No. 98-1294, 1999 WL 1021559, at *18-19 (S.D.N.Y. Nov. 9, 1999) (ruling that plaintiff cannot defeat summary judgment by speculating that further evidence will develop to support his allegations), appeal dismissed for failure to prosecute, No. 00-6041 (2d Cir. Sept. 12, 2000).

[330] See Grandison v. DOJ, 600 F. Supp. 2d 103, 116-17 (D.D.C. 2009) (finding that plaintiff's assertions and his production of excerpts of requested records were insufficient to show that all information at issue was in the public domain and granting agency's motion for summary judgment); Steinberg v. DOJ, 179 F.R.D. 357, 360 (D.D.C. 1998) (finding that summary judgment is not defeated "with pure conjecture about the possible content of withheld information, raising 'some metaphysical doubt as to the material facts'" (quoting Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986))).

[331] See ACLU, 681 F.3d at 69 (stating that court has "'consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake a searching judicial review'" (quoting Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 927 (D.C. Cir. 2003))); ACLU, 628 F.3d at 619 ("Because courts 'lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case,' . . . we 'must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'") (citations omitted); Houghton v. NSA, 378 F. App'x 235, 237 (3d Cir. 2010) ("In the context of a national security exemption to disclosure under FOIA Exemption One, courts 'afford substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record'").

[332] Allnet Commc'n v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (quoting Struth v. FBI, 673 F. Supp. 949, 954 (E.D. Wis. 1987)); see, e.g., ACLU, 628 F.3d at 623-26 (Exemption 1); Alyeska Pipeline, 856 F.2d at 314 (Exemption 7(A)); Goldberg v. Dep't of State, 818 F.2d 71, 78-79 (D.C. Cir. 1987) (Exemption 1); Spannaus v. DOJ, 813 F.2d at 1289 (Exemption 7(A)); Curran v. DOJ, 813 F.2d 473, 477 (1st Cir. 1987) (Exemption 7(A)); Gardels v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982) (Exemptions 1 and 3); People for the Am. Way Found. v. NSA/Cent. Sec. Serv., 462 F. Supp. 2d 21, 33-34 (D.D.C. 2006) (Exemption 1); Edmonds v. DOJ, 405 F. Supp. 2d 23, 27-30 (D.D.C. 2005) (Exemption 1); Whalen v. U.S. Marine Corps,

Additionally, a plaintiff – even one appearing pro se – has been found to have conceded the government's factual assertions if he fails to contest them, once it is clear that he understands his responsibility to do so.[333]

An agency's failure to respond to a FOIA request in a timely manner does not, by itself, justify an award of summary judgment to the requester.[334] Summary judgment has

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407 F. Supp. 2d 54, 56-59 (D.D.C. 2005) (Exemptions 1 and 3); Kay v. FCC, 867 F. Supp. 11, 20-22 (D.D.C. 1994) (Exemption 7(A)).

[333] See Augustus v. McHugh, 870 F. Supp. 2d 167, 171-73 (D.D.C. 2012) (granting defendant's motion for summary judgment as conceded where plaintiff failed to challenge agency's justifications for withholding certain information); Skybridge Spectrum Found. v. FCC, 842 F. Supp. 2d 65, 77-79 (D.D.C. 2012) (granting FCC's motion for summary judgment on basis that plaintiff conceded merits of FCC's withholding decisions, but additionally finding that agency's affidavits were sufficient to support its motion for summary judgment); Davis v. DOJ, No. 09-0008, 2009 U.S. Dist. LEXIS 69318, *1 (D.D.C. Aug. 7, 2009) (granting FBI's motion for summary judgment as conceded where court advised pro se plaintiff of his obligation to file an opposition and warned him of consequences of failure to do so); Geter v. Sydnor, No. 08-1863, 2009 WL 320322, at *1 (D.D.C. Feb. 9, 2009) (dismissing plaintiff's complaint based on his failure to respond to defendant's motion to dismiss or for summary judgment and, accordingly, material facts alleged by defendant are taken as conceded); McNamara v. Nat'l Credit Union Ass'n, 264 F. Supp. 2d 1, 4 (D.D.C. 2002) (treating as conceded defendant's statement of material facts because plaintiff filed motion to dismiss without prejudice rather than opposition to summary judgment motion); Knight v. FDA, No. 95-4097, 1997 WL 109971, at *1 (D. Kan. Feb. 11, 1997) (accepting as "reasonable and fair" agency's processing of plaintiff's request and granting agency summary judgment "[i]n the absence of any argument from the plaintiff"); see also Hart v. FBI, No. 94 C 6010, 1995 WL 170001, at *2 (N.D. Ill. Apr. 7, 1995) (holding that "plaintiff has not asserted any facts which convince this Court that the FBI has any records which relate to him or has failed to conduct an adequate search"), aff'd, 91 F.3d 146 (7th Cir. July 16, 1996) (unpublished table decision); cf. Ruotolo v. IRS, 28 F.3d 6, 8-9 (2d Cir. 1994) (finding that although plaintiffs were generally aware of summary judgment rules, district court should have specifically notified them of consequences of not complying with litigation deadlines before dismissing case).

[334] See Jacobs v. BOP, 725 F. Supp. 2d 85, 89 (D.D.C. 2010) (ruling that "BOP's untimely response does not entitle plaintiff to summary judgment in his favor"); Mosby v. Hunt, No. 09-1917, 2010 WL 1783536, at *3 (D.D.C. May 5, 2010) ("Because the Court is authorized under the FOIA only to resolve whether an agency improperly withheld responsive records, 'however fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform.'" (quoting Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982))); Schmidt v. Shah, No. 08-2185, 2010 U.S. Dist. LEXIS 25539, at *29 (D.D.C. Mar. 18, 2010) (noting that "'a lack of timeliness or compliance with FOIA deadlines does not preclude summary judgment for an agency, nor mandate summary judgment for the requester'") (citation omitted); Ford Motor Co. v. U.S. Customs & Border Prot., No. 06-13346, 2008 WL 4899402, at *7 (E.D.

also been granted despite discrepancies in the agency's page counts, particularly when the agency has processed a voluminous number of pages, so long as the agency has supplied a "well-detailed and clear" explanation for the differences.[335]

Discovery

Discovery is the exception, not the rule, in FOIA cases.[336] The decision to grant discovery and the conditions under which it is permitted are within the discretion of the district court.[337] In the limited instances where discovery is determined to be appropriate,

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Mich. Aug. 1, 2008) (finding that although agency's response to plaintiff's request was not timely, "'a lack of timeliness does not preclude summary judgment for an agency in a FOIA case'" (quoting Hornbostel v. Dep't of Interior, 305 F. Supp. 2d 21, 28 (D.D.C. 2003)) (magistrate's recommendation)), adopted in pertinent part, 2008 WL 4899401 (E.D. Mich. Nov. 12, 2008); Tri-Valley CAREs v. DOE, No. 03-3926, 2004 WL 2043034, at *18 (N.D. Cal. Sept. 10, 2004) ("[A] lack of timeliness does not preclude summary judgment for an agency in a FOIA case."), aff'd in pertinent part & remanded, No. 04-17232, 2006 WL 2971651 (9th Cir. Oct. 16, 2006); St. Andrews Park, Inc. v. U.S. Dep't of the Army Corps. of Eng'rs, 299 F. Supp. 2d 1264, 1269 (S.D. Fla. 2003) ("Defendant's exceeding the prescribed 20-day time limit to adjudicate the FOIA denial appeal does not entitle Plaintiffs to [summary] judgment.").

[335] Master v. FBI, 926 F. Supp. 193, 197-98 (D.D.C. 1996), aff'd 124 F.3d 1309 (D.C. Cir. 1997) (unpublished table decision); see also Am. Mgmt. Servs., LLC, 842 F. Supp. 2d at 870 (finding that errors in Vaughn Index, which were remedied by Army, "are not sufficient grounds for striking the entire index or questioning the good faith of the Army"), aff'd, 703 F.3 724 (4th Cir. 2013); Piper v. DOJ, 294 F. Supp. 2d 16, 23-24 (D.D.C. 2003) (finding "no material issue to rebut the Government's good faith presumption in the processing of [plaintiff's] FOIA request" merely because of "gaps in the serialization of the files"); cf. McGehee v. DOJ, 800 F. Supp. 2d 220, 237-38 (D.D.C. 2011) (denying, in part, FBI's motion for summary judgment where Vaughn Index fails to provide specific information about missing pages and numerous redactions "rendering it impossible" for court to determine that all reasonably segregable information was disclosed).

[336] See, e.g., CareToLive v. FDA, 631 F.3d 336, 345-46 (6th Cir. 2011) ("Claims under the [FOIA] are typically resolved without discovery on the basis of the agency's affidavits."); Lane v. Dep't of Interior, 523 F.3d 1128, 1134 (9th Cir. 2008) (noting that in a FOIA case "discovery is limited because the underlying case revolves around the propriety of revealing certain documents"); Heily v. Dep't of Commerce, 69 F. App'x 171, 174 (4th Cir. 2003) (per curiam) ("It is well-established that discovery may be greatly restricted in FOIA cases."); Justice v. IRS, 798 F. Supp. 2d 43, 47 (D.D.C. 2011) (noting that "discovery is disfavored" in FOIA actions), aff'd, 485 F. App'x 439 (D.C. Cir. 2012); Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions").

[337] See, e.g., World Publ'g Co. v. DOJ, 672 F.3d 825, 832 (10th Cir. 2012) (noting that "[t]he decision whether to allow discovery in FOIA cases is largely left to the discretion of the district court judge"); Lane, 523 F.3d at 1134 (stating that "[a] district court 'has wide latitude in controlling discovery, and its rulings will not be overturned in absence of a clear

courts ordinarily confine it to the scope of an agency's search, its indexing and classification procedures, and similar factual matters.[338]

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abuse of discretion'" (quoting White v. City of San Diego, 605 F.2d 455, 461 (9th Cir. 1979))); Wood v. FBI, 432 F.3d 78, 84-85 (2d Cir. 2005) (recognizing that "[a] district court has broad discretion to manage pre-trial discovery" (citing Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 488 (2d Cir. 1999))); Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993); Gillin v. IRS, 980 F.2d 819, 823 (1st Cir. 1992) (per curiam); N.C. Network for Animals, Inc. v. USDA, 924 F.2d 1052, 1052 (4th Cir. 1991) ("The district court should exercise its discretion to limit discovery in this as in all FOIA cases, and may enter summary judgment on the basis of agency affidavits when they are sufficient to resolve issues . . . .") (unpublished table decision); Petrus v. Brown, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."); Meeropol v. Meese, 790 F.2d 942, 960-61 (D.C. Cir. 1986) (same, with respect to broad district court discretion).

[338] See, e.g., Heily, 69 F. App'x at 174 (explaining that when discovery is permitted, generally it is "limited to the scope of agency's search and its indexing and classification procedures"); Ruotolo v. DOJ, 53 F.3d 4, 11 (2d Cir. 1995) (holding that discovery on scope of burden that search would entail should have been granted); Weisberg v. DOJ, 627 F.2d 365, 371 (D.C. Cir. 1980) (finding discovery appropriate to inquire into adequacy of document search); Pulliam v. EPA, 292 F. Supp. 3d 255, 260-61 (D.D.C. 2018) (allowing limited discovery to resolve discrepancy between between prior declarations which stated only email records were searched and fourth declaration which stated that all electronic records were searched); Jett v. FBI, 241 F. Supp. 3d 1, 14 (D.D.C. 2017) (granting discovery request for "limited purpose of determining whether the FBI has the capability of simultaneously searching for records in the CRS and ELSUR indices"); Carr v. NLRB, No. 2:12-0871, 2012 WL 5462751, at *4 (S.D. W.Va. Nov. 8, 2012) (finding that "[i]n the unusual case when discovery has been allowed it is often limited to the agency's search, indexing and classification procedures"); Raher v. BOP, No. 09-526, 2012 WL 2721613, at *2-3 (D. Or. July 2, 2012) (permitting discovery to probe "applicable records retention policies" and agency's compliance with such policies where agency admitted to practice of routinely destroying employees' emails following their departures); Citizens for Resp. & Ethics in Wash. v. VA, 828 F. Supp. 2d 325, 334 (D.D.C. 2011) (approving deposition of two VA employees for "purpose of determining whether the explanation for the [potential improper destruction of responsive records] is document destruction, incompetence, or something in between"), reconsideration denied, 69 F. Supp. 3d 115 (D.D.C. 2014); Families for Freedom v. U.S. Customs & Border Protect., 837 F. Supp. 2d 331, 336-37 (S.D.N.Y. 2011) (granting plaintiff's request for discovery without showing of bad faith because there was evidence in record that agency had not performed adequate search); El Badrawi v. DHS, 583 F. Supp. 2d 285, 299-301 (D. Conn. 2008) (permitting limited discovery where agency failed to adequately describe general scheme of its file system and did not explain why it chose to search only one database and not others); Kozacky & Weitzel, P.C. v. United States, No. 07-2246, 2008 WL 2188457, at *7 (N.D. Ill. Apr. 10, 2008) (directing agency to answer several of plaintiff's interrogatories concerning nature and adequacy of its search); Citizens for Responsibility & Ethics in Wash. v. DOJ, No. 05-2078, 2006 WL 1518964, at *3-6 (D.D.C. June 1, 2006) (granting plaintiff's motion for discovery in form of time-limited depositions because plaintiff raised sufficient question of bad faith on part of government to "warrant

Discovery generally is not available "where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains."[339] Unsubstantiated claims that an agency has acted in bad faith, are not

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limited discovery for the purpose of exploring the reasons behind [purported] delays in processing [plaintiff's] FOIA requests"); Judicial Watch, Inc. v. Dep't of Commerce, 127 F. Supp. 2d 228, 230 (D.D.C. 2000) (permitting depositions to be taken about parameters of FOIA search); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 1999 WL 1051963, at *3 (W.D. Pa. Oct. 12, 1999) (allowing limited discovery "regarding the authenticity and completeness of the material produced by HHS, as well as the methodology used to compile it," because plaintiff "'does not know the contents of the information sought and is, therefore, helpless to contradict the government's description of the information or assist the trial judge'" (quoting Davin v. DOJ, 60 F.3d 1043, 1049 (3d Cir. 1995))), appeal dismissed voluntarily, No. 01-1886 (3d Cir. Apr. 24, 2002); Long v. DOJ, 10 F. Supp. 2d 205, 210 (N.D.N.Y. 1998) (finding discovery appropriate to test adequacy of search); Pub. Citizen Health Research Grp. v. FDA, 997 F. Supp. 56, 72 (D.D.C. 1998) (holding that discovery is limited to "investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like"), rev'd, in part, on other grounds, 185 F.3d 898 (D.C. Cir. 1999); cf. Citizens for Responsibility & Ethics in Wash. v. DOJ, 298 F. Supp. 3d 151, 156 (D.D.C. 2018) (denying plaintiff's request for discovery "to provide 'a full record to evaluate the scope of DOJ's obligations under § 552(a)(2)'" because "[t]o avoid dismissal under Rule 12(b)(6), [plaintiff] must file a complaint – not proposed discovery – stating a plausible claim to relief").

[339] Schrecker v. DOJ, 217 F. Supp. 2d 29, 35 (D.D.C. 2002), aff'd, 349 F.3d 657 (D.C. Cir. 2003); see, e.g., Freedom Watch v. NSA, 783 F.3d 1340, 1345 (D.C. Cir. 2015) (affirming district court's decision to deny discovery as to adequacy of search, on ground that agency's affidavits were sufficiently detailed); Becker, 34 F.3d at 406 (finding that district court did not err by granting summary judgment to government without addressing plaintiff's motion for discovery; explaining that judge "must have been satisfied that discovery was unnecessary when she concluded that the IRS's search was reasonable and ruled in favor of the IRS on summary judgment"); Long v. OPM, 692 F.3d 185, 191 (2d Cir. 2012) (holding that "'discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face'" (quoting Carney v. DOJ, 19 F.3d 807, 812 (2d Cir.1994))); Reich v. DOE, 784 F. Supp. 2d 15, 22 (D. Mass. 2011) (denying request for discovery where agency affidavits were "'reasonably detailed' and 'submitted in good faith'" and plaintiff presented no evidence that declarants "misled the court or had any motivation to do so"); Schoenman v. FBI, 763 F. Supp. 2d 173, 204 (D.D.C. 2011) (concluding that discovery not warranted where court already affirmed adequacy of agency's search and its declarations are sufficiently detailed and submitted in good faith); Reid v. USPS, No. 05-294, 2006 WL 1876682, at *5 (S.D. Ill. July 5, 2006) (denying discovery because "[d]efendant's submissions are adequate on their face"); Fla. Immigrant Advoc. Ctr. v. NSA, 380 F. Supp. 2d 1332, 1343 (S.D. Fla. 2005) (denying discovery because agency's affidavit was "sufficiently detailed, nonconclusory and submitted in good faith").

sufficient to warrant discovery.[340] Courts likewise have denied discovery when the FOIA plaintiff failed to demonstrate that the discovery requested will uncover information that would create a genuine issue of material fact.[341] In fact, even when an agency's

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[340] See, e.g., CareToLive, 631 F.3d at 345-46 (concluding that district court did not abuse its discretion in denying discovery where challenge to FDA's decision to place plaintiff's request in "complex" track, and claims regarding adequacy of search and pre-request destruction of records, did not evidence agency bad faith); Wilson v. U.S. Dep't of Transp., No. 10-5295, 2010 WL 5479580, at *1 (D.C. Cir. Dec. 30, 2010) (per curiam) (holding that "[b]ecause appellant offered no evidence of bad faith to rebut agency's affidavits, he is not entitled to discovery"); Wood, 432 F.3d at 85 (affirming denial of discovery, and holding that "district court did not abuse its discretion in finding [plaintiff's conjectural] assertion insufficient to overcome the government's good faith showing"); Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 124 (D.C. Cir. 1999) (upholding denial of discovery based on "speculative criticism" of agency's search); Grand Cent. P'ship, 166 F.3d at 489 (finding discovery unwarranted based on plaintiff's "speculation that there must be more documents" and that agency acted in "bad faith" by not producing them); Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (finding discovery unwarranted when court was convinced that agency "has acted in good faith and has properly withheld responsive material"; declaring fact that agency destroyed documents prior to receipt of FOIA request was not evidence of lack of "good faith"); Military Audit Project v. Casey, 656 F.2d 724, 751 (D.C. Cir. 1981) (affirming trial court's refusal to permit discovery when plaintiffs had failed to raise "substantial questions concerning the substantive content of the [defendants'] affidavits"); Freedom Watch, Inc. v. NSA, 220 F. Supp. 3d 40, 46 (D.D.C. 2016) (denying motion for discovery and finding that "'mistakes do not imply bad faith[;]' 'In fact, [an] agency's cooperative behavior of notifying the Court and plaintiff that it . . . discovered a mistake, if anything, shows good faith.'"); New York Times Co. v. Treasury, No. 15-5740, 2016 WL 1651867, at *4 (S.D.N.Y. Apr. 26, 2016) (denying plaintiff's motion for discovery to review defendant's responsiveness determinations, finding "only a weak inference of bad faith, at best"); Hall v. CIA, 881 F. Supp. 2d 38, 73 (D.D.C. 2012) (denying plaintiff's request for discovery based on plaintiff's allegation of bad faith in connection with fee assessment, because "[e]stimating the search fees – especially of such a broad search as that of the plaintiffs – is no doubt a difficult proposition, and a recalculation of those fees does not show that the previous estimate was intentionally inaccurate"); Justice v. IRS, 798 F. Supp. 2d 43, 47 (D.D.C. 2011) (concluding plaintiff's speculation that requested record was "'ordered destroyed'" was not sufficient to establish bad faith, and denying his request for discovery), aff'd, 485 F. App'x 439 (D.C. Cir. 2012); Exxon Mobil Corp. v. Dep't of the Interior, No. 09-6732, 2010 WL 4668452, at *7 (E.D. La. Nov. 4, 2010) (rejecting plaintiff's request to depose agency declarant where "declarations are facially adequate" and plaintiff has not demonstrated bad faith); Allen v. U.S. Secret Serv., 335 F. Supp. 2d 95, 100 (D.D.C. 2004) (denying discovery because the "[p]laintiff has not established that the affidavits are incomplete or made in bad faith").

[341] See Trentadue v. FBI, 572 F.3d 794, 806-08 (10th Cir. 2009) (reversing district court's discovery order permitting plaintiff to depose two federal prisoners for purpose of establishing that FBI maintains responsive records, finding that plaintiff failed to show any possibility that depositions would produce relevant evidence); Sharkey v. FDA, 250 F. App'x 284, 291 (11th Cir. 2007) (affirming district court's denial of discovery request for information related to potential market for vaccine in Exemption 4 case where plaintiff

declarations are found to be insufficient, courts often order the submission of supplemental information rather than resorting to discovery.[342]

In addition, courts have denied discovery when a FOIA plaintiff attempts to probe the agency's "thought processes" for claiming particular exemptions.[343] Moreover,

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failed to "state with particularity the facts [which] he believes discovery will reveal [that are] sufficient to create a genuine issue of material fact"); Jarvik v. CIA, 741 F. Supp. 2d 106, 122 (D.D.C. 2010) (declining to permit plaintiff to depose declarant in order to ascertain his personal knowledge of search where declarant holds supervisory position overseeing FOIA requests and therefore is ordinarily deemed to have personal knowledge of search); Asarco, Inc. v. EPA, No. 08-1332, 2009 WL 1138830, at *2 (D.D.C. Apr. 28, 2009) (finding that because plaintiff "fails to show how the discovery it seeks is necessary for the resolution of a genuine issue of material fact as to the adequacy of the agency's search, its motion to engage in such discovery is denied") (magistrate's recommendation), adopted, (D.D.C. July 15, 2009); Thomas v. HHS, 587 F. Supp. 2d 114, 115 n. 2 (D.D.C. 2008) (noting that discovery is "an extraordinary procedure in a FOIA action" and denying plaintiff's discovery request on the basis that he "gives no reason for needing" it); Scarver v. McGlocklyn, No. 05-2775, 2008 WL 686757, at *5 (E.D.N.Y. Mar. 4, 2008) (concluding that discovery was not warranted where plaintiff "offer[ed] absolutely no facts to support her allegations"); Dinisio v. FBI, No. 05-6159, 2007 WL 2362253, at *3 (W.D.N.Y. Aug. 16, 2007) (finding discovery inappropriate where plaintiff's motions "are based on rank speculation and unsupported assertions, and fail to show how the requested discovery would be likely to demonstrate the existence of any genuine issue of material fact"); O'Neill v. DOJ, No. 06-0671, 2006 WL 3538991, at *2 (E.D. Wis. Dec. 7, 2006) (denying plaintiff's motion to compel discovery as information sought is irrelevant to instant FOIA case); Morley v. CIA, No. 03-2545, 2006 WL 280645, at *2 (D.D.C. Feb. 6, 2006) (stating that plaintiff's Rule 56(f) declaration merely addresses "his and the public's interest in the disclosure of documents relating to the assassination of President John F. Kennedy, rather than [his] inability to file his opposition to Defendant's motion for summary judgment," and finding that plaintiff's argument therefore is not a basis for allowing discovery).

[342] See Beltranena v. Clinton, 770 F. Supp. 2d 175, 187 (D.D.C. 2011) (denying requests for discovery and in camera review and instead ordering agency to supplement affidavits to establish that it conducted adequate searches and to provide particularized explanations for its segregability determinations); Reich v. DOE, 784 F. Supp. 2d 15, 21 (D. Mass. 2011) (observing that "court generally will request a supplement before ordering discovery"); Jarvik v. CIA, 741 F. Supp. 2d 106, 122 (D.D.C. 2010) ("Even if an agency's affidavits regarding its search are deficient, courts generally do not grant discovery but instead direct the agency to supplement its affidavits.").

[343] Ajluni v. FBI, 947 F. Supp. 599, 608 (N.D.N.Y. 1996) (explaining that discovery not permitted into the "thought processes of [the] agency in deciding to claim a particular FOIA exemption"); Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980) (stating that "discovery is limited to factual disputes . . . [and that] the thought processes of the agency in deciding to claim a particular FOIA exemption . . . are protected from disclosure").

discovery has been disallowed when a plaintiff seeks to utilize it as a way to uncover the contents of the withheld documents.[344]

Discovery also has not been permitted when a plaintiff attempts to use a FOIA lawsuit as a means of questioning investigatory action taken by the agency or the

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[344] See, e.g., Lane, 523 F.3d at 1135 (noting that "this circuit has affirmed denials of discovery where, as here, the plaintiff's requests consisted of 'precisely what defendants maintain is exempt from disclosure to plaintiff pursuant to the FOIA'" (quoting Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983))); Tax Analysts v. IRS, 410 F.3d 715, 722 (D.C. Cir. 2005) (reasoning that "[Appellant's] demand for further inquiry into the substance of the documents would, if granted, turn FOIA on its head, awarding Appellant in discovery the very remedy for which it seeks to prevail in the suit"); Local 3, Int'l Brotherhood of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988) (finding plaintiff not entitled to discovery that would be tantamount to disclosure of contents of exempt documents); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (affirming denial of discovery when directed to substance of withheld documents at issue); Driggers v. United States, No. 11-229, 2011 WL 2883283, at *2 (N.D. Tex. July 18, 2011) (noting that to extent that plaintiff seeks contents of documents, and opinions and conclusions regarding that information, his request "far exceeds the limited scope of discovery usually allowed in a FOIA case"); Lawyers' Comm. for Civ. Rts. of S.F. Bay Area v. Dep't of Treasury, 534 F. Supp. 2d 1126, 1137 (N.D. Cal. 2008) (concluding that plaintiff's discovery requests are improper "because they seek information beyond merely investigating the scope of Treasury's search for responsive documents and instead seek under the guise of discovery, the same records which its FOIA requests ostensibly seek"); Johnson v. DOJ, No. 06-1248, 2007 U.S. Dist. LEXIS 57963, at *4 (W.D. Wis. Aug. 8, 2007) (finding discovery inappropriate because plaintiff "is seeking to obtain through discovery the very same information he sought to obtain by virtue of his FOIA request, namely substantive information related to his earlier trial on drug charges"); Fla. Immigrant Advoc. Ctr., 380 F. Supp. 2d at 1343 (observing that discovery is impermissible when plaintiff is seeking to obtain "information [that] would not be available to it under the FOIA and may be classified or otherwise protected by disclosure by statute").

underlying reasons for undertaking such investigations,[345] or uses discovery "as a fishing expedition [for] investigating matters related to separate lawsuits."[346]

In addition, courts have found "'curtailment of discovery'" appropriate when the court undertakes an in camera review.[347] Moreover, when discovery is sought prior to the time the government moves for summary judgment and submits its supporting affidavits

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[345] See, e.g., Shannahan v. IRS, 672 F.3d 1142, 1151 (9th Cir. 2012) (affirming district court's denial of plaintiff's "discovery requests for information concerning the nature and origins of documents" related to his clients' prosecution for tax fraud); RNR Enters. v. SEC, 122 F.3d 93, 98 (2d Cir. 1997) (finding no abuse of discretion in district court denial of discovery propounded for "investigative purposes"); Flowers v. IRS, 307 F. Supp. 2d 60, 72 (D.D.C. 2004) (denying plaintiff 's discovery requests which were designed to "investigate the IRS' motives in selecting her for an audit"); Cecola v. FBI, No. 94 C 4866, 1995 WL 143548, at *3 (N.D. Ill. Mar. 31, 1995) (disallowing deposition concerning factual basis for assertion of Exemption 7(A), because "there is concern that the subject of the investigation not be alerted to the government's investigative strategy"); Williams v. FBI, No. 90-2299, 1991 WL 163757, at *3 (D.D.C. Aug. 6, 1991) ("An agency's rationale for undertaking an investigation of the Plaintiff is not the proper subject of FOIA discovery requests.").

[346] Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, No. 04-1919, 2005 WL 913268, at *7 (D.D.C. Apr. 20, 2005) (denying plaintiff's request for discovery because "the purpose of FOIA is not to serve as a tool for obtaining discovery for an administrative forfeiture proceeding"); see, e.g., Al-Fayed v. CIA, No. 00-2092, slip op. at 17 (D.D.C. Dec. 11, 2000) (terming plaintiff's discovery request "a fishing expedition" and refusing to grant it), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); Immanuel v. Sec'y of Treasury, No. 94-884, 1995 WL 464141, at *1 (D. Md. Apr. 4, 1995) (rejecting discovery that would constitute "a fishing expedition into all the possible funds held by the Department of [the] Treasury which may fall within the terms of [plaintiff's] broad FOIA request. Such an expedition is certainly not going to come at the government's expense when it is evident that [plaintiff] seeks this information only for his own commercial use."), aff'd on other grounds, No. 95-1953, 1996 WL 157732 (4th Cir. Apr. 5, 1996); cf. Tannehill v. Dep't of the Air Force, No. 87-1335, 1987 WL 25657, at *2 (D.D.C. Nov. 12, 1987) (limiting discovery to determination of FOIA issues, not to underlying personnel decision).

[347] Ajluni, 947 F. Supp. at 608 (quoting Katzman v. Freeh, 926 F. Supp. 316, 320 (E.D.N.Y. 1996)); see Laborers' Int'l Union of N. Am. v. DOJ, 772 F.2d 919, 921 (D.C. Cir. 1984) (finding that "curtailment of discovery" was proper exercise of district court's discretion where "the court reasonably determined that in camera examination was required of the sole document being sought by the FOIA requester-litigant in order for the court to make the substantive determination as to the pertinent statutory exemption's applicability"); Nat'l Whistleblower Ctr. v. HHS, 903 F. Supp. 2d 59, 71 (D.D.C. Nov. 9, 2012) (finding that "[p]laintiffs have essentially obtained the discovery they sought because the [c]ourt agreed to conduct in camera review" and "[h]aving obtained that review, there is nothing else discovery could offer them"); Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (employing in camera review, rather than discovery, to resolve inconsistency between representations in Vaughn Index and agency's prior public statements).

and memorandum of law, courts will frequently deny the request or grant a protective order staying discovery on the grounds that it is premature.[348]

Lastly, courts have held that in appropriate cases the government can conduct discovery against a FOIA plaintiff.[349]

Waiver of Exemptions in Litigation

Because the FOIA directs district courts to review agency actions de novo,[350] an agency is not barred from invoking a particular exemption in litigation merely because

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[348] See, e.g., Lane, 523 F.3d at 1134-35 (holding that district court's "delay of discovery" with respect to plaintiff's FOIA claim until after summary judgment "was certainly within its discretion"); Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) ("The plaintiff's early attempt in litigation of this kind . . . to take discovery depositions is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); Farese v. DOJ, No. 86-5528, slip op. at 6 (D.C. Cir. Aug. 12, 1987) (affirming denial of discovery filed prior to affidavits, because discovery "sought to short-circuit the agencies' review of the voluminous amount of documentation requested"); Mullen v. U.S. Army Crim. Investigation Command, No. 10-262, 2011 WL 5870550, at *3-4 (E.D. Va. Nov. 22, 2011) (vacating court's previous scheduling order with respect to discovery and allowing government to first file its motion for summary judgment); Driggers v. United States, No. 11-229, 2011 WL 2883283, at *2 (N.D. Tex. July 18, 2011) (granting defendant's motion for protective order staying discovery until after defendant submits its motion for summary judgment and accompanying affidavits); Taylor v. Babbit, 673 F. Supp. 2d 20, 23-24 (D.D.C. 2009) (denying without prejudice plaintiff's request for discovery, and concluding that plaintiff may refile his request after government has submitted its renewed motion for summary judgment); Lion Raisins, Inc. v. USDA, No. 08-0358, 2009 WL 160283, at *3 (E.D. Cal. Jan. 21, 2009) (denying discovery request before summary judgment stage because "there is not enough information to conclusively determine, at this time, whether or to what extent discovery should be permitted, or whether the case or particular issues can be properly decided without discovery"). But see Long, 10 F. Supp. 2d at 210 (allowing discovery prior to government's motion for summary judgment, but only to test adequacy of search).

[349] See, e.g., In re Engram, 966 F.2d 1442, 1442 (4th Cir. 1992) (per curiam) (permitting discovery regarding how plaintiff obtained defendant's document as relevant to issue of waiver under Exemption 5); Weisberg v. DOJ, 749 F.2d 864, 868 (D.C. Cir. 1984) (ruling that agency "should be able to use the discovery rules in FOIA suits like any other litigant"); McSheffrey v. EOUSA, No. 98-0650, slip op. at 3 (D.D.C. Sept. 8, 1999) (recognizing that by conducting discovery against plaintiff, government could have confirmed receipt of agency's response to FOIA request), aff'd on other grounds, 13 F. App'x 3 (D.C. Cir. 2001). But see Kurz-Kasch, Inc. v. DOD, 113 F.R.D. 147, 148 (S.D. Ohio 1986) (indicating that "only . . . agencies of the government" can be subject to discovery in FOIA cases).

[350] 5 U.S.C. § 552(a)(4)(B) (2012 & Supp. V 2017).

that exemption was not cited in responding to the request at the administrative level.[351] Moreover, an agency, with identical documents in dispute in a FOIA and in a non-FOIA case, may invoke FOIA exemptions even though "it did not invoke the same underlying privilege claims in [the] ongoing discovery dispute in [the] non-FOIA case."[352] However, an agency's failure to timely raise an exemption in litigation at the district court level may result in a waiver of the agency's ability to assert the exemption.[353]

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

[352] Stonehill v. IRS, 558 F.3d 534, 535 (D.C. Cir. 2009); see also Marshall v. FBI, 802 F. Supp. 2d 125, 136 (D.D.C. 2011) (finding court order for production of records in criminal case did not constitute waiver for purposes of FOIA because "disclosure obligations under the FOIA and disclosure obligations in criminal proceedings are separate matters, governed by different standards"); Moffat v. DOJ, No. 09-12067, 2011 WL 3475440, at *19 (D. Mass. Aug. 5, 2011) (finding previous production in full during criminal trial irrelevant and concluding that no waiver occurred "as the standards for disclosure of information under FOIA are different from the standards of disclosure of information in a criminal trial").

[353] See, e.g., Ryan v. DOJ, 617 F.2d 781, 792 & n.38a (D.C. Cir. 1980) (refusing to allow agency to invoke exemption not previously "raised," proclaiming instead that "an agency must identify the specific statutory exemptions relied upon, and do so at least by the time of the district court proceedings"), abrogated on other grounds by, Dep't of Interior v. Klamath Water Users Protective Ass'n, 531 U.S. 1 (2001); cf. Citizens for Responsibility & Ethics in Wash. v. DOJ, 854 F.3d 675, 681 (D.C. Cir. 2017) (refusing to allow FBI to belatedly invoke Exemption 5 even when Criminal Division timely did so because "DOJ utilized a decentralized process, in which the Criminal Division and the FBI independently decided

Although an agency is not generally required to plead its exemptions in its answer to a complaint,[354] the Court of Appeals for the District of Columbia Circuit has held that "'agencies [may] not make new exemption claims to a district court after the judge has ruled in the other party's favor,' nor may they 'wait until appeal to raise additional claims of exemption or additional rationales for the same claim.'"[355] On occasion, when the district court proceedings are not completed and when the plaintiff has an opportunity to respond, courts have permitted the raising of new claims at later stages of the proceedings.[356] Generally, however, in the absence of mitigating factors, discussed below,

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whether or not to release responsive records that originated in their respective components.").

[354] See, e.g., Sciba v. Bd. of Governors of the Fed. Reserve Sys., No. 04-1011, 2005 WL 758260, at *1 n.3 (D.D.C. Apr. 1, 2005) (recognizing that agency is not required to raise any exemption in its answer); Lawrence v. United States, 355 F. Supp. 2d 1307, 1311 (M.D. Fla. 2004) (finding that IRS did not waive its right to invoke exemptions when it did not include them in its answer to plaintiff's amended complaint); Frito-Lay, 964 F. Supp. at 239 & n.4 (distinguishing between affirmative defenses, which are waived if not raised, and FOIA exemption claims, which are not waived, and declaring that "[p]laintiff has had ample notice of and opportunity to rebut Defendant's defenses"); Farmworkers Legal Servs, 639 F. Supp. at 1371 (same); Berry v. DOJ, 612 F. Supp. 45, 47 (D. Ariz. 1985) (same). But see Ray v. DOJ, 908 F.2d 1549, 1557 (11th Cir. 1990) (suggesting that all exemptions must be raised by defendant agency "'in a responsive pleading'" (quoting Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982))), rev'd on other grounds sub nom. U.S. Dep't of State v. Ray, 502 U.S. 164 (1991); Maccaferri Gabions, Inc. v. DOJ, No. 95-2576, slip op. at 4-6 (D. Md. Mar. 26, 1996) (holding that government's withholding pursuant to FOIA exemption constitutes affirmative defense which must be set forth in its answer, but finding that government's reference to exemption in its answer and requester's knowledge of basis for withholding cured any pleading defect), appeal dismissed voluntarily, No. 96-1513 (4th Cir. Sept. 19, 1996).

[355] Senate of P.R. v. DOJ, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting Holy Spirit Ass'n v. CIA, 636 F.2d 838, 846 (D.C. Cir. 1980)); cf. Tax Analysts v. IRS, 152 F. Supp. 2d 1, 25-26 (D.D.C. 2001) (refusing to revisit issue of attorney-client privilege because court ruled on attorney-client privilege issue in previous opinion), aff'd in pertinent part, rev'd in part, 294 F.3d 71 (D.C. Cir. 2002).

[356] See, e.g., Reliant Energy Power Generation v. FERC, 520 F. Supp. 2d 194, 201-02 (D.D.C. 2007) (concluding that agency did not waive right to claim Exemption 4 by raising claim in second motion for summary judgment because court's denial of agency's first motion for summary judgment was not ruling in plaintiff's favor, as plaintiff's own motion for summary judgment was also denied); Judicial Watch, Inc. v. DOJ, 102 F. Supp. 2d 6, 12 & n.4 (D.D.C. 2000) (explaining that agency may not raise exemption for first time in brief replying to plaintiff's response to motion for summary judgment, but may raise it in future motion for summary judgment, thereby affording plaintiff opportunity to respond); Williams v. FBI, No. 91-1054, 1997 WL 198109, at *2 (D.D.C. Apr. 16, 1997) (finding, in case where exemption was raised first in motion for reconsideration, that "policy militating against piecemeal litigation is less weighty where the district court proceedings are not yet

an agency's failure to adequately preserve its exemption positions at the district court level has resulted in waiver of those exemption claims – not only during the initial district court proceedings,[357] but also at the appellate level,[358] and even following a remand.[359]

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completed"), appeal dismissed, No. 98-5249 (D.C. Cir. Oct. 7, 1998); cf. Senate of P.R., 823 F.2d at 581 (holding that "the district judge did not abuse his discretion when he evaluated the situation at hand as one inappropriate for application of a rigid 'press it at the threshold, or lose it for all times' approach to the agency's FOIA exemption claims"); Piper v. DOJ, 374 F. Supp. 2d 73, 78 (D.D.C. 2005) (opining that while FOIA exemptions not raised at initial district court proceedings ordinarily may be waived, if disclosure "will impinge on rights of third parties that are expressly protected by FOIA . . . district courts not only have the discretion, but sometimes the obligation to consider newly presented facts and to grant" post-judgment relief).

[357] See, e.g., Rosenfeld v. DOJ, 57 F.3d 803, 811 (9th Cir. 1995) (holding new exemption claims waived when raised for first time after district court ruled against government on its motion for summary judgment); Ray, 908 F.2d at 1551 (same); Scheer v. DOJ, No. 98-1613, slip op. at 4-5 (D.D.C. July 24, 1999) (denying motion for reconsideration to present new exemption claims, partly because defendant did not show "why, through the exercise of due diligence, it could not have presented this evidence before judgment was rendered"), remanded per stipulation, No. 99-5317 (D.C. Cir. Nov. 2, 2000); Miller v. Sessions, No. 77-C-3331, 1988 WL 45519, at *1-2 (N.D. Ill. May 2, 1988) (holding "misunderstanding" on part of government counsel of court's order to submit additional affidavits insufficient to overcome waiver, and denying motion for reconsideration); Powell v. DOJ, No. C-82-326, slip op. at 4 (N.D. Cal. June 14, 1985) (holding that government may not raise Exemption 7(D) for documents declassified during pendency of case when only Exemption 1 was raised at outset); cf. Judicial Watch, Inc. v. DOE, 319 F. Supp. 2d 32, 34-35 (D.D.C. 2004) (denying motion for reconsideration and explaining that government may not raise for first time presidential communication privilege after summary judgment was granted to plaintiff).

[358] See, e.g., Jordan v. DOJ, 591 F.2d 753, 779-80 (D.C. Cir. 1978) (en banc) (refusing to consider government's Exemption 7 claim first raised in "supplemental memorandum" filed one month prior to appellate oral argument).

[359] See, e.g., Fendler v. Parole Comm'n, 774 F.2d 975, 978 (9th Cir. 1985) (barring government from raising Exemption 5 on remand to protect presentence report because it was raised for first time on appeal); Ryan, 617 F.2d at 792 & n.38a (holding government barred from invoking Exemption 6 on remand because it was "raised" for first time on appeal, and defining "raised" to mean, in effect, "fully Vaughned"). Compare Wash. Post Co. v. HHS, 795 F.2d 205, 208-09 (D.C. Cir. 1986) (finding that "privilege" prong of Exemption 4 may not be raised for first time on remand -- even though "confidential" prong was previously raised -- absent sufficient extenuating circumstances), and Wash. Post Co. v. HHS, 865 F.2d 320, 327 (D.C. Cir. 1989) (prohibiting agency from raising new aspect of previously raised prong of Exemption 4), with Lame v. DOJ, 767 F.2d 66, 71 n.7 (3d Cir. 1985) (permitting new exemptions to be raised on remand, as compared to raising new exemptions on appeal). But see also Morgan v. DOJ, 923 F.2d 195, 199 n.5 (D.C. Cir. 1991) (remanding for the district court to determine whether a sealing order actually prohibits disclosure under the FOIA, but noting that the government can invoke other exemptions "if the court determines that the seal does not prohibit disclosure").

In Maydak v. DOJ, the D.C. Circuit refused to allow the defendant agency to invoke underlying FOIA exemptions when its initial Exemption 7(A) basis for nondisclosure became moot due to the completion of the underlying law enforcement proceedings.[360] While recognizing that it previously had allowed agencies to raise new exemptions when there was "a substantial change in the factual context of the case,"[361] the D.C. Circuit ruled that the termination of underlying enforcement proceedings and the resultant expiration of the applicability of Exemption 7(A) did not meet this standard.[362] (For further discussion of waiver of Exemption 7(A) in litigation, see Exemption 7(A), Changes in Circumstances in Litigation When Exemption 7(A) no Longer Applies, above.)

Three years later, when another D.C. Circuit panel was presented with a similar situation, in August v. FBI, the court pointed out that it did not intend to "adopt[] a rigid 'press it at the threshold or lose it for all times' approach to . . . agenc[ies'] FOIA exemption claims."[363] Significantly, that panel emphasized the fact that the full court in Jordan v. DOJ[364] had adopted a "flexible approach to handling belated invocations of FOIA exemptions," which it said actually was "affirmed" in Maydak.[365] The D.C. Circuit in August acknowledged three circumstances that might permit the government belatedly to invoke FOIA exemptions: a substantial change in the factual context of a case; an interim development in an applicable legal doctrine; or pure mistake.[366]

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[360] 218 F.3d 760, 767 (D.C. Cir. 2000).

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

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

[363] 328 F.3d 697, 699 (D.C. Cir. 2003) (quoting Senate of P.R., 823 F.2d at 581).

[364] 591 F.2d 753.

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

[366] August, 328 F.3d at 700 (citing Jordan); see, e.g., Citizens for Responsibility and Ethics in Washington v. DOJ, 854 F.3d 675, 680-81 (D.C. Cir. 2017) (discussing reasons for allowing untimely assertion of exemption and finding that defendant has not provided sufficient basis for declining to assert exemption in a timly manner); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1119 (D.C. Cir. 2007) (relying on August and explaining that "where an agency fails 'through pure mistake' to cite a particular exemption, the appellate court has discretion to remand for consideration of the exemption, at least where the government's case is sufficiently strong"); Hiken v. DOD, 872 F. Supp. 2d 936, 941 (N.D. Cal. 2012) (concluding that "the Supreme Court's decision, in Milner, to overturn the interpretation of Exemption 2 on which Defendants had relied constitutes an 'interim

Moreover, in two rulings issued shortly after August, another panel of the D.C. Circuit suggested that an agency's belated raising of FOIA exemptions might be appropriate under an additional circumstance – namely, when the legal basis for an agency's initial decision on a FOIA request is rejected in litigation. In United We Stand America, Inc. v. IRS,[367] the primary issue was whether a requested record should be considered a congressional document or an "agency record."[368] At the district court level, the agency actually "reserved the right" to invoke exemptions if the court disagreed with the agency's determination that the record was a congressional document and thus not subject to the FOIA.[369] On appeal, the D.C. Circuit determined that the document was at least partially an "agency record," and it remanded the case to the district court to decide the applicability of any exemption claims that the agency previously had "reserved."[370] Similarly, in LaCedra v. EOUSA,[371] the D.C. Circuit found as a matter of law that the agency's interpretation of a FOIA request was "implausible," but nonetheless explicitly permitted the agency on remand to raise exemption claims for the additional records that would be considered responsive, on the basis that "[n]othing in Maydak requires an agency to invoke any exemption applicable to a record the agency in good faith believes has not been requested."[372]

Special Counsel Provision

The FOIA contains a provision regarding possible disciplinary action if agency personnel were to act arbitrarily or capriciously to withhold information. Specifically, subsection (a)(4)(F) of the FOIA provides:

> Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States

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development in applicable legal doctrine' sufficient to warrant the government's assertion of a belated FOIA exemption"); Gerstein v. CIA, No. 06-4643, 2008 WL 4415080, at *13 (N.D. Cal. Sept. 26, 2008) (finding that CIA did not waive right to claim exemption although it failed to raise claim in initial motion because omission was inadvertent and CIA made adequate showing as to excusable neglect); Judicial Watch v. Dep't of the Army, 466 F. Supp. 2d 112, 124 (D.D.C. 2006) (granting reconsideration to correct agency's error and afford intervenor an opportunity to raise exemptions).

[367] 359 F.3d 595 (D.C. Cir. 2004).

[368] Id. at 597.

[369] Id. at 598.

[370] Id. at 603.

[371] 317 F.3d 345 (D.C. Cir. 2003).

[372] Id. at 348.

> reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the [United States Office of] Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding.[373]

There are three separate prerequisites to trigger the initiation of a Special Counsel investigation under the FOIA: 1) the court must order the production of agency records found to be improperly withheld, 2) it must award attorney fees and litigation costs, and 3) it must issue a specific "written finding" of suspected arbitrary or capricious conduct.[374] Courts have declined to order a referral to the Office of Special Counsel where these prerequisites have not been met.[375]

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[373] 5 U.S.C. § 552(a)(4)(F)(i) (2012 & Supp. V 2017) (requiring Attorney General to "notify the Special Counsel of each civil action" described above; to "annually submit a report to Congress on the number of such civil actions in the preceding year," and further requiring the Special Counsel to "annually submit a report to Congress on the actions taken" by that Office).

[374] 5 U.S.C. § 552(a)(4)(F)(i).

[375] See, e.g., Light v. DOJ, 968 F. Supp. 2d 11, 31 (D.D.C. 2013) (declining to refer defendant to Office of Special Counsel after rejecting plaintiff's claim of wrongful delay and arbitrary action because plaintiffs made six separate detailed FOIA requests which compelled defendant to take additional time to search), reconsideration denied, Truthout v. DOJ, 968 F. Supp. 2d 32 (D.D.C. 2013); Pub. Emps. for Envtl. Resp. v. U.S. Sec. Int'l Boundary & Water Comm'n, 839 F. Supp. 2d 304, at 329-30 (D.D.C. 2012) (denying plaintiff's request to refer matter to Office of Special Counsel based on its unfounded allegations that agency denied existence of record and exaggerated threat of harm in disclosure), rev'd on other grounds, 740 F.3d 195 (D.C. Cir. 2014); Hernandez v. U.S. Customs & Border Protect. Agency, No. 10-4502, 2012 U.S. Dist. LEXIS 14290, at *39-40 (E.D. La. Feb. 7, 2012) (awarding plaintiff attorney fees and costs, but declining to refer matter to Office of Special Counsel where agency's conduct in responding to request did not rise to level of arbitrary and capricious); O'Shea v. NLRB, No. 05-2808, 2006 WL 1977152, at *6 (D.S.C. July 11, 2006) (holding that referral to Office of Special Counsel was unwarranted because defendant agency was not improperly withholding documents); Hull v. Dep't of Labor, No. 04-1264, 2006 U.S. Dist. LEXIS 35054, at *21 (D. Colo. May 30, 2006) (concluding that, despite "bureaucratic mistakes," defendant did not lie or disobey or ignore court orders, and that defendant's conduct therefore did not warrant referral to Office of Special Counsel); Defenders of Wildlife v. USDA, 311 F. Supp. 2d 44, 61 (D.D.C. 2004) (declining to find that agency acted arbitrarily and capriciously, because court did not find that agency withheld nonexempt records); Chourre v. IRS, 203 F. Supp. 2d 1196, 1202 (W.D. Wash. 2002) (rejecting plaintiff's request for written finding in accordance with 5 U.S.C. § 552(a)(4)(F)(i), because "[t]here is nothing in the record to suggest that any officer or agent [of the agency] acted arbitrarily or capriciously"); Kempker-Cloyd v. DOJ, No. 5:97-253, 1999 U.S. Dist. LEXIS 4813, at *23 (W.D. Mich. Mar. 12, 1999) (finding that even

One court has referred a disciplinary matter involving an Assistant United States Attorney to the Department of Justice's Office of Professional Responsibility following a finding that he prematurely "destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending."[376] However, claims of "bad faith" actions by a government agency ordinarily are considered in the context of whether to grant attorney fees.[377]

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though agency's action was "incomplete and untimely" and "not in good faith," there was no evidence of arbitrary or capricious behavior), motion for fees & costs granted, slip op. at 14 (W.D. Mich. Apr. 2, 1999) (magistrate's recommendations), adopted, (W.D. Mich. Aug. 17, 1999); Gabel v. IRS, No. 97-1653, 1998 WL 817758, at *5-6 (N.D. Cal. June 25, 1998) (declining to issue written finding in accordance with 5 U.S.C. § 552(a)(4)(F)(i) where all requested records had been produced and thus no records improperly were withheld); Norwood v. FAA, No. 83-2315, slip op. at 20 (W.D. Tenn. Dec. 11, 1991) (finding that when court denies fees on ground that plaintiff is proceeding pro se, "the issuance of written findings pursuant to 5 U.S.C. § 552(a)(4)(F) would be inappropriate since both prerequisites have not been met"), aff'd in part & rev'd in part on other grounds, 993 F.2d 570 (6th Cir. 1993); cf. Consumer Fed'n of Am. v. USDA, 539 F. Supp. 2d 225, 228 (D.D.C. 2008) (directing agency to file supplemental declaration detailing its plans to respond to future FOIA requests and steps it has taken to correct problem which led to destruction of responsive records, and further stating that it will take under advisement whether to sanction defendant by referring matter to Office of Inspector General and/or Office of Special Counsel), defendant's motion for summary judgment granted and plaintiff's motion for sanctions denied (D.D.C. Aug. 6, 2008) (minute order).

[376] Jefferson v. Reno, 123 F. Supp. 2d 1, 5 (D.D.C. 2000).

[377] See, e.g., Islamic Shura Council v. FBI, 757 F.3d 870, 873 (9th Cir. 2013) (reversing order granting motion for sanctions and vacating order awarding fees after finding that "motion for sanctions was made after 'judicial rejection of the offending contention'"); ACLU v. DOD, 827 F. Supp. 2d 217, 230-33 (S.D.N.Y. 2011) (denying plaintiff's motion to hold CIA in contempt for destruction of requested videos, but noting that parties should endeavor to settle amounts of attorney fees and costs "that are fairly due"); Judicial Watch, Inc. v. Dep't of Commerce, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorney's fees and costs because, among other factors, agency's "initial search was unlawful and egregiously mishandled and that likely responsive documents were destroyed and removed"), aff'd in relevant part, 470 F.3d 363, 375 (D.C. Cir. 2006) (affirming award of attorney fees, but remanding in part to recalculate attorney fees assessed); Landmark Legal Found. v. EPA, 272 F. Supp. 2d, 70, 87 (D.D.C. 2003) (awarding attorneys fees and costs for agency's violation of court order intended to preserve FOIA-requested records); Jefferson, 123 F. Supp. 2d at 5 (assessing attorney fees and costs associated with reconstruction of records, following violation of court order that had required that records be reconstructed and sent to both plaintiff and his attorney); Okla. Publ'g Co. v. HUD, No. 87-1935-P, slip op. at 7 (W.D. Okla. June 17, 1988) (attorney fees assessed against government when counsel failed to comply with scheduling and disclosure orders); see also Allen v. BOP, No. 00-342, slip op. at 9-10 (D.D.C. Aug. 26, 2002) (ordering "reimbursement of Plaintiff of his filing fee and all postage and copying costs," and prohibiting agency from charging fee for processing of few remaining records after it "inexcusabl[y]" destroyed majority of requested records); Hill v. Dep't of the Air Force, No. 85-1485, slip op. at 7 (D.N.M. Sept. 4, 1987) (ordering

Considerations on Appeal

As noted previously, an exceptionally large percentage of FOIA cases are decided by summary judgment.[378] While a decision granting a motion for summary judgment usually is immediately appealable, that is not generally the case with other orders that are issued during the course of a FOIA lawsuit.[379] For example, the grant of an Open America stay of proceedings is not a decision that is immediately appealable.[380] Similarly, it has

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documents processed at no further cost to plaintiff because of unreasonable delay in processing FOIA request), aff'd on other grounds, 844 F.2d 1407 (10th Cir. 1988).

[378] See World Publ'g Co. v. DOJ, 672 F.3d 825, 832 (10th Cir. 2012) ("In general FOIA cases are resolved on summary judgment."); Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1243 (11th Cir. 2008) ("'Generally, FOIA cases should be handled on motions for summary judgment, once the documents at issue are properly identified.'" (quoting Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993))); Wickwire Gavin, P.C. v. USPS, 356 F.3d 588, 591 (4th Cir. 2004) (declaring that FOIA cases are generally resolved on summary judgment); Cooper Cameron Corp. v. Dep't of Labor, 280 F.3d 539, 543 (5th Cir. 2002) ("Summary judgment resolves most FOIA cases.").

[379] See, e.g., Citizens for Ethics and Resp. in Wash. v. DHS, 532 F.3d 860, 862-68 (D.C. Cir. 2008) (holding that district court's denial of agency's motion for summary judgment, which was premised on argument that requested records did not qualify as "agency records," was not final and appealable order nor was it an injunction subject to interlocutory appeal); Loomis v. DOE, 199 F.3d 1322, 1322 (2d Cir. 1999) (holding that partial grant of summary judgment is not final order) (unpublished table decision); Ferguson v. FBI, 957 F.2d 1059, 1063-64 (2d Cir. 1992) (noting that while "partial disclosure orders in FOIA cases are appealable," fact that district court may have erred in deciding question of law does not vest jurisdiction in appellate court when no disclosure order has yet been entered and, consequently, no irreparable harm would result); Hinton v. FBI, 844 F.2d 126, 129-33 (3d Cir. 1988) (declining to review district court order that Vaughn Index be filed); In re Motion to Compel filed by Steele, 799 F.2d 461, 464-65 (9th Cir. 1986); Ctr. for Nat'l Sec. Studies v. CIA, 711 F.2d 409, 413-14 (D.C. Cir. 1983) (finding no appellate jurisdiction to review lower court order granting summary judgment to defendant on only one of twelve counts in complaint, because order did not affect "predominantly all" of merits of case and plaintiffs did not establish that denial of relief would cause them irreparable injury); cf. Judicial Watch, Inc. v. DOE, 412 F.3d 125, 128 (D.C. Cir. 2005) (denying motion to dismiss appeal because, although district court's order was not final as it did not resolve all issues, it was injunctive in nature and therefore appealable under 28 U.S.C. § 1292(a)(1)); John Doe Corp. v. John Doe Agency, 850 F.2d 105, 107-08 (2d Cir. 1988) (finding district court order denying motion for disclosure of documents, preparation of Vaughn Index, and answers to interrogatories appealable, and thereupon reversing on merits), rev'd on other grounds, 493 U.S. 146 (1989).

[380] See Summers v. DOJ, 925 F.2d 450, 453 (D.C. Cir. 1991); Al-Fayed v. CIA, No. 00-2092, slip op. at 4, n.2 (D.D.C. Jan. 16, 2001) (refusing to treat defendant's motion for stay as "akin" to motion for summary judgment, because "in stark contrast to a motion for

been held that an "interim" award of attorney fees is not appealable until the conclusion of the district court proceedings in the case.[381] A district court's determination with respect to a FOIA plaintiff's fee category likewise is not subject to interlocutory appeal.[382]

Where there is a final order requiring that an agency disclose the relevant records, courts typically grant the government's request for a stay pending appeal because release of the information would disrupt the status quo and cause irreparable harm by mooting the issue on appeal.[383]

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summary judgment, a motion for a stay does not evaluate the merits of a case"), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001).

[381] See Nat'l Ass'n of Criminal Def. Lawyers v. DOJ, 182 F.3d 981, 984-85 (D.C. Cir. 1999) (finding that award of "interim" attorney fees is not appealable either as final judgment or as collateral order).

[382] Judicial Watch, Inc. v. DOJ, No. 01-5019, 2001 WL 800022, at *1 (D.C. Cir. June 13, 2001) (per curiam) (dismissing appeal because "district court's order holding that appellee is a representative of the news media for purposes of 5 U.S.C. § 552(a)(4)(A)(ii)(II) is not final in the traditional sense and does not meet the requirements of the collateral order doctrine").

[383] See, e.g., HHS v. Alley, 556 U.S. 1149, 1149 (2009) (ordering stay of district court's order which directed agency to disclose records to plaintiff, pending final disposition of appeal, following denial of stay by United States Court of Appeals for the Eleventh Circuit); Rosenfeld v. DOJ, 501 U.S. 1227, 1227 (1991) (granting full stay pending appeal); John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1307 (1989) (granting stay based upon "balance of the equities"); Islamic Shura Council of S. Cal. v. FBI, 635 F.3d 1160, 1164 (9th Cir. 2011) (noting that motions panel of Ninth Circuit granted an administrative stay in order to permit merits panel sufficient time to review district court's decision to unseal a sealed, ex parte order); Elec. Frontier Found. v. ODNI, 595 F.3d 949, 954 (9th Cir. 2010) (granting stay pending appeal to allow Solicitor General opportunity to decide which portions of summary judgment order to appeal), amended by, 639 F.3d 876 (9th Cir. 2010); Nat'l Council of La Raza v. DOJ, No. 04-5474, slip op. at 2 (2d Cir. Dec. 20, 2004) (granting stay for duration of appeal, but subject to expedited briefing schedule); Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979); Nat'l Day Laborer Org. Network v. ICE, 827 F. Supp. 2d 242 (S.D.N.Y. 2011) (granting stay to agency pending appeal); People for Am. Way Found. v. Dep't of Educ., 518 F. Supp. 2d 174, 179 (D.D.C. 2007) (same); Ctr. for Nat'l Sec. Studies v. DOJ, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (explaining that "stays are routinely granted in FOIA cases," and granting stay because disclosure of detainee names would "effectively moot any appeal"), aff'd in part, rev'd in part & remanded, 331 F.3d 918 (D.C. Cir. 2003). But cf. Manos v. Dep't of the Air Force, No. 93-15672, slip op. at 2 (9th Cir. Apr. 28, 1993) (denying stay of district court disclosure order when government "failed to demonstrate . . . any possibility of success on the merits of its appeal," despite appellate court's recognition that such denial would render appeal moot, but providing temporary stay for three days to allow Supreme Court to consider a stay); ACLU v. DOD, 357 F. Supp. 2d 708, 709 (S.D.N.Y. 2005) (denying motion to stay order requiring agency to search and review its operational files because court's order was procedural in nature, agency did not

The courts of appeals do not have uniform legal standards governing the scope of appellate review of FOIA decisions. Generally, the Courts of Appeals for the District of

demonstrate likelihood of success, or show that public interest would be served by immediate appeal, or that it would suffer irreparable harm).

Columbia,[384] First,[385] Second,[386] Fifth,[387] Sixth,[388] Eighth,[389] and Ninth Circuits,[390] have applied a de novo standard of review. By contrast, the Courts of Appeals for the Third[391]

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[384] See Elec. Priv. Info. Ctr. v. NSA, 678 F.3d 926, 930 (D.C. Cir. 2012) (reviewing de novo district court's grant of summary judgment); ACLU v. DOJ, 655 F.3d 1, 5 (D.C. Cir. 2011) (same); Consumers' Checkbook v. HHS, 554 F.3d 1046, 1049-50 (D.C. Cir. 2009) (same); Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 57 (D.C. Cir. 2003) (same).

[385] See Carpenter v. DOJ, 470 F.3d 434, 437 (1st Cir. 2006) ("Our review of the district court's determination that the materials are exempt from disclosure is de novo."); Sephton v. FBI, 442 F.3d 27, 29 (1st Cir. 2006) (reviewing de novo district court's grant of summary judgment); Church of Scientology Int'l v. DOJ, 30 F.3d 224, 228 (1st Cir. 1994) ("Our review of the district court's determination that the government was entitled to summary judgment based on its index and affidavits is de novo.").

[386] See Assoc. Press v. DOD, 554 F.3d 274, 283 (2d Cir. 2009) ("We review de novo the district court's grant of summary judgment in a FOIA case"); Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 355 (2d Cir. 2005) (reviewing "de novo a district court's grant of summary judgment in a FOIA case"); Tigue v. DOJ, 312 F.3d 70, 75 (2d Cir. 2002) (same).

[387] See Abrams v. Dep't of Treasury, 243 F. App'x 4, 5 (5th Cir. 2007) (reviewing district court's grant of summary judgment de novo). But cf. FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 610-11 & n.2 (5th Cir. 2003) (per curiam) (applying de novo standard of review to district court's legal conclusions while recognizing potential applicability of different standard for factual determinations).

[388] See CareToLive v. FDA, 631 F.3d 336, 340 (6th Cir. 2011) (reviewing de novo district court's grant of summary judgment in FOIA proceeding); Joseph W. Diemert, Jr. & Assoc. Co. v. FAA, 218 F. App'x 479, 481 (6th Cir. 2007) ("The review of the district court's application of law to the facts is de novo."); Rugiero v. DOJ, 257 F.3d 534, 543 (6th Cir. 2001) ("[T]his court reviews the propriety of a district court's grant of summary judgment in a FOIA proceeding de novo."); Sorrells v. United States, 142 F.3d 436, 436 (6th Cir. 1998) (deciding appeal "[u]pon de novo review") (unpublished table decision). But see Vonderheide v. IRS, 194 F.3d 1315, 1315 (6th Cir. 1999) ("Where an appeal concerns a factual attack on subject matter jurisdiction, this court reviews the factual findings of the district court for clear error and the legal conclusions de novo.") (unpublished table decision).

[389] See Madel v. DOJ, 784 F.3d 448, 451 (8th Cir. 2015) (reviewing de novo district court's grant of summary judgment); Hulstein v. DEA, 671 F.3d 690, 694 (8th Cir. 2012) (reviewing "applicability of FOIA exemptions de novo"); Cent. Platte Nat. Res. Dist. v. USDA, 643 F.3d 1142, 1146 (8th Cir. 2011) (reviewing de novo district court's grant of summary judgment, "viewing all facts and making all reasonable inferences in the light most favorable to the nonmoving party"); Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1209 (8th Cir. 2008) (reviewing district court's decision to grant summary judgment de novo). But see Johnston v. DOJ, 163 F.3d 602, 602 (8th Cir. 1998) ("We review the district court's factual findings for clear error and its legal conclusions de novo.") (unpublished table decision).

and Seventh Circuits[392] apply a two-tiered analysis, whereby they review whether the district court had an adequate factual basis for its decision and, if so, whether that

[390] See Animal Legal Def. Fund v. FDA, 836 F.3d 987, 989 (9th Cir. 2016) (en banc) ("Accordingly, we adopt a de novo standard of review for summary judgment decisions in FOIA cases . . . and our other decisions to the contrary are overruled.").

[391] See, e.g., Abdelfattah v. DHS, 488 F.3d 178, 182 (3d Cir. 2007) (detailing two-tiered standard of review applied in FOIA cases); Sheet Metal Workers Int'l Ass'n v. VA, 135 F.3d 891, 896 & n.3 (3d Cir. 1998) (describing "two-tiered test" while recognizing that review standard is not uniform among circuits); McDonnell v. United States, 4 F.3d 1227, 1241-42 (3d Cir. 1993) (pointing to "unique configuration" of summary judgment in FOIA cases as basis for rejecting "familiar standard of appellate review" for summary judgment cases).

[392] See Enviro Tech Int'l, Inc. v. EPA, 371 F.3d 370, 373-74 (7th Cir. 2004) (recognizing inconsistent application of standards of review among Circuits and within Seventh Circuit's own FOIA case law and reaffirming its use of two-tiered analysis); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1038 (7th Cir. 1998) ("[W]e continue to believe that the clearly erroneous standard remains appropriate in light of the unique circumstances presented by FOIA exemption cases."); Becker v. IRS, 34 F.3d 398, 402 (7th Cir. 1994) (explaining that whether withheld material fits within established standards of exemption reviewed is under two-pronged, deferential test).

decision is clearly erroneous. Similarly, the Fourth,[393] Tenth,[394] and Eleventh Circuits[395] generally distinguish between the district court's factual basis for its decision, which is reviewed under a clearly erroneous standard, and the district court's application of FOIA exemptions to approve withholding of documents, which is most often reviewed de novo. The end result has "caused some confusion" in the standard for appellate review for FOIA

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[393] See Rein v. U.S. Patent & Trademark Off., 553 F.3d 353, 358 (4th Cir. 2009) ("The standard of review in FOIA cases is limited to determining 'whether (1) the district court had an adequate factual basis for the decision rendered and (2) whether upon this basis the decision reached is clearly erroneous,'" and "[l]egal errors are reviewed de novo") (citations omitted); United States v. Mitchell, No. 03-6938, 2003 WL 22999456, at *1 (4th Cir. Dec. 23, 2003) (articulating standard of review in this case as "limited to determining whether the district court had an adequate factual basis for its decision and whether upon this basis the decision was clearly erroneous"). But see Hanson v. Agency for Int'l Dev., 372 F.3d 286, 290 (4th Cir. 2004) (stating that grant of summary judgment in FOIA action is issue of law, which is reviewed de novo); Heily v. Dep't of Commerce, 69 F. App'x 171, 173 (4th Cir. July 3, 2003) (per curiam) (same).

[394] See World Publ'g Co., 672 F.3d at 826 (reviewing "de novo district court's legal conclusion that requested records are exempt from disclosure under the FOIA," after noting that it can do so, "given undisputed facts"); Jordan v. DOJ, 668 F.3d 1188, 1192 (10th Cir. 2011) (stating that "the standard of review of a grant of summary judgment is de novo, if the district court's decision had an adequate factual basis'" (quoting Audubon Soc'y v. U.S. Forest Serv., 104 F.3d 1201, 1203 (10th Cir. 1997))); Prison Legal News v. EOUSA, 628 F.3d 1243, 1247 (10th Cir. 2011) (same); Stewart v. Dep't of Interior, 554 F.3d 1236, 1241 (10th Cir. 2009) (reviewing de novo agency's decision to withhold records under FOIA, noting review was limited to record before agency); Casad v. HHS, 301 F.3d 1247, 1251 (10th Cir. 2002) (explaining that review is first "whether the district court had an adequate factual basis" for its decision, and then "de novo [of] the district court's legal conclusions that the requested materials are covered by the relevant FOIA exemptions"). But see Forest Guardians v. Dep't of Interior, 416 F.3d 1173, 1177 (10th Cir. 2005) (reviewing de novo district court's decision to grant summary judgment).

[395] See Miccosukee Tribe, 516 F.3d at 1243-44 (reviewing de novo district court's grant of summary judgment and, with regard to proper application of Exemption 5, determining whether district court had adequate factual basis and whether decision reached was clearly erroneous); News-Press v. DHS, 489 F.3d 1173, 1187-89 (11th Cir. 2007) (concluding that de novo standard of review applies where facts are not in dispute and only issue on appeal is whether agency properly applied Exemption 6); Office of the Capital Collateral Counsel v. DOJ, 331 F.3d 799, 802 (11th Cir. 2003) (applying de novo standard of review because "issues in this appeal are limited to the legal application of [a] FOIA exemption"); cf. Sharkey v. FDA, 250 F. App'x 284, 287 (11th Cir. 2007) (declining to decide what standard of review applies where parties dispute applicable standard and district court's opinion should be affirmed under either). But see Brown v. DOJ, 169 F. App'x 537, 539 (11th Cir. 2006) (stating that "district court's determinations under the FOIA are reviewed for clear error").

cases in these circuits,[396] because it is difficult to distinguish between the "clearly erroneous" review standard which applies to the "'factual conclusions that place a document within a stated exemption of FOIA'"[397] and the de novo review standard that is used to determine "'whether a document fits within one of FOIA's prescribed exemptions.'"[398] In sum, the case law on this point is not consistent among the various circuits, and conflicting decisions are not uncommon even within the same circuit.[399]

On another issue involving appeal considerations, the D.C. Circuit, in a case of first impression, ruled that the standard of review of a district court decision on that portion of the FOIA's expedited access provision, which authorizes expedited access "in cases in which the person requesting the records demonstrates a compelling need,"[400] is de novo.[401] The D.C. Circuit held that "[p]recisely because FOIA's terms apply nationwide," it would not accord deference to any particular agency's interpretation of this provision of the FOIA.[402] At the same time, however, the D.C. Circuit held that if an agency were to issue a rule consistent with the FOIA's statutory language that permits expedition "in other cases determined by the agency,"[403] that rule would be entitled to judicial deference.[404] In any event, once an agency has acted upon the underlying request for

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[396] Schiffer v. FBI, 78 F.3d 1405, 1408 (9th Cir. 1996) ("Determining the appropriate standard of review to apply to summary judgment in FOIA cases . . . has caused some confusion because of the peculiar circumstances presented by such cases.").

[397] Id. at 1409 (quoting Ethyl Corp. v. EPA, 25 F.3d 1241, 1246 (4th Cir. 1994)).

[398] Id.

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

[400] 5 U.S.C. § 552(a)(6)(E)(i) (2012 & Supp. V 2017).

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

[402] Al-Fayed, 254 F.3d at 307.

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

[404] See id. at 307 n.7 ("A regulation promulgated in response to such an express delegation of authority to an individual agency is entitled to judicial deference . . . as is each agency's reasonable interpretation of its own regulations."). Contra ACLU of N. Cal. v. DOJ, No. 04-4447, 2005 U.S. Dist. LEXIS 3763, at*22 (N.D. Cal. Mar. 11, 2005) (concluding that "in the absence of any controlling Ninth Circuit authority to the contrary, . . . judicial review of any denial of a request for expedited processing – whether the request is made pursuant to the

which expedited access was requested, the FOIA itself removes jurisdiction from the courts to review the agency's decision on the issue of expedition.[405]

On appeal, a court of appeals generally reviews a lower court's decision to deny discovery using an abuse of discretion standard. [406]

In some FOIA cases where the merits and law of the case are so clear as to justify summary disposition, summary affirmance at the appellate stage is granted.[407] Additionally, although an otherwise routine case may be remanded solely on the basis that the district court failed to make a segregability finding,[408] courts of appeal still may

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'compelling need provision' of subparagraph (E)(i)(I), or is made pursuant to 'other cases determined by the agency provision' of subparagraph (E)(i)(II) – must be conducted de novo").

[405] See 5 U.S.C. § 552(a)(6)(E)(iv) ("A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request."); see also Coven v. OPM, No. 07-1831, 2009 U.S. Dist. LEXIS 90625, at *29-31 (D. Ariz. Sept. 29, 2009) (concluding that court does not have jurisdiction to review expedited processing claim where agency has provided complete response to request); Judicial Watch, Inc. v. U.S. Naval Observatory, 160 F. Supp. 2d 111, 112 (D.D.C. 2001) ("[B]ecause defendant has . . . provided a complete response to the request for records, this Court no longer has subject matter jurisdiction over the claim that defendant failed to expedite processing of plaintiff's request.").

[406] See, e.g., Freedom Watch v. NSA, 783 F.3d 1340, 1345 (D.C. Cir. 2015) (reviewing denial of discovery for abuse of discretion); Yagman v. BOP, 605 F. App'x 666, 667 (9th Cir. 2015) (same); CareToLive, 631 F.3d at 344 (same); Batton v. Evers, 598 F.3d 169, 175 (5th Cir. 2010) (same); Sharkey, 250 F. App'x at 287 (same); Trentadue v. FBI, 572 F.3d 794, 806 (10th Cir. 2009) (same); see also Mobley v. CIA, 806 F.3d 568, 576 (D.C. Cir. 2015) (reviewing denial of in camera inspection for abuse of discretion); Life Extension Found., Inc. v. IRS, 559 F. App'x 3, 3 (D.C. Cir. 2014) (same).

[407] See, e.g., Taitz v. Ruemmler, No. 11-5306, 2012 U.S. App. LEXIS 10714, at *1 (D.C. Cir. May 24, 2012) (per curiam) (granting summary affirmance and finding that district court properly determined that White House Counsel's Office is not an "agency" subject to FOIA); Cooper v. Stewart, No. 11-5061, 2011 WL 6758484, at *1 (D.C. Cir. Dec. 15, 2011) (per curiam) (granting agency's motion for summary affirmance on grounds that district court properly dismissed FOIA claims against individual defendants, granted summary judgment to DOJ based on adequacy of search, and concluded that Federal Torts Claims Act does not provide basis for considering plaintiff's FOIA claim); Mosby v. Hunt, No. 10-5296, 2011 U.S. App. LEXIS 17668, at *3-4 (D.C. Cir. July 6, 2011) (per curiam) (granting agency's motion for summary affirmance on basis that district court properly concluded that search was adequate and withholdings were proper).

[408] See, e.g., Stolt-Nielsen Transp. Group Ltd. v. United States, 534 F.3d 728, 734 (D.C. Cir. 2008) (stating that if district court approves agency's withholdings without issuing finding on segregability, then "'remand is required even if the requester did not raise the issue of

opt to make a segregability determination based on the record presented before the lower court.[409] (For a further discussion of this point, see Litigation Considerations, "Reasonably Segregable" Requirements, above.)

Additionally, appellate courts ordinarily will not consider issues raised for the first time on appeal by either party.[410] Similarly, agencies that do not raise or preserve all exemption claims at the district court level risk waiving these claims at the appellate level.[411] (See Litigation Considerations, Waiver of Exemptions in Litigation, above.)

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segregability before the court'" (quoting Johnson v. EOUSA, 310 F.3d 771, 776 (D.C. Cir. 2002))); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1116 (D.C. Cir. 2007) (same); James Madison Project v. NARA, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (denying summary affirmance in part and remanding for "a more precise finding by the district court as to segregability").

[409] See Juarez v. DOJ, 518 F.3d 54, 60 (D.C. Cir. 2008) (concluding that district court's failure to address segregability was "reversible error," but nevertheless determining that, based on its own review of agency affidavits, "no part of the requested documents was improperly withheld" and accordingly finding that no remand was necessary).

[410] See, e.g., Roth v. DOJ, 642 F.3d 1161, 1179-80 (D.C. Cir. 2011) (prohibiting government from raising argument on appeal that it did not raise in district court in manner sufficient to put plaintiff "on notice of the need to rebut it"); Adamowicz v. IRS, 402 F. App'x 648, 653 n.8 (2d Cir. 2010) (noting that plaintiff's argument that "district court should have conducted an in camera review" is waived where it is raised for first time on appeal); Elliott v. USDA, 596 F.3d 842, 850-51 (D.C. Cir. 2010) (barring plaintiff from raising new arguments concerning relationship between records requested and agency's practices where he did not first raise issue in trial court)); Judicial Watch, Inc. v. United States, 84 F. App'x 335, 338 (4th Cir. 2004) (refusing to entertain new arguments from appellant on adequacy of agency's search, despite appellant's characterization of them as "further articulation" of points made below); Blanton v. DOJ, 64 F. App'x 787, 789 (D.C. Cir. 2003) (per curiam) (rebuffing appellant's efforts to challenge adequacy of agency's Vaughn Index, because issue was not raised in district court); Iturralde v. Comptroller, 315 F.3d 311, 314 (D.C. Cir. 2003) (rejecting appellant's efforts to challenge sufficiency of agency's affidavits, because he did not raise issue in district court); James Madison Project, 2002 WL 31296220, at *1 (deciding that appellant waived challenges to agency's invocation of FOIA exemptions by failing to address arguments supporting withholding that were made in agency's summary affirmance motion); Greyshock v. U.S. Coast Guard, 107 F.3d 16, 16 (9th Cir. 1997) (declining to consider challenge to separate FOIA request that was not "mentioned in the complaint or any other pleading before the district court") (unpublished table decision). But see also Trans-Pacific Policing Agreement v. United States Customs Service, 177 F.3d 1022, 1027 (D.C. Cir. 1999) (allowing segregability issue to be raised for first time on appeal, because "appellants' failure to raise segregability certainly was not a knowing waiver of that argument").

[411] See Jordan, 668 F.3d at 1198 n.6 (noting that court will not consider defendants' alternate arguments, raised for first time on appeal, that additional exemptions apply to

Lastly, courts have awarded costs to the government in accordance with Rule 39(a) of the Federal Rules of Appellate Procedure when it is successful in a FOIA appeal.[412]

requested information); Senate of P.R. v. DOJ, 823 F.2d 574, 580 (D.C. Cir. 1987) (concluding that agencies may not "'wait until appeal to raise additional claims of exemptions or additional rationales for the same claim'" (quoting Holy Spirit Ass'n v. CIA, 636 F.2d 838, 846 (D.C. Cir. 1980))); see also Maydak v. DOJ, 218 F.3d 760, 769 (D.C. Cir. 2000) (concluding that agency could not assert new exemptions on appeal where it failed to raise those exemptions at district court level and "offered no convincing reasons why it could not have done so"); Rosenfeld v. DOJ, 57 F.3d 803, 811 (9th Cir. 1995) (finding new exemption claims waived when raised for first time after district court ruled against agency on its motion for summary judgment), cert. dismissed, 516 U.S. 1103 (1996); Ray v. DOJ, 908 F.2d 1549, 1551 (11th Cir. 1990) (same), rev'd on other grounds sub nom; cf. August v. FBI, 328 F.3d 697, 700-01 (D.C. Cir. 2003) (remanding to district court to consider applicability of exemptions that agency failed to raise at district court where government's "failure to raise all FOIA exemptions at the outset resulted from human error, because wholesale disclosure could pose a significant risk to the safety and privacy of third parties, and because the Government has taken steps to ensure that it does not make the same mistake again").

[412] See Fed R. Appellate Pr. 39(A); Baez v. DOJ, 684 F.2d 999, 1005-07 (D.C. Cir. 1982) (en banc); see also Scherer v. United States, 78 F. App'x 687, 690 (10th Cir. 2003) (upholding district court's award of costs to agency); Johnson v. Comm'r, 68 F. App'x 839, 840 (9th Cir. 2003) (awarding costs to agency because requester's appeal was frivolous).