Litigation Considerations

The President and Attorney General have issued memoranda to all agencies emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure."[1] (For a discussion of these memoranda, see Procedural Requirements, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, above.) In accordance with the Attorney General's FOIA Memorandum, it is the Department of Justice's policy to defend an agency's decision made under the FOIA "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."[2] The President's and Attorney General's memoranda do not create any new rights or benefits for FOIA litigants.[3]

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, Venue, and Other Preliminary Matters

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

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[1] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum]; accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[2] Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[3] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 ("This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."); Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (same); see also Amsinger v. IRS, No. 08-1085, 2009 WL 911831, at *3 (E.D. Mo. Apr. 1, 2009) (same).

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.[4]

This provision has been held to govern judicial review under all three of the FOIA's access provisions.[5] Because of its specific reference to the "complainant," however, the Court of Appeals for the District of Columbia Circuit has held that this language limits relief under the FOIA to disclosure of records to a particular requester.[6] Consequently, this provision does

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[4] 5 U.S.C. § 552(a)(4)(B) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Mangham v. Shinseki, No. 07-1338, 2009 WL 799541, at *2 (Vet. App. Mar. 25, 2009) (stating that United States Court of Appeals for Veterans Claims lacks jurisdiction over FOIA matters); Haralson v. Peake, 315 F. App'x 258, 260 (Fed. Cir. 2008) (same); Clark v. United States, 116 F. App'x 278, 279 (Fed. Cir. 2004) (explaining that FOIA suits are not within subject matter jurisdiction of Court of Federal Claims); Arriaga v. West, No. 00-1171, 2000 WL 870867, at *2 (Vet. App. June 21, 2000) (commenting that Court of Appeals for Veterans Claims has no jurisdiction over FOIA claims); In re Lucabaugh, 262 B.R. 900, 905 (E.D. Pa. 2000) (finding FOIA claims insufficient to confer jurisdiction on bankruptcy court); Bernard v. United States, 59 Fed. Cl. 497, 503 (2004) (declaring that Court of Federal Claims has no jurisdiction over FOIA matters), aff'd, 98 F. App'x 860 (Fed. Cir. 2004), reh'g denied, No. 04-5039 (Fed. Cir. May 5, 2004). 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)).

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

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

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not appear to authorize a court to order the publication of information, even information required to be published under subsection (a)(1) of the FOIA.[7] Nor does it appear to empower a court to order an agency to make records available for public inspection and copying under subsection (a)(2).[8] Similarly, the FOIA does not provide a jurisdictional vehicle for a court to consider Bivens-type constitutional tort claims against FOIA officers.[9] Instead, 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

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[6](...continued)
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").

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

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

[9] Johnson v. EOUSA, 310 F.3d 771, 777 (D.C. Cir. 2002) (explaining that the "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 a plaintiff "cannot obtain a Bivens remedy for an alleged violation of FOIA"). But cf. O'Shea v. NLRB, No. 2:05-2808, 2006 WL 1977152, at *5 (D.S.C. July 11, 2006) (recognizing that agency employees who arbitrarily and capriciously withhold information may be subject to disciplinary action).

has (1) "improperly," (2) "withheld," (3) "agency records."[10] Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation.[11]

As a consequence, 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[12] or, alternatively, fails to state a claim upon which relief could be granted under Rule 12(b)(6).[13]

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[10] 445 U.S. 136, 150 (1980).

[11] Id.

[12] See, e.g., Educap Inc. v. IRS, No. 07-2106, 2009 WL 416428, at *3 (D.D.C. Feb. 18, 2009) (finding lack of jurisdiction as to plaintiff's first request for relief because under FOIA court cannot order IRS to comply with Section 7602(c) of the Internal Revenue Code); Pickering-George v. ATF, No. 07-0899, 2008 WL 501375, at *1 (D.D.C. Feb. 22, 2008) (holding that there is no subject matter jurisdiction under FOIA because "the subject of the complaint - a petition to restore gun privileges pursuant to 18 U.S.C. § 925(c) - is not a FOIA request"); Segal v. Whitmyre, No. 04-80795, 2005 WL 1406171, at *3 (S.D. Fla. Apr. 6, 2005) (finding lack of jurisdiction over FOIA claim because plaintiff failed to allege improper withholding of agency records); Ellis v. IRS, No. 02-1976, 2003 U.S. Dist. LEXIS 24829, at *11 (D. Colo. Dec. 29, 2003) (dismissing claim for lack of subject matter jurisdiction because all documents were released prior to lawsuit); Armstead v. Gray, No. 3-03-1350, 2003 WL 21730737, at *1-2 (N.D. Tex. July 23, 2003) (finding no basis for jurisdiction under FOIA when plaintiff alleged only that agency employees "improperly accessed" plaintiff's records); Tota v. United States, No. 99-0445E, 2000 WL 1160477, at *2 (W.D.N.Y. July 31, 2000) (dismissing claim for lack of subject matter jurisdiction because the "[p]laintiff has not provided any evidence that the FBI improperly withheld any agency records"); Shafmaster Fishing Co. v. United States, 814 F. Supp. 182, 184 (D.N.H. 1993) ("The court thus lacks subject matter jurisdiction if the information was properly withheld under FOIA exemptions."); see also Goldgar v. Office of Admin., 26 F.3d 32, 34 (5th Cir. 1994) (per curiam) (pointing out that where agency had no records responsive to plaintiff's request, court had no jurisdiction under FOIA); Rae v. Hawk, No. 98-1099, slip op. at 3 (D.D.C. Mar. 7, 2001) (finding no subject matter jurisdiction over claims against agencies that received no FOIA request from plaintiff); Unigard Ins. Co. v. Dep't of the Treasury, 997 F. Supp. 1339, 1341 (S.D. Cal. 1997) ("The court presumes a lack of jurisdiction until the party asserting [it] proves otherwise."); cf. Kennecott, 88 F.3d at 1202 (dismissing, for lack of jurisdiction, claim seeking court-ordered publication of information, when court concluded that no such remedy exists under FOIA).

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

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Regardless of the exact legal basis used, however, if an agency has not improperly withheld records, courts have dismissed the FOIA suit.[14]

For the jurisdictional requirements for a FOIA case to be met, "an agency first must either have created or obtained a record as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA."[15] If an agency does not have possession and control of the requested record, then there can be no improper withholding.[16]

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

[14] See, e.g., Kissinger, 445 U.S. at 139 ("When an agency has demonstrated that it has not 'withheld' requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the FOIA."); Bloom v. 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").

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

[16] See DOJ v. Tax Analysts, 492 U.S. 136, 145 (1989); Kissinger, 445 U.S. at 155 n.9 ("[T]here is no FOIA obligation to retain records prior to [receipt of a FOIA] request."); Lechliter v. Rumsfeld, 182 F. App'x 113, 116 (3d Cir. 2006) (finding no improper withholding where agency (continued...)

Records that are created by or come into the possession of an agency after a FOIA request is received but before the search for responsive records is conducted, however, may be considered "agency records" for purposes of such FOIA request depending upon the agency's "scope-of-search cut-off" policy.[17] An agency's failure to consider these records when responding to the FOIA request may be considered an improper withholding.[18] (For a further

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[16](...continued)
destroyed documents for reason that "'is not itself suspect'" (citing SafeCard Servs. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991))); Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam) ("[T]he fact that responsive documents once existed does not mean that they remain in the [agency's] custody today or that the [agency] had a duty under FOIA to retain the records."); Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (finding no remedy for records destroyed prior to FOIA request); Carson v. U.S. Office of Special Counsel, 534 F. Supp. 2d 99, 103 (D.D.C. 2008) (explaining that "jurisdiction under the FOIA extends only to claims arising from the improper withholding of agency records" and therefore court cannot order agency to create records); 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); Graves v. EEOC, Nos. 02-6842, 02-6306, slip op. at 10-11 (C.D. Cal. Apr. 4, 2003) (providing no relief to plaintiff where agency properly destroyed records prior to receiving his FOIA request); Blanton v. 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); Folstad v. Bd. of Governors of the Fed. Reserve Sys., No. 1:99-124, 1999 U.S. Dist. LEXIS 17852, at *5 (W.D. Mich. Nov. 16, 1999) (declaring that the FOIA "does not independently impose a retention obligation on the agency" and that "[e]ven if the agency failed to keep documents that it should have kept, that failure would create neither responsibility under FOIA to reconstruct those documents nor liability for the lapse"), aff'd, 234 F.3d 1268 (6th Cir. 2000) (unpublished table decision); Bartlett v. DOJ, 867 F. Supp. 314, 316 (E.D. Pa. 1994) (dismissing case for lack of jurisdiction after finding that "[plaintiff's] request seeks presently nonexistent material"); cf. Morris v. Comm'r, No. F-97-5031, 1997 WL 842413, at *4 (E.D. Cal. Nov. 25, 1997) (finding that a request for determination of tax status "was not a request for a document in existence" and thus was not "a valid FOIA request"). But see also Cal-Almond, Inc. v. USDA, No. 89-574, slip op. at 2-3 (E.D. Cal. Mar. 12, 1993) (ruling that when agency returned requested records to submitter four days after denying requester's administrative appeal, in violation of its own records-retention requirements, and court determined that such records were required to be disclosed, agency must seek return of records from submitter for disclosure to requester), appeal dismissed per stipulation, No. 93-16727 (9th Cir. Oct. 26, 1994).

[17] See, e.g., DOJ FOIA Regulations, 28 C.F.R. § 16.4(a) (2008) (specifying that its standard "cut-off" practice "include[s] only records in its possession as of the date [that it] begins its search for them") (emphasis added).

[18] See Pub. Citizen, 276 F.3d at 643-44 (refusing to approve agency's "date-of-request cut-off" policy, and pointing out that it effectively results in withholding of potentially large number (continued...)

discussion of "cut-off" dates, see 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.)

Further, the term "record" includes "any information that would be an agency record subject to the [FOIA] when maintained by an agency in any format, including an electronic format."[19] The FOIA provides no jurisdiction over records other than those held by a federal agency.[20] (For further discussions of the terms "agency" and "agency records," see Procedural

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[18](...continued)
of relevant agency records); McGehee v. CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983) (cautioning agencies against adopting policies the net effect of which "is significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them"), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983).

[19] 5 U.S.C. § 552(f)(2)(A).

[20] See, e.g., Citizens for Responsibility and Ethics in Wash. v. Office of Admin., No. 08-5188, 2009 WL 1373612, at *4 (D.C. Cir. May 19, 2009) (holding that Office of Administration is not subject to FOIA because it "lacks substantial independent authority"); Megibow v. Clerk of U.S. Tax Court, 432 F.3d 387, 388 (2d Cir. 2005) (ruling that United States Tax Court is not subject to FOIA); Blankenship v. Claus, 149 F. App'x 897, 898 (11th Cir. 2005) (affirming dismissal of FOIA claim brought against state authority); Wright v. Curry, 122 F. App'x 724, 725 (5th Cir. 2004) (emphasizing that FOIA "applies to federal agencies, not state agencies"); United States v. Alcorn, 6 F. App'x 315, 316-17 (6th Cir. 2001) (affirming the dismissal of a FOIA claim against a district court "because the federal courts are specifically excluded from FOIA's definition of 'agency'"); McDonnell v. Clinton, No. 97-5179, 1997 WL 812536, at *1 (D.C. Cir. Dec. 29, 1997) (dismissing FOIA claim brought solely against the President); Ortez v. Wash. County, 88 F.3d 804, 811 (9th Cir. 1996) (dismissing FOIA claims against county and county officials); Simon v. Miami County Incarceration Facility, No. 3:05-CV-191, 2006 WL 1663689, at *1 (S.D. Ohio May 5, 2006) (magistrate's recommendation) (explaining that because telecommunications company is not federal agency, it is not subject to FOIA), adopted, 2006 WL 1663689 (S.D. Ohio May 12, 2006); Cruz v. Superior Court Judges, No. 3:04-CV-1103, 2006 WL 547930, at *1 (D. Conn. Mar. 1, 2006) (holding that municipal police department is not subject to FOIA, which "applies [only] to federal agencies"); Davis v. Johnson, No. 05-2060, 2005 U.S. Dist. LEXIS 12475, at *1 (N.D. Cal. June 20, 2005) (disallowing FOIA claim against deputy public defender who represented plaintiff in state criminal trial); Benjamin v. Fuller, No. 3:05-cv-941, 2005 WL 1136864, at *1 (M.D. Pa. May 13, 2005) (dismissing a FOIA suit against a district court because the FOIA's definition of "'agency' does not include the courts of the United States"); Carter v. U.S. 6th Circuit Court of Appeal, No. 3:05-cv-134, 2005 WL 1138828, at *1 (E.D. Tenn. May 12, 2005) (dismissing claim against appellate court and explaining that FOIA applies only to executive branch agencies); Yoonessi v. N.Y. State Bd. for Prof'l Med. Conduct, No. 03-cv-871, 2005 WL 645223, at *26 (W.D.N.Y. Mar. 21, 2005) ("[T]he plain language of the FOIA precludes its application to state and local agencies or to individuals."); Slovinec v. Ill. Dep't of Human Servs., No. 02-4124, 2005 WL 442555, at *7 (N.D. Ill. Feb. 22, 2005) (explaining that the "FOIA has no application to the (continued...)

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

Whether an agency has "improperly" withheld records usually turns on whether one or more exemptions applies to the documents at issue.[21] If the agency can establish that no responsive records exist, then there is no "improper" withholding.[22] The same is true if all responsive records have been released in full to the requester,[23] though a court still may grant

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[20](...continued)
States"); Troyer v. McCallum, No. 03-0143, 2002 WL 32365922, at *1 (W.D. Wis. Mar. 14, 2002) (holding that FOIA "creates no obligations for state agencies"); Allnut v. 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); Anderson v. Fed. Pub. Defender, No. 95-1485, slip op. at 1 (D.D.C. Mar. 28, 1996) (determining that the "Federal Public Defender is not an agency subject to the requirements of the Freedom of Information Act"); cf. Moye, O'Brien, O'Rourke, Hogan & Pickert v. National R.R. Passenger Corp., No. 6:02-CV-126, 2003 WL 21146674, at *6 (M.D. Fla. May 13, 2003) ("Although Amtrak is not a federal agency, it must comply with FOIA pursuant to statute."), rev'd & remanded on other grounds, 116 F. App'x 251 (11th Cir. 2004). See generally Price v. County of San Diego, 165 F.R.D. 614, 620 (S.D. Cal. 1996) (emphasizing that the FOIA applies only "to authorities of the Government of the United States").

[21] 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).

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

[23] See, e.g., Gabel v. Comm'r, No. 94-16245, 1995 WL 267203, at *2 (9th Cir. May 5, 1995) (finding no improper withholding because "it was uncontested" that agency provided complete response to request); Burr v. Huff, No. 04-C-53, 2004 WL 253345, at *2 (W.D. Wis. (continued...)

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.[24] (For further discussion see Litigation Considerations, Mootness and Other Grounds for Dismissal, below.) This narrow situation, however, is different from the issuance of a declaration, following disclosure of all requested records, that an agency's initial withholding violated the FOIA.[25] The D.C. Circuit has held that such a declaratory judgment would constitute an advisory opinion that courts lack the jurisdiction to issue.[26]

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[23](...continued)
Feb. 6, 2004) ("If no documents exist, nothing can be withheld, and jurisdiction cannot be established."), aff'd, No. 04-1466, 2004 U.S. App. LEXIS 22476, at *2-3 (7th Cir. Oct. 14, 2004); Ferranti v. Gilfillan, No. 04-cv-339, 2005 WL 1366446, at *2 (D. Conn. May 31, 2005) (dismissing suit for lack of jurisdiction after agency fully released all requested records); Reg'l Mgmt. Corp. v. Legal Servs. Corp., 10 F. Supp. 2d 565, 573-74 (D.S.C. 1998) (concluding that "no case or controversy exists" because agency produced all requested documents); D'Angelica v. IRS, No. S-94-1998, 1996 U.S. Dist. LEXIS 6681, at *3 (E.D. Cal. Apr. 25, 1996) (granting agency summary judgment when all requested records either did not exist or were fully disclosed); cf. Martinez v. 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)).

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

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

[26] Id.; see also Pagosans for Pub. Lands v. U.S. Forest Serv., No. 06-cv-00556, 2007 WL 162745, at *3 (D. Colo. Jan. 18, 2007) ("There is no jurisdiction under FOIA for a declaratory (continued...)

Once a court determines that information has been properly withheld pursuant to a FOIA exemption, the court has no inherent, equitable power to order disclosure absent some other statute mandating disclosure.[27] The converse of this rule, however -- that a court has inherent, equitable power to refuse to order disclosure of nonexempt information -- has not been established with the same degree of certainty.[28]

Similarly, an agency has not improperly withheld records when it is prohibited from disclosing them by a preexisting court order.[29] While the validity of such a preexisting court

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[26](...continued)
judgment."). But see 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, a 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 an agency's disclosure of the requested photographs, that its initial withholding was "contrary to the FOIA").

[27] 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).

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

[29] 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 the release of records covered by preexisting nondisclosure (continued...)

order does not depend upon whether it is based upon FOIA exemptions,[30] 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.[31]

Further, because the Supreme Court has clearly instructed that, as a general rule, "the identity of the requesting party" does not have any bearing on the proper disclosure of information under the FOIA,[32] it is well settled that it is not appropriate for a court to order disclosure of information to a FOIA requester with a special restriction, either explicit or implicit, that the requester not further disseminate the information received.[33] As the

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[29](...continued)
order of sister district court); cf. Riley v. FBI, No. 00-2378, 2002 U.S. Dist. LEXIS 2632, at *7 (D.D.C. Feb. 12, 2002) (finding that "pen register" materials were sealed and therefore were properly withheld on basis of Exemption 3).

[30] 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).

[31] See, e.g., 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."); 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]"); Armstrong v. Executive Office of the President, 830 F. Supp. 19, 23 (D.D.C. 1993) ("[I]t is also clear that the Protective Order was not intended to act as a limitation on the Government's ability to determine the final disposition of these classified materials."); Senate of P.R. v. DOJ, No. 84-1829, 1993 U.S. Dist. LEXIS, at *18-19 (D.D.C. Aug. 24, 1993) (finding that agency declaration failed to satisfy Morgan test, and requiring more detailed explanation of intended effect of sealing order); McDonnell Douglas Corp. v. NASA, No. 91-3134, slip op. at 1-2 (D.D.C. July 12, 1993) ("While this court's sealing Order temporarily precluded release, that order was not intended to operate as the functional equivalent of an injunction prohibiting release. It was only approved by the court for the purposes of expediting this litigation and protecting information . . . until this lawsuit was resolved."); see also Lykins v. DOJ, 725 F.2d 1455, 1460-61 & n.7 (D.C. Cir. 1984) (determining that a federal district court policy -- one "now enshrined in an order [that was] not issued as part of a concrete case or controversy before [that] court" -- does not constitute the type of "court order" contemplated in GTE Sylvania); cf. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 791 (3d Cir. 1994) ("[W]here it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information pursuant to the relevant freedom of information law.").

[32] DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771-72 (1989).

[33] See, e.g., Chin v. U.S. Dep't of the Air Force, No. 99-3127, 2000 WL 960515, at *2 (5th Cir. (continued...)

Supreme Court explained: "There is no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination."[34]

The venue provision of the FOIA, quoted above, provides requesters with a broad choice of forums in which to bring suit.[35] When a requester sues in a jurisdiction other than the District of Columbia, however, he is obliged to allege the nexus giving rise to proper venue in that jurisdiction.[36] Largely due to the statutory designation of the District of Columbia as

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[33](...continued)
June 15, 2000) (refusing to allow disclosure of exempt information under protective order); Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) (overruling district court's order limiting access to persons other than plaintiff because "such action is not authorized by FOIA"); Spurlock, 69 F.3d at 1016 (finding that district court erred when, after determining that requested material was exempt, it nevertheless ordered disclosure of any "falsified statements" made to FBI about requester); cf. Maricopa, 108 F.3d at 1088-89 (rejecting, as irrelevant, plaintiff's offer to agree not to further disclose requested information: "FOIA does not permit selective disclosure of information only to certain parties . . . . [O]nce the information is disclosed to [this requester], it must also be made available to all members of the public who request it.").

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

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

[36] See 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); Cosio v. INS, No. 97-5380, slip op. at 3 (C.D. Cal. Dec. 29, 1997) (finding venue improper for plaintiffs who do not reside or have their principal places of business in judicial district and who do not allege that their records were maintained there); Handlery Hotels, Inc. v. U.S. Consumer Prod. Safety Comm'n, No. 97-1100, slip op. at 3 (S.D. Cal. Dec. 5, 1997) (finding venue improper where based on location of plaintiff's counsel); Keen v. FBI, No. 97-2657, 1997 U.S. Dist. LEXIS 16220, at *2 (N.D. Cal. Oct. 17, 1997) (finding venue improper where pro se plaintiff housed temporarily); see also Morrell v. DOJ, No. 96-4356, 1996 WL 732499, at *1 (N.D. Cal. Dec. 16, 1996) (transferring pro se action improperly filed in Northern District of California to Eastern District of California, where plaintiff resided); cf. Smith v. DOJ, 223 F. App'x 528, 529 (8th Cir. 2007) (remanding to district court to consider appropriateness of transfer as plaintiff provided permanent address, enabling district court to determine correct venue); McHale v. FBI, No. 99-1628, slip op. at 8-9
(continued...)

an appropriate forum for any FOIA action,[37] the District Court for the District of Columbia and the D.C. Circuit have, over the years, decided a great many of the leading cases under the FOIA.[38]

The District Court for the District of Columbia has been held to be the sole appropriate forum for cases in which the requester resides and works outside the United States and the records requested are located in the District of Columbia.[39] As a related matter, aliens are treated the same as U.S. citizens for FOIA venue purposes.[40] And on another technical venue matter, even though the District Court for the District of Columbia is the "universal" venue for FOIA lawsuits,[41] it is not settled whether the Tennessee Valley Authority is amenable to FOIA suit in Washington, D.C. or only in the Northern District of Alabama (the venue set by statute for that wholly owned government corporation).[42]

The judicial doctrine of forum non conveniens, as codified in 28 U.S.C. § 1404(a),[43] can permit the transfer of a FOIA case to a different judicial district.[44] The courts have invoked this doctrine to transfer FOIA cases under a variety of circumstances.[45] Similarly, when the

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[36](...continued)
(D.D.C. Nov. 7, 2000) (dismissing case under "first-filed" rule in favor of similar litigation pending in another jurisdiction).

[37] See 5 U.S.C. § 552(a)(4)(B).

[38] 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.").

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

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

[41] See 5 U.S.C. § 552(a)(4)(B).

[42] Compare Jones v. NRC, 654 F. Supp. 130, 132 (D.D.C. 1987) (declaring that "Congress has made clear that the venue statute that permits [service of] process against federal agencies does not apply to TVA"), with Murphy v. TVA, 559 F. Supp. 58, 59 (D.D.C. 1983) (finding a "strong presumption that Congress intended FOIA actions against the TVA to be maintainable in the District of Columbia").

[43] (2006).

[44] 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).

[45] See, e.g., Our Children's Earth Found. v. EPA, No. 08-01461, 2008 WL 3181583, at *7 (N.D.
(continued...)

requested records are the subject of pending FOIA litigation in another judicial district, the related doctrine of "federal comity" can permit a court to defer to the jurisdiction of the other court, in order to avoid unnecessarily burdening the federal judiciary and delivering conflicting FOIA judgments.[46]

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[45](...continued)
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"); Bauer v. United States, No. 91-374A, slip op. at 3 (W.D.N.Y. Feb. 3, 1992) (finding venue improper where pro se suit filed; action transferred to jurisdiction where records located); Housley v. DOJ, No. 89-436, slip op. at 3-4 (D.D.C. Nov. 13, 1989) (transferring case to district where criminal proceeding against plaintiff was held and where evidence obtained by government's electronic surveillance allegedly was improperly withheld); cf. Envtl. Crimes Project v. EPA, 928 F. Supp. 1, 1-2 (D.D.C. 1995) (finding that "[t]he interest of justice clearly favors transfer of this case," but absent "precise" information as to location of records sought, declining to order transfer in view of "substantial weight due to plaintiff's choice of forum"). But see In re Scott, 709 F.2d 717, 721-22 (D.C. Cir. 1983) (issuing writ of mandamus and remanding case when district court sua sponte transferred case, without determination of whether venue was proper in other forum, merely in effort to reduce burden of "very large number of in forma pauperis cases"); Haswell v. Nat'l R.R. Passenger Corp., No. 05-723, 2006 WL 839067, at *3-4 (D. Ariz. Mar. 28, 2006) (denying government's request to transfer venue to District of Columbia, because plaintiff was resident of Arizona, even though agency and all responsive records were located in Washington, D.C.; reasoning that "case [likely] will be decided on summary judgment" based upon affidavits).

[46] See, e.g., Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 749-50 (9th Cir. 1979) (holding that "[t]he purpose of the comity principle is of paramount importance" and therefore the Court of Appeals for the Ninth Circuit will defer to litigation in progress in D.C. Circuit, even though comity doctrine is technically inapplicable in instant case because D.C. complaint was filed after California complaint); McHale, 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);
(continued...)

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.[47] The Eighth Circuit explained that not only does the federal removal statute, 28 U.S.C. § 1442(a)(1),[48] establish an independent basis for federal court jurisdiction, but the FOIA itself raises a "colorable defense" to the state action.[49]

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.[50] When such extraordinary relief is sought, the court does not

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[46](...continued)
see also City of Chicago v. U.S. Dep't of the Treasury, No. 01 C 3835, 2001 WL 1173331, at *3 (N.D. Ill. Oct. 4, 2001) (finding "comity" inapposite when a related case seeking much of the same information at issue is before a court of appeals); 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).

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

[48] (2006).

[49] 245 F.3d at 693.

[50] See U.S. Dep't of Commerce v. Assembly of Cal., 501 U.S. 1272 (1991) (staying preliminary injunction); Aronson v. HUD, 869 F.2d 646, 648 (1st Cir. 1989) (denying preliminary injunction); 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); Robbins v. U.S. Bureau of Land Mgmt., 219 F.R.D. 685, 687 (D. Wyo. 2004) (denying as premature a motion to compel production of documents that were the subject of multiple FOIA requests); Beta Steel Corp. v. NLRB, No. 2:97 CV 358, 1997 WL 836525, at *2 (N.D. Ind. Oct. 22, 1997) (denying preliminary injunction); see also Cullinane v. Arnold, No. 97-779, 1998 U.S. Dist. LEXIS 5575, at *4 (C.D. Cal. Mar. 24, 1998) (denying writ of mandamus because FOIA provides adequate remedy); Al-Fayed v. CIA, No. 00-2092, slip op. at 18 (D.D.C. Dec. 11, 2000) (reminding plaintiffs, who twice before had petitioned for a temporary restraining order, that a preliminary injunction amounts to "extraordinary" relief, which must be granted "sparingly"), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); cf. Dorsett v. 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 (continued...)

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 relief.[51]

In a FOIA case, the granting of such an injunction would necessarily force the government to disclose the very information that is the subject of the litigation, without affording it any opportunity to fully and fairly litigate its position on the merits; such an injunction would moot the government's claims before they could ever be adjudicated and would effectively destroy any possibility of appellate review.[52]

The FOIA itself contemplates expedited processing of requests in cases of "compelling need" and in other cases that are determined by agency regulation to warrant such processing.[53] However, even the timing of an agency's response to an expedited processing

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[50](...continued)
temporary restraining order to force "immediate compliance" with plaintiff's FOIA requests by moving them "to the head of the queue forthwith").

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

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

[53] 5 U.S.C. § 552(a)(6)(E)(i)(I)-(II); see, e.g., Dep't of State FOIA Regulations, 22 C.F.R. § 171.12(c)(4) (2008) (providing that expedited processing may be granted if "[s]ubstantial (continued...)

request itself has been subject to a preliminary injunction.[54] Such 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 for records concerning the government's terrorist surveillance program.[55] In EPIC, the court ruled that courts have the jurisdictional authority to impose "concrete deadlines" on any agency that "delay[s]" the processing of an expedited FOIA request beyond what arguably is "as soon as practicable,"[56] i.e., the statutory standard applicable to expedition.[57] It then issued an injunction to accelerate the processing of EPIC's FOIA request (which the Department of Justice already had agreed to handle on an expedited basis) by requiring production of records within twenty days of its order.[58]

In reaching this decision, the court focused on the "twenty-day deadline applicable to standard FOIA requests" and opined that if an agency fails to meet this deadline, it "presumptively also fails to" meet the expedition standard.[59] Because the Department of Justice had surpassed the "standard" twenty-day deadline -- and had as yet presented no

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[53](...continued)
humanitarian concerns would be harmed by the [agency's] failure to process [the requested records] immediately"); cf. Aguilera, 941 F. Supp. at 152-53 (granting the plaintiff's motion for a preliminary injunction to compel expedited processing on the basis that the plaintiff "made a strong showing of exceptional and urgent need in this case to fall within the exception . . . [and] to warrant an expedition of his FOIA request").

[54] 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. Frontier Found. v. Office of the Dir. of Nat'l Intelligence, No. 07-5278, 2007 WL 4208311, at *8 (N.D. Cal. Nov. 27, 2007) (granting injunctive relief and ordering defendant to "process plaintiff's FOIA requests within ten days of this 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, at *4-5 (N.D. Cal. Nov. 29, 2006) (granting plaintiff's motion for preliminary injunction and ordering agencies to process plaintiff's FOIA requests within thirty days); Wash. Post, 459 F. Supp. 2d at 68 n.4, 76 (granting the plaintiff's motion for a preliminary injunction "to complete the processing of the plaintiff's . . . FOIA requests and produce or identify all responsive records within 10 days," and to provide a Vaughn Index, despite the agency's prior expedited review of plaintiff's FOIA request). But cf. Long, 436 F. Supp. 2d at 44 (denying, given the "broad scope of plaintiff's requests," a motion for a preliminary injunction to compel processing within twenty days, and explaining that "[t]he government has not yet had a chance to review its files, prepare and file a dispositive motion, and provide the Court the information necessary to make a decision on any material that might be subject to an exemption").

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

[56] Id. at 38.

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

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

[59] Id. at 39.

"credible evidence" justifying its "delay" -- the court found that EPIC's "right to expedition" would be lost if a preliminary injunction were not issued.[60] Despite this ruling, it is worth reiterating that the FOIA provides no specific time frame within which an expedited request must be processed, but rather, as mentioned above, requires only that the processing be accomplished "as soon as practicable."[61] (See the further discussions of expedited processing under Procedural Requirements, Expedited Processing, above; and Litigation Considerations, "Open America" Stays of Proceedings, below.)

In any event, a FOIA plaintiff ordinarily must file suit before expiration of the applicable statute of limitations.[62] In Spannaus v. DOJ, the D.C. Circuit applied the general federal statute of limitations, which is found at 28 U.S.C. § 2401(a),[63] to FOIA actions.[64] Section

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[60] Id. at 40-41.

[61] 5 U.S.C. § 552(a)(6)(E)(iii); see also ACLU v. DOD, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004) ("While it would appear that expedited processing would necessarily require compliance in fewer than 20 days, Congress provided that the executive was to 'process as soon as practicable' any expedited request."); S. Rep. 104-272, 1996 WL 262861, at *17 (May 15, 1996) ("The goal [of expedited processing] is not to get the request processed within a specific time period, but to give the request priority in processing more quickly than would otherwise occur." (emphasis added)).

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

[63] (2006).

[64] 824 F.2d 52, 55-56 (D.C. Cir. 1987); see also, e.g., Porter v. CIA, 579 F. Supp. 2d 121, 126 (D.D.C. 2008) (finding that plaintiff's FOIA claim is barred by six year statute of limitations); 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 a "jurisdictional condition attached to the government's waiver of sovereign immunity," and dismissing complaint filed five months too late because the statute of limitations "must be strictly construed"); Lighter v. IRS, No. 00-00289, 2001 U.S. Dist. LEXIS 3483, at *4 (D. Haw. Feb. 27, 2001) (dismissing complaint filed eight years after plaintiff exhausted his administrative remedies, two years too late); 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) (continued...)

2401(a) states, in pertinent part, that "every action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." In Spannaus it was held that the FOIA cause of action accrued -- and, therefore, that the statute of limitations began to run -- once the plaintiff had "constructively" exhausted his administrative remedies (see the discussion of Litigation Considerations, Exhaustion of Administrative Remedies, below) and not when all administrative appeals had been finally adjudicated.[65] A time-barred FOIA cause of action can be cured by filing a new FOIA request "so long as the new claims replace the time-barred claims."[66] In accordance with the Spannaus decision, the National Archives and Records Administration issued General Records Schedule 14,[67] which sets the record-retention period at six years for all correspondence and supporting documentation relating to denied FOIA requests.[68]

Lastly, where a pro se FOIA plaintiff seeks appointment of counsel, a district court has wide discretion to decide whether to grant that request under 28 U.S.C. § 1915(e)(1).[69] 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.[70] (For a discussion of the availability of attorney fees in the event that

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[64](...continued)
(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").

[65] 824 F.2d at 57-59; see 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).

[66] 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").

[67] Nat'l Archives & Records Admin., General Records Schedule, Schedule 14 (1998).

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

[69] (2006); 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").

[70] See, e.g., Willis v. FBI, 274 F.3d 531, 532-33 (D.C. Cir. 2001) (citing local court rules as most appropriate basis upon which to decide a question of appointment of counsel in a FOIA (continued...)

counsel is appointed, see Attorney Fees, below.) Finally, it should be noted that the FOIA does not provide a plaintiff, pro se or otherwise, with a right to a jury trial.[71]

Pleadings

An agency has thirty days from the date of service to answer a FOIA complaint,[72] not the typical sixty days that are otherwise permitted by Federal Rule of Civil Procedure 12(a). Courts are not required to automatically accord expedited treatment to FOIA lawsuits, but they may do so "if good cause therefor is shown."[73]

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.[74] Second, the burden of proof is on the defendant agency, which must justify its decision to withhold any information.[75]

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[70](...continued)
case); Jackson v. County of McLean, 953 F.2d 1070, 1072 (7th Cir. 1992) (providing "nonexclusive" list of factors to be considered on questions of appointment of counsel) (non-FOIA case); Long v. Shillinger, 927 F.2d 525, 527 (10th Cir. 1991) (same) (non-FOIA case); 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 FOIA claim, and given that factual and legal issues relating to her FOIA claim do not appear overly complex).

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

[72] See 5 U.S.C. § 552(a)(4)(C) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[73] Federal Courts Improvement Act, 28 U.S.C. § 1657 (2006).

[74] See 5 U.S.C. § 552(a)(4)(B); 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)); ACLU v. DOD, 543 F.3d 59, 66 (2d Cir. 2008) (finding that the FOIA "expressly provides for de novo review of agency decisions to withhold records"), application to extend time to file petition for cert. granted, No. 08A1068 (J. Ginsburg, May 29, 2009); Summers v. DOJ, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (explaining that review is "de novo").

[75] See 5 U.S.C. § 552(a)(4)(B); 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.[76] (See the discussion under Exemption 1, Standard of Review, above.) Fee waiver issues also are reviewed under the de novo standard of review, but the scope of review is specifically limited by statute to the record before the agency.[77] (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"[78] standard and an agency denies that request for expedition, courts review that decision de novo.[79] 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."[80] In reverse FOIA lawsuits, unlike traditional FOIA actions, courts apply the more deferential "arbitrary and capricious" standard under the Administrative Procedure Act.[81] (See the discussion of this point under Reverse FOIA, Standard of Review, below.)

Only federal agencies are proper party defendants in FOIA litigation.[82] Consequently,

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[76] See, e.g., 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))); Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001) (same).

[77] 5 U.S.C. § 552(a)(4)(A)(vii); see, e.g., Judicial Watch, Inc. v. Rosotti, 326 F.3d 1309, 1311 (D.C. Cir. 2003).

[78] 5 U.S.C. § 552(a)(6)(E)(i)(I).

[79] See Al-Fayed v. CIA, 254 F.3d 300, 306-08 (D.C. Cir. 2001) (holding, in a case of first impression, that "a district court must review de novo an agency's denial of a request for expedition under FOIA"); ACLU v. DOJ, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) (same).

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

[81] 5 U.S.C. §§ 701-706 (2006).

[82] See 5 U.S.C. § 552(a)(4)(B) (granting district courts "jurisdiction to enjoin the agency from withholding agency records improperly withheld from complainant"); 5 U.S.C. § 552(f)(1) (defining the term "agency"); see also Dunleavy v. New Jersey, 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, on issue of first impression, that United States Tax Court is not subject to FOIA); Pennyfeather v. Tessler, 431 F.3d 54, 56 (2d Cir. 2005) (holding that the FOIA does not provide for private right of action

(continued...)

neither the agency head nor other agency officials are proper parties to a FOIA suit,[83] nor is "the United States."[84] (For a further discussion of which entities are subject to the FOIA, see Procedural Requirements, Entities Subject to the FOIA, above). Since the plain language of the Act vests the district courts with jurisdiction to enjoin an "agency" from withholding records,[85] when FOIA plaintiffs name an office or component as a defendant, courts frequently substitute the appropriate agency as the proper party.[86] Similarly, as a general rule, only the

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[82](...continued)
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 the 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."); 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"); DeMartino v. FBI, 511 F. Supp. 2d. 146, 148 (D.D.C. 2008) (dismissing FOIA complaint against U.S. Probation Office, because "a court unit . . . is not subject to the requirements of the FOIA").

[83] See, e.g., 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."); Ginarte v. Mueller, 534 F. Supp. 2d 135, 137 (D.D.C. 2008) (dismissing FOIA claims against individual officers at federal agency, because they are not proper party defendants); Santini v. Taylor, 555 F. Supp. 2d 181, 184 (D.D.C. 2008) (dismissing FOIA complaint for lack of subject matter jurisdiction because plaintiff named government employees as defendants, rather than agency).

[84] See Sanders v. United States, No. 96-5372, 1997 WL 529073, at *1 (D.C. Cir. July 3, 1997) (dismissing complaint because "United States" is not agency subject to FOIA); United States v. Trenk, No. 06-1004, 2006 WL 3359725, at *8 (D.N.J. Nov. 20, 2006) ("The United States is not a proper party in a FOIA action."); Huertas v. United States, No. 04-3361, 2005 WL 1719143, at *7 (D.N.J. July 21, 2005) (granting defendants' motion for summary judgment because United States and individual defendants were only defendants named); Lawrence v. United States, No. 03-660, 2004 U.S. Dist. LEXIS 15445, at *6-7 (M.D. Fla. July 8, 2004) (ruling that "all parts of [plaintiff's FOIA case] as brought against the United States of America are hereby dismissed for lack of jurisdiction").

[85] 5 U.S.C. § 552(a)(4)(B) (emphasis added).

[86] See, e.g., Finkel v. Dep't of Labor, No. 05-5525, 2007 WL 1963163, at *1 n.1 (D.N.J. June 29, 2007) (finding that Department of Labor, not OSHA, is proper party defendant); Trupei v. DEA, No. 06-1162, 2007 WL 1238867, at * 1 n.1 (D.D.C. Apr. 27, 2007) (substituting DOJ as sole defendant in place of DEA and Office of Information and Privacy); Pri-Har v. DOJ, No. 04-1448, 2005 WL 3273550, at *1 n.1 (D.D.C. Sept. 27, 2005) (noting that "[a]lthough the plaintiff lists both the Executive Office for the United States Attorneys and the Department of Justice as (continued...)

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.[87]

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

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[86](...continued)
defendants in this action, the only proper defendant is the Department of Justice"); Brooks v. BOP, No. 04-0055, 2005 WL 623229, at *2 (D.D.C. Mar. 17, 2005) ("The proper defendant in a FOIA or Privacy Act case is the agency, in this case, the Department of Justice of which BOP is a component."). But see County of Santa Cruz v. Ctrs. for Medicare & Medicaid Services, 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"); Peralta v. U.S. Attorney's Office, 136 F.3d 169, 173 (D.C. Cir. 1998) (dictum) (suggesting, despite both statutory language and agency structure, that "the FBI is subject to the FOIA in its own name"); Rosenfeld v. DOJ, No. 07-3240, 2008 WL 3925633, at *1 n.1 (N.D. Cal. Aug. 22, 2008) (noting that FBI is proper party defendant); Prison Legal News v. Lappin, 436 F. Supp. 2d 17, 22 (D.D.C. 2006) (finding that BOP "exercises 'substantial independent authority'" and that, accordingly, "despite its status as a component agency of the DOJ, is a proper defendant in this FOIA action").

[87] See 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); Trenk, 2006 WL 3359725, at *9 (concluding that plaintiff lacks standing to bring FOIA action because "[h]is name does not appear on the document requests, and he is not the client for which the requests were made"); 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. v. Bureau of Land Mgmt., 358 F. Supp. 2d 1, 2 (D.D.C. 2005) (holding that "a FOIA request made by an attorney must clearly indicate that it is being made 'on behalf of' the corporation to give that corporation standing to bring a FOIA challenge"); Mahtesian v. OPM, 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) (finding that attorney's reference to anonymous client in FOIA request does not confer standing on that client); Maxxam, Inc. v. FDIC, No. 98-0989, 1999 WL 33912624, at *2 (D.D.C. Jan. 29, 1999) (finding that only plaintiff's attorney was real party in interest when FOIA request was made in attorney's, not plaintiff's, name); cf. Burka v. HHS, 142 F.3d 1286, 1290-91 (D.C. Cir. 1998) (refusing to award attorney fees to plaintiff who claimed he was suing for unnamed party, because of "dangers inherent in recognizing an 'undisclosed' client as the real plaintiff"); Doe v. FBI, 218 F.R.D. 256, 260 (D. Colo. 2003) (refusing to allow FOIA plaintiff to proceed pseudonymously). But see Archibald v. Roche, No. 01-1492, slip op. at 2 (D.D.C. Mar. 29, 2002) (allowing a plaintiff whose name did not appear on the initial FOIA request to amend his complaint in order to name a proper plaintiff, "in the interest of justice"); Olsen v. Dep't of Transp. Fed. Transit Admin., No. 02-00673, 2002 WL 31738794, at *2 n.2 (N.D. Cal. Dec. 2, 2002) (refusing to find lack of standing when plaintiff was not identified by his attorney in initial request, because agency's administrative appeal response itself acknowledged plaintiff's identity).

elsewhere.'"[88] In litigation, a defendant agency that has referred records to an originating agency for processing ordinarily will include with its own court submissions affidavits from those originating agencies which address any withholdings made in the referred records.[89] (For a further discussion of agency referral practices, see Procedural Requirements, Referrals and Consultations, above.)

Lastly, Rule 15(a) of the Federal Rules of Civil Procedure provides that the court "should freely give" parties leave to amend their pleadings "when justice so requires,"[90] and district courts possess the discretion to grant such leave.[91] However, there are limits on a plaintiff's ability to amend a FOIA complaint, even when the plaintiff is proceeding pro se.[92] In particular, courts have rejected attempts by FOIA plaintiffs to amend their complaints when amendment is unduly delayed,[93] when the complaint as amended still would fail to state a

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[88] Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1118 (D.C. Cir. 2007) (quoting McGehee v. CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983); see also FOIA Update, Vol. XV, No. 3, at 6 (advising agencies of record-referral responsibilities).

[89] 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); 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); Schoenman v. FBI, 575 F. Supp. 2d 136, 166 (D.D.C. 2008) (reviewing Department of Army's submissions which detailed its processing of records referred to it by FBI); Greenberg v. DOT, 10 F. Supp. 2d 3, 18 (D.D.C. 1998) (requiring Customs to provide a more particularized Vaughn Index for records referred to it by another agency and to explain non-production of records that it subsequently referred to other agencies and that were not addressed in its affidavits or in separate submissions by agencies that were recipients of referrals).

[90] Fed. R. Civ. P. 15(a)(B)(2); see Foman v. Davis, 371 U.S. 178, 182 (1962) (non-FOIA case); Richardson v. United States, 193 F.3d 545, 548-49 (D.C. Cir. 1999) ("Leave to amend a complaint should be freely given in the absence of undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies, or futility.") (non-FOIA case).

[91] See, e.g., Wolf v. CIA, 569 F. Supp. 2d 1, 11 (D.D.C. 2008) ("District courts have discretion to grant or deny a motion to amend the complaint.").

[92] See, e.g., Brown v. U.S. Patent & Trademark Office, No. 06-14716, 2007 WL 446601, at *1 (11th Cir. Feb. 13, 2007) (noting that "[a]lthough pro se pleadings are to be liberally construed, . . . ordinary rules of procedure and summary judgment still apply"); Leinenbach v. DOJ, No. 05-744, 2006 WL 1663506, at *3 (D.D.C. June 14, 2006) (stating that there are "limits to the latitude a court must afford" a pro se litigant, notably, a court may not allow a litigant to "disregard the Federal Rules of Civil Procedure" or assert claims without an adequate jurisdictional basis).

[93] See 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. Ca. 2006) (denying motion to (continued...)

justiciable claim,[94] or when the proposed amendments would dramatically alter the scope and nature of the FOIA litigation.[95]

Exhaustion of Administrative Remedies

Under the FOIA, administrative remedies generally must be exhausted prior to judicial review.[96] When a FOIA plaintiff attempts to obtain judicial review without first properly

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[93](...continued)
amend complaint because "[t]he parties' summary judgment motions have been fully briefed and argued, and allowing amendment would unduly prolong these proceedings").

[94] See, e.g., 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"); Geschke v. SSA, No. 06-1256, 2007 WL 1140281, at *12-14 (W.D. Wa. Apr. 17, 2007) (denying motion to amend pleading because court lacked subject matter jurisdiction on date of original complaint and, accordingly, proposed amendments would not cure jurisdictional defect); Beech v. Comm'r, 190 F. Supp. 2d 1183, 1187 (D. Ariz. 2001) (dismissing complaint with prejudice because it "could not be made viable by amendment").

[95] See, e.g., Wolf, 569 F. Supp. 2d at 24-25 (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, 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 an 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 also 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"); see also Allnutt v. U.S. Trustee, No. 97-02414, slip op. at 8 (D.D.C. July 31, 1999) (allowing amendment seeking to add six FOIA claims, but noting that further attempts to amend would be disallowed in order to prevent plaintiff from advancing "a never-ending case by perpetually amending his complaint to add the latest FOIA request"), appeal dismissed for lack of juris., No. 99-5410 (D.C. Cir. Feb. 2, 2000).

[96] See, e.g., Schoenman v. FBI, No. 04-2202, 2006 WL 1582253, at *9 (D.D.C. June 5, 2006) ("[E]xhaustion of administrative remedies is required before a party can seek judicial review . . . ."); Judicial Watch, Inc. v. FBI, 190 F. Supp. 2d 29, 33 (D.D.C. 2002) (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 (continued...)

undertaking full and timely administrative exhaustion, the lawsuit is subject to ready dismissal because "exhaustion of administrative remedies is a mandatory prerequisite to a lawsuit under FOIA."[97] Exhaustion allows top-level officials of an agency to correct possible mistakes made at lower levels and thereby obviate unnecessary judicial review.[98]

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.[99] However, the Court of Appeals for the District of Columbia Circuit

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[96](...continued)
(D.C. Cir. 1986))); Trueblood v. U.S. Dep't of Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996). But see 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, 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).

[97] 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., 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 v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994) ("The FOIA clearly requires a party to exhaust all administrative remedies before seeking redress in the federal courts."); McDonnell v. United States, 4 F.3d 1227, 1240, 1241 (3d Cir. 1993) (same); Voinche v. U.S. Dep't of the Air Force, 983 F.2d 667, 669 (5th Cir. 1993) ("We conclude that the FOIA should be read to require that a party must present proof of exhaustion of administrative remedies prior to seeking judicial review."); see also Scherer v. U.S. Dep't of Educ., 78 F. App'x 687, 690 (10th Cir. 2003) (affirming dismissal based on failure to exhaust because while plaintiff's "labors may have been exhausting . . . he failed to pursue any of his requests as far as he could").

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

[99] See, e.g., McDonnell, 4 F.3d at 1240 & n.9 (affirming dismissal for lack of subject matter jurisdiction because plaintiff failed to exhaust administrative remedies); Trenerry v. IRS, No. 95-5150, 1996 WL 88459, at *1 (10th Cir. Mar. 1, 1996) (confirming that district court lacked subject matter jurisdiction "where plaintiff has failed to exhaust her administrative remedies"); Hymen v. MSPB, 799 F.2d 1421, 1423 (9th Cir. 1986) (same); 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");
(continued...)

has 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.[100]

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[99](...continued)
Hardy v. Daniels, No. 05-955, 2006 WL 176531, at *1 (D. Or. Jan. 23, 2006) ("Where a plaintiff has failed to exhaust . . . the district court will dismiss the case for lack of jurisdiction."); Robert VIII v. DOJ, No. 05-CV-2543, 2005 WL 3371480, at *7 (E.D.N.Y. Dec. 12, 2005) (holding that a "court lacks subject matter jurisdiction over a requester's claim where the requester has failed to exhaust the administrative remedies provided under the FOIA statute"); 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); Scherer v. United States, 241 F. Supp. 2d 1270, 1277 (D. Kan. 2003) (granting government's motion to dismiss under Rule 12(b)(1) because plaintiff failed to exhaust administrative remedies), aff'd, 78 F. App'x 687 (10th Cir. 2003); Redding v. Christian, 161 F. Supp. 2d 671, 674 (W.D.N.C. 2001) (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"); Maples v. USDA, No. 97-5663, slip op. at 6 (E.D. Cal. Jan. 15, 1998) ("When a complaint contains an unexhausted request in its prayer for relief, the court must dismiss this portion for lack of subject matter jurisdiction."); Rabin v. U.S. Dep't of State, 980 F. Supp. 116, 119 (E.D.N.Y. 1997) (suggesting that defense of failure to exhaust is most properly raised in FRCP Rule 12(b)(1) dismissal motion); Thomas v. Office of the U.S. Attorney, 171 F.R.D. 53, 55 (E.D.N.Y. 1997) ("Failure to properly exhaust . . . precludes a federal court of subject matter jurisdiction over a requester's claims."); Jones v. Shalala, 887 F. Supp. 210, 214 (S.D. Iowa 1995) (declaring that failure to exhaust administrative remedies deprives court of jurisdiction to compel disclosure of records).

[100] See, e.g., Hildalgo v. FBI, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003) (opining that the exhaustion requirement is not jurisdictional because "the FOIA does not unequivocally make it so," but then explaining that exhaustion is required if "'the purposes of exhaustion' and the 'particular administrative scheme' support such a bar" (quoting Oglesby, 920 F.2d at 61)); Taylor, 30 F.3d at 1367 n.3 (stating that an unexhausted FOIA claim "should have been dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted"); Scherer v. Balkema, 840 F.2d 437, 443 (7th Cir. 1988) (ruling that plaintiff failed to state a claim when he failed to allege exhaustion of administrative remedies); 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 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 (continued...)

Courts have found that a plaintiff cannot evade proper FOIA administrative procedures by attempting to file his or her FOIA request as part of a judicial proceeding[101] or in the course of administratively appealing a previously filed FOIA request,[102] though a requester has been

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

[101] 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"); Hillman v. Comm'r, No. 1:97-cv-760, 1998 U.S. Dist. LEXIS 12431, at *15 (W.D. Mich. July 10, 1998) (rejecting plaintiff's attempt to have discovery demand treated as access request because "a governmental agency is not required to respond to interrogatories disguised as a FOIA request"); Smith v. Reno, No. C-93-1316, 1996 U.S. Dist. LEXIS 5594, at *8 n.3 (N.D. Cal. Apr. 23, 1996) ("A request for documents in a complaint does not constitute a proper discovery request, much less a proper FOIA request."), aff'd sub nom. Smith v. City of Berkeley, 133 F.3d 929 (9th Cir. 1998) (unpublished table decision); Juda v. DOJ, No. 94-1521, slip op. at 4, 6 (D.D.C. Mar. 28, 1996) (holding that plaintiff cannot interpose new request through vehicle of "motion for leave to pursue discovery"); 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"), 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); see also Kowalczyk v. DOJ, 73 F.3d 386, 388 (D.C. Cir. 1996) ("Requiring an additional search each time the agency receives a letter that clarifies a prior request could extend indefinitely the delay in processing new requests."); cf. Payne, No. 97-0266SC, slip op. at 12 (D.N.M. Apr. 30, 1998) ("The FOIA creates a cause of action only for persons who have followed its procedures.").

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

permitted to narrow the scope of an existing request.[103] Along similar lines, a FOIA claim may be dismissed on exhaustion grounds if the defendant agency is unable to locate the request in its files -- unless the plaintiff produces sufficient evidence that a request actually was made.[104] (For a further discussion of the proper submission of requests, see Procedural Requirements, Proper FOIA Requests, above.)

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[103] See Forest Guardians v. U.S. Dep't of the Interior, No. 02-1003, 2004 WL 3426434, at *11 (D.N.M. Feb. 28, 2004) (rejecting an agency's argument that the plaintiff's attempt to narrow the scope of its request -- during the course of litigation -- was tantamount to a failure to exhaust 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); cf. 5 U.S.C. § 552(a)(6)(B)(ii) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (providing that agency must allow requester opportunity to modify his request if it needs to extend its twenty-day time limit for processing by more than ten additional days).

[104] See, e.g., 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); Thomas v. FAA, No. 05-2391, 2007 WL 2020096, at *3-4 (D.D.C. July 12, 2007) (concluding that plaintiff did not exhaust administrative remedies because agency had no evidence that plaintiff submitted FOIA request); Arnold v. U.S. Secret Serv., No. 05-0450, 2006 WL 2844238, at *2 (D.D.C. Sept. 29, 2006) (holding that a "certified mail return receipt is not competent evidence of plaintiff's compliance with the FOIA's exhaustion requirement"); Schoenman, 2006 WL 1582253, at *12 (dismissing claims where agency stated that appeals were never received, and finding that plaintiff failed to present clear evidence that draft appeal letters on his counsel's computer "were ever mailed to and received" by agency); 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); see also Roum v. Bush, 461 F. Supp. 2d 40, 47 n.3 (D.D.C. 2006) (implying that plaintiff produced sufficient evidence that request actually was made when plaintiff provided receipt from U.S. Postal Service indicating that request was delivered to FBI); Reyes v. U.S. Customs Serv., No. 05-173, 2005 WL 3274563, at *2 (D.D.C. July 28, 2005) (concluding, without elaboration, that plaintiff presented genuine issue of material fact as to whether his request was received by defendant agency, which had no record of it); Linn v. DOJ, No. 92-1406, 1995 WL 631847, at *15-16 (D.D.C. Aug. 22, 1995) (ruling that when plaintiff introduces copy of appeal letter and attests that it was sent, case should not be dismissed for failure to exhaust administrative remedies); Hammie v. SSA, 765 F. Supp. 1224, 1226 (E.D. Pa. 1991) (stating that in considering government's dismissal motion, court is required to accept plaintiff's averments that he submitted requests); cf. Jones, 576 F. Supp. 2d at 67 (holding that genuine issue of material fact existed as to whether plaintiff received agency's response).

The FOIA permits requesters to treat an agency's failure to comply with its specific time limits as full, or "constructive," exhaustion of administrative remedies.[105] Thus, when an agency does not respond to a perfected request within the twenty-day (excepting Saturdays, Sundays, and legal public holidays) statutory time limit set forth in the Act,[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] If a requester files suit before the twenty-day period has expired, the suit must be dismissed even if the agency still has failed to respond to the request after the twenty day period has expired because "the Court will only consider those facts and circumstances that existed at the time of the filing of the complaint, and not subsequent events."[108] Moreover, an agency's failure to comply with

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[105] See 5 U.S.C. § 552(a)(6)(C); 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., Pollack, 49 F.3d at 118-19 ("Under FOIA's statutory scheme, when an agency fails to comply in a timely fashion with a proper FOIA request, it may not insist on the exhaustion of administrative remedies unless the agency responds to the request before suit is filed."); Campbell v. Unknown Power Superintendent of the Flathead Irrigation & Power Project, No. 91-35104, 1992 WL 84315, at *1 (9th Cir. Apr. 22, 1992) (noting that exhaustion is deemed to have occurred if agency fails to respond to request within statutory time limit); Accuracy in Media, Inc. v. NTSB, No. 03-0024, 2006 WL 826070, at *6 (D.D.C. Mar. 29, 2006) (finding constructive exhaustion because plaintiff filed its FOIA Complaint seven months after NTSB received its request and before NTSB complied with it); Hall v. CIA, No. 04-0614, 2005 WL 850379, at *2 & n.6 (D.D.C. Apr. 13, 2005) (finding constructive exhaustion where plaintiff filed suit prior to CIA's belated response to his request, and rejecting agency's "novel" argument that it was somehow excused from FOIA's statutory time limit while awaiting final outcome of plaintiff's previous FOIA suit); cf. Or. Natural Desert Ass'n, 409 F. Supp. 2d at 1247 (finding constructive exhaustion with respect to "cut-off" date challenge, even though plaintiff did not raise such claim in its administrative appeal, because document production from agency and referral agencies continued after plaintiff filed suit and plaintiff could not have foreseen effect of "cut-off" policy at time appeal was filed); Anderson v. USPS, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998) (finding that "vague positive response" from agency received after statutory time limit allows plaintiff to claim "constructive" exhaustion), aff'd, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision).

[108] 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 Said, 2007 WL 2789344, at *6 (dismissing FOIA claims as complaint was filed prematurily); 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 (continued...)

the statutory deadline does not "automatically entitle" the requester to the documents he seeks.[109]

The special right to immediate judicial review that arises from the lack of a timely response lapses if an agency responds to a request at any time before the requester's FOIA suit is filed; in that situation, the requester must administratively appeal a denial and wait at least twenty working days for the agency to adjudicate that appeal -- as is required by 5 U.S.C. § 552(a)(6)(A)(ii) -- before commencing litigation.[110] 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."[111] Thus, under Oglesby, if a FOIA requester waits beyond the twenty-day period for the agency's initial response and then, in fact, receives that response before suing the agency, the requester must exhaust his administrative appeal rights before litigating the matter.[112]

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[108](...continued)
premature complaint to be cured by filing of "supplemental" complaint).

[109] Barvick v. Cisneros, 941 F. Supp. 1015, 1019-20 (D. Kan. 1996) ("This court is persuaded that an agency's failure to respond within ten days does not automatically entitle a FOIA requester to summary judgment."); see, e.g., M.K. v. DOJ, No. 96 CIV. 1307, 1996 WL 509724, at *3 (S.D.N.Y. Sept. 9, 1996) (holding that "the government's failure to respond to M.K.'s request within the statutory . . . time limit does not give M.K. the right to obtain the requested documents; it merely amounts to an exhaustion of administrative remedies and allows M.K. to bring this lawsuit"); cf. 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").

[110] See, e.g., Oglesby, 920 F.2d at 63 (ruling that if requester receives agency response before filing suit -- even one that is untimely -- requester must submit an administrative appeal before filing suit); Bonner v. SSA, 574 F. Supp. 2d 136, 139 (D.D.C. 2008) (same); Smith v. FBI, 448 F. Supp. 2d 216, 220 (D.D.C. 2006) (same); Judicial Watch, Inc. v. Rossotti, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (same).

[111] 920 F.2d at 63.

[112] Id. at 63-64; see, 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 a "failure to exhaust his administrative remedies"); Taylor, 30 F.3d at 1369 ("We therefore join the District of Columbia Circuit and the Third Circuit on this issue."); McDonnell, 4 F.3d at 1240 (applying Oglesby); Yang v. IRS, No. 06-1547, 2006 WL 2927548, at *2 (D. Minn. Oct. 12, 2006) (same); Hardy v. Lappin, No. 03-1949, 2005 WL 670753, at *1 (D.D.C. Mar. 21, 2005) (same); Allen v. IRS, No. 03-1698, 2004 WL 1638155, at *1 (D. Ariz. June 15, 2004) (same), aff'd on other grounds, 137 F. App'x 22 (9th Cir. 2005); Judicial Watch, Inc. v. FBI, 190 F. Supp. 2d 29, 33 (D.D.C. 2002) (same); Samuel v. DOJ, No. 93-0348, slip op. at 3-4 (D. Idaho Feb. 3, 1995) (same);
(continued...)

If an agency makes an adverse determination after the requester has filed suit, however, the requester need not first administratively appeal that determination before pressing forward with the court action.[113]

Regardless of whether the agency's response is timely, the requester's exhaustion obligation may be excused if the agency's response fails to supply notice of the right to file an administrative appeal, as required by 5 U.S.C. § 552(a)(6)(A)(i),[114] or ultimately to supply notice of the right to seek court review at the conclusion of the administrative appeal process.[115] However, so long as such notice is given, there is no particular formula or set of "magic words"

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[112](...continued)
Sloman v. DOJ, 832 F. Supp. 63, 66-67 (S.D.N.Y. 1993) (same). But cf. 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).

[113] 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"); 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. 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).

[114] See Ruotolo v. DOJ, 53 F.3d 4, 9 (2d Cir. 1995); Oglesby, 920 F.2d at 65; Thomas v. HHS, 587 F. Supp. 2d 114, 117-18 (D.D.C. 2008) (finding plaintiff entitled to constructive exhaustion because agency failed to advise plaintiff of appeal rights and agency did not 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 the plaintiff's failure to file an administrative appeal, because the agency's response letter failed to provide him with "[correct] information regarding the administrative process to be followed"); Nurse, 231 F. Supp. 2d at 327-28 (finding constructive exhaustion because agency failed to inform requester of his right to appeal adverse decision); Lamb v. IRS, 871 F. Supp. 301, 303 (E.D. Mich. 1994) (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 a format different from that requested), rev'd & remanded on other grounds, 432 F.3d 945 (9th Cir. 2005).

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

that the agency must employ in giving it.[116] (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.[117]

An agency response that merely acknowledges receipt of a request does not constitute a "determination" under the FOIA in that it neither denies records nor grants the right to appeal the agency's determination.[118] Significantly, though, with the exception of misdirected requests, discussed below, the twenty-day time period does not run until the request is

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[116] 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, 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).

[117] See Oglesby, 920 F.2d at 65 n.9 (citing regulations of agencies involved); Hamilton Sec. Group, Inc. v. HUD, 106 F. Supp. 2d 23 (D.D.C. 2000) (finding that requester failed to exhaust administrative remedies when it submitted administrative appeal one day after agency's regulatory time period had expired), summary affirmance granted, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001) (per curiam); Voinche v. CIA, No. 96-1708, slip op. at 3 (W.D. La. Nov. 25, 1996) (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); Jones v. DOJ, No. 94-2294, slip op. at 6 (D. Md. Jan. 18, 1995) (awarding summary judgment to government when time limit prescribed by agency regulations for administrative appeal had expired); Lanter v. DOJ, No. 93-0034, slip op. at 2 (W.D. Okla. July 30, 1993) (explaining that court compelled to dismiss FOIA claim when plaintiff's administrative appeal from agency's response not filed in timely manner), aff'd, 19 F.3d 33 (10th Cir. 1994) (unpublished table decision). But cf. 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").

[118] See Martinez v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,005, at 83,435 (D.D.C. Dec. 1, 1982); cf. Dickstein v. IRS, 635 F. Supp. 1004, 1006 (D. Alaska 1986) (finding that letter referring requester to alternative "procedures which involved less red tape and bureaucratic hassle" not deemed to be denial). But cf. N.Y. Times Co. v. U.S. Dep't of Labor, 340 F. Supp. 2d 394, 399 (S.D.N.Y. 2004) (concluding that letter from agency that merely informed requester that submitter notice to 13,000 businesses would be required before final disclosure decision could be made was implicit denial of his administrative appeal).

received by the appropriate office in the agency.[119]

As a result of the recent FOIA amendments,[120] if a FOIA request is misdirected, i.e. mistakenly addressed, to an agency component that is designated by the agency's regulations to receive FOIA requests, but is not itself the proper component to process the request, the receiving FOIA office has ten working days within which to forward the FOIA request to the appropriate agency component for processing.[121] Once the FOIA request has been received by the appropriate agency component -- provided that occurs within ten working days after receipt by the receiving component -- the twenty working-day time period to respond to the request begins.[122] If the receiving component takes longer than ten days to forward or route the request to the proper agency component, the twenty-day period begins to run on the tenth day nonetheless.[123] (For a further discussion of time limits, see Procedural Requirements, Time Limits, above.) Additionally, even when a requester has "constructively" exhausted his administrative remedies by the agency's failure to respond determinatively to the request within the statutory time limits, the requester is not entitled to a Vaughn Index during the administrative process.[124]

Whether the agency has met or exceeded its twenty-day time limit for the processing of initial responses to a request, its twenty-day time limit for the processing of administrative appeals, or its ten-day extension of either time limit,[125] requesters have been deemed not to have constructively exhausted administrative remedies when they have failed to comply with necessary requirements of the FOIA's administrative process. This has been the case, for

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[119] See Schoenman, 2006 WL 1126813, at *12 (recognizing that twenty-day period does not begin to run until agency receives request); Hutchins v. DOJ, No. 00-2349, 2005 WL 1334941, at *2 (D.D.C. June 6, 2005) ("Without any showing that the agency received the request, the agency has no obligation to respond to it."). But see Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1077 n.5 (9th Cir. 2004) (holding that constructive exhaustion occurred despite fact that plaintiff's administrative appeal was not received because agency mailroom became contaminated with anthrax spores).

[120] See OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 6 (to be codified at 5 U.S.C. § 552 (a)(6)(A)(ii)).

[121] See OPEN Government Act, § 6; see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

[122] See OPEN Government Act, § 6; see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

[123] See OPEN Government Act, § 6; see also *FOIA Post*, "OIP Guidance: New Requirement to Route Misdirected FOIA Requests" (posted 11/18/08).

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

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

example, when requesters have failed to:

(1) provide required proof of identity[126] in first-party requests[127] or disclosure authorization by third parties when required by agency regulations;[128]

(2) "reasonably describe" the records sought;[129]

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[126] 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 (2006)).

[127] See 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); Banks, 538 F. Supp. 2d at 234 (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).

[128] Compare 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, 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).

[129] See, e.g., Gillin, 980 F.2d at 822-23 (deciding that a request for records "used as a basis to conclude there was a deficiency in [requester's] tax return" did not "reasonably describe" the records of the agency's field examination of requester's tax return, since the agency concluded after completion of its field examination that there was no deficiency); Marks v. DOJ, 578 F.2d 261, 263 (9th Cir. 1978); 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

(continued...)

(3) comply with fee requirements;[130]

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[129](...continued)
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 an agency is "under no obligation to release records that have not been reasonably described" and that a request that failed to conform to agency requirements "amounted to an all-encompassing fishing expedition . . . at taxpayer expense"); see also Voinche v. U.S. Dep't of the Air Force, 983 F.2d 667, 669 n.5 (5th Cir. 1993) (concluding that administrative remedies on fee waiver request were not exhausted when requester failed to amend request to achieve specificity required by agency regulations).

[130] See, e.g., Pietrangelo v. U.S. Dep't of the Army, 155 F. App'x 526 (2d Cir. 2005) (affirming dismissal for failure to exhaust, despite agency's untimely response, because plaintiff neither paid nor requested waiver of assessed fees); Pollack, 49 F.3d at 119-20 (rejecting plaintiff's novel argument that untimeliness of agency response required it to provide documents free of charge); 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); Skrzypek v. U.S. Dep't of Treasury, No. 06-1129, 2007 WL 2506440, at *3 (D.D.C. Aug. 31, 2007) ("The payment or waiver of assessed fees or an administrative appeal from the denial of a fee waiver request is a condition precedent to judicial review of a FOIA claim."); Kumar v. DOJ, No. 06-714, 2007 WL 537723, at *3 (D.D.C. Feb. 16, 2007) (concluding that "plaintiff failed to exhaust his administrative remedies because he did not pay the required fees associated with the search for records responsive to his FOIA request"); Ivey v. Snow, No. 05-CV-1095, 2006 WL 2051339, at *4 (D.D.C. July 20, 2006) (finding that plaintiff failed to exhaust administrative remedies, because he neither paid fees associated with requests nor sought fee waiver), 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 civil action pursuant to FOIA does not relieve a requester of his obligation to pay any required fees"); Farrugia v. EOUSA, 366 F. Supp. 2d 56, 57 (D.D.C. 2005) (dismissing complaint for failure to exhaust, because plaintiff failed to pay search fees that agency requested after it processed his request and properly informed him that records were available upon payment); Jeanes v. DOJ, 357 F. Supp. 2d 119, 123 (D.D.C. 2004) (finding that "exhaustion of administrative remedies does not occur until the required fees are paid or an appeal is taken from the denial of a request for a fee waiver"); Dale, 238 F. Supp. 2d at 107 (dismissing complaint for failure to claim or establish entitlement to fee waiver or, alternatively, to commit to payment of fees); Ctr. to Prevent Handgun Violence, 981 F. Supp. at 23 (rejecting requester's "equitable tolling" argument; requester's agreement to accept sampling of documents for free does not excuse noncompliance with exhaustion requirement in subsequent fee waiver suit covering all records); Trueblood v. U.S. Dep't of the Treasury, 943 (continued...)

(4) pay authorized fees incurred in a prior request before making new requests;[131]

(5) present for review at the administrative appeal level any objection to earlier processing practices;[132]

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[130](...continued)
F. Supp. 64, 68 (D.D.C. 1996) ("Regardless of whether the plaintiff 'filed' suit before or after receiving a request for payment, the plaintiff has an obligation to pay for the reasonable copying and search fees assessed by the defendant."); Kuchta v. Harris, No. 92-1121, 1993 WL 87750, at *3-4 (D. Md. Mar. 25, 1993) (noting that failure to either pay fees or request fee waiver halts administrative process and precludes exhaustion); see also Kong On Imp. & Exp. Co. v. U.S. Customs & Border Prot. Bureau, No. 04-2001, 2005 WL 1458279, at *2 (D.D.C. June 20, 2005) (dismissing complaint for failure to exhaust administrative remedies because plaintiff did not pay processing fees until after he filed suit); Atkin v. EEOC, No. 92-5522, slip op. at 5 n.3 (D.N.J. Jan. 24, 1994) (noting that subject matter jurisdiction determined as of date that complaint was filed; fact that plaintiff paid fees after suit was instituted does not confer jurisdiction); cf. 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."); 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 the plaintiff's failure to pay requested fees "constitutes a failure to exhaust," but excusing failure to pay duplication fee because the agency "produced no evidence" that it ever informed him of the 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).

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

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

(6) administratively request a waiver of fees;[133] or

(7) challenge a fee waiver denial at the administrative appeal stage.[134]

Despite statutory language referring to administrative appeals of denials of requests for expedited processing,[135] 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.[136]

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

[134] See, e.g., 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, 2005 WL 555412, at *4 ("Failure to pay the requested fees or to appeal the denial from a refusal to waive fees constitutes a failure to exhaust administrative remedies."); Oguaju v. 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).

[135] 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").

[136] 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 that the statutory language "provides for direct judicial review of an agency's failure to timely respond to a request for expedited processing"); Al-Fayed v. CIA, No. 00-2092, 2000 U.S. Dist. LEXIS 21476, at *8 (D.D.C. Sept. 20, 2000) (concluding that "[n]othing in the statute or its legislative history" indicates that an administrative appeal of a denial of expedited processing is required before an applicant may seek judicial review), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001); 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).

"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."[137] This provision of the FOIA provides an important "safety valve" for agencies that have been, and continue to be, overwhelmed by increasing numbers of FOIA requests.[138]

The leading case construing this FOIA provision is Open America v. Watergate Special Prosecution Force.[139] 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)."[140]

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."[141] 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.[142] At the same time, in enacting the Electronic FOIA amendments, Congress

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[137] 5 U.S.C. § 552(a)(6)(C)(i)-(iii) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[138] 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).

[139] 547 F.2d 605 (D.C. Cir. 1976).

[140] Id. at 616.

[141] 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)).

[142] 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

(continued...)

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.[143] Furthermore, the amendments include a companion provision that specifies that a requester's "refusal . . . to reasonably modify the scope of a request or arrange for an alternative time frame for processing . . . shall be considered as a factor in determining whether exceptional circumstances exist."[144]

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."[145] In so ruling, the D.C. Circuit

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[142](...continued)
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).

[143] 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). But see 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").

[144] 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 a stay and explaining that the plaintiff's refusal "to modify the scope of his request supports a finding of exceptional circumstances"); Al-Fayed, No. 00-2092, slip op. at 6, 12 (D.D.C. Jan. 16, 2001) (granting an Open America stay and denigrating plaintiffs' ostensible efforts to limit scope of their requests as "more symbolic than substantive"), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001). But see Elec. Frontier Found., 517 F. Supp. 2d at 118 (finding that 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).

[145] See Open Am., 547 F.2d at 616; see also Gov't Accountability Project, 568 F. Supp. 2d at
(continued...)

rejected the notion that the mere filing of a lawsuit was a basis for such expedited treatment.[146] The Electronic FOIA amendments modified this first in/first out rule by explicitly allowing agencies to establish "multitrack" processing for requests, based on the amount of time and/or work involved in a particular request.[147] The amendments nevertheless preserved the principle that, within such multiple tracks, an agency's "due diligence" in handling its FOIA requests is shown by its consideration of those requests on a first-in, first-out basis.[148]

When the requirements of the statute and Open America -- as modified by the 1996 amendments -- are met, courts have readily granted agency motions to stay judicial proceedings to allow for additional time to complete the administrative processing of a request.[149] By contrast, such motions have proven unsuccessful when agencies have failed

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[145](...continued)
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").

[146] Open Am., 547 F.2d at 615; 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, at *1-2 (D.D.C. May 3, 1994), summary affirmance granted, No. 94-5234 (D.C. Cir. Apr. 10, 1995) (forbidding requester from circumventing Open America stay by filing new complaint based on same request). But see Exner v. FBI, 542 F.2d 1121, 1123 (9th Cir. 1976) (adopting the approach of a concurring opinion in Open America, and holding that the filing of a suit can move a requester "up the line").

[147] 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)).

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

[149] See, e.g., 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 an agency experienced an unpredictable "increase in the number of FOIA requests for the two most recent fiscal years and also the unforseen increase in . . . [its FOIA staff's] other information access duties"); Elec. Privacy Info. Ctr. v. 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
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to set forth sufficient facts to demonstrate the propriety of such a stay.[150] Even in those

[149](...continued)
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 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).

[150] See, e.g., Fiduccia, 185 F.3d at 1042 (overturning stay of proceedings granted by district court because a "slight upward creep in the caseload" does not constitute exceptional circumstances); 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"); 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); Eltayib, No. 99-1033, slip op. at 4 (D.D.C. Nov. 11, 1999) (denying stay and criticizing agency for failing to take any measures to comport with statutory requirements for showing reasonable progress); 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 (continued...)

instances in which some additional processing time is appropriate, courts have ordered stays for less time than requested by the agency.[151]

While the Open America decision itself does not address the additional time needed by an agency to justify nondisclosure of any withheld records once they are processed, courts have, as a practical matter, tended to merge the record-processing and affidavit-preparation stages of a case when issuing stays of proceedings under Open America.[152] 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

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[150](...continued)
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 the CIA's argument that a stay was warranted while the agency awaited "final guidance from the Court" on the plaintiff's previous lawsuit); Homick v. 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").

[151] 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 the agency made "a satisfactory showing that a stay . . . is warranted," but reducing the stay's length from the thirty-three months requested to only seven months); Beneville v. 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).

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

on agency processing efforts.[153]

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.[154] Traditionally, 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.[155] (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 responsive

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[153] 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 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); Hinton v. FBI, 527 F. Supp. 223, 223-25 (E.D. Pa. 1981) (staying proceedings, but ordering interim releases at ninety-day intervals); cf. Bower, 2004 WL 2030277, at *3 (requiring FDA to produce status report at end of seven-month stay, which included estimated time by which document production would be completed).

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

[155] 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").

documents. Sometimes, that is all that a plaintiff will dispute.[156] (For discussions of administrative considerations in conducting searches, see Procedural Requirements, Searching for Responsive Records, above.) To prevail in a FOIA action, the agency must show that it made "'a good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'"[157] 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.'"[158] In other words,

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[156] 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).

[157] 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., 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))); Schoenman v. FBI, No. 04-2202, 2009 WL 763065, at *10 (D.D.C. Mar. 19, 2009) ("In determining the adequacy of a FOIA search, the Court is guided by principles of reasonableness."); 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))); Bonaparte v. DOJ, 531 F. Supp. 2d 118, 122 (D.D.C. 2008) ("The Court's review of the adequacy of an agency's search for responsive record is based on principles of reasonableness.").

[158] 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); Ramstack v. Dep't of the Army, 607 F. Supp. 2d 94, 105 (D.D.C. 2009) ("The principal issue is not whether the agency's search uncovered responsive documents, but whether the search was reasonable."); Citizens for Responsibility and Ethics in Wash. v. DOJ, 535 F. Supp. 2d 157, 162 (D.D.C. 2008) ("The question is not whether other responsive documents may exist, but whether the search itself was adequate."); Sephton v. FBI, 365 F. Supp. 2d 91, 101 (D. Mass. 2005) (explaining that FOIA does not require review of "every single file that might conceivably contain responsive information"), aff'd, 442 F.3d 27 (1st Cir. 2006); Snyder v. CIA, 230 F. Supp. 2d 17, 21 (D.D.C. 2002) (stipulating that FOIA does not require a search of "every conceivable area where responsive records might be found"); cf. Raulerson v. Reno, No. 96-120, slip op. at 5 (D.D.C. Feb. 26, 1999) (suggesting that agency's failure to locate complaints filed by plaintiff, the existence of which agency did not dispute, "casts substantial doubt" on adequacy of agency's search), summary affirmance granted, No.

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simply put, "the focus of the adequacy inquiry is not on the results."[159]

The adequacy of any FOIA search is necessarily "dependent upon the circumstances of the case."[160] When a requester has set limitations on the scope of his request, either at the

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[158](...continued)
99-5300 (D.C. Cir. Nov. 23, 1999).

[159] Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 28 (D.D.C. 2003), aff'd, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); see Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) ("'[T]he factual question . . . is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.'" (quoting SafeCard Servs., 926 F.2d at 1201)); In re Wade, 969 F.2d at 249 n.11 (declaring that issue is not whether other documents may exist, but whether search was adequate); Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986) ("[A] search is not unreasonable simply because it fails to produce all relevant material; no search of this [large] size . . . will be free from error."); 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)); Elliot v. U.S. Attorney Gen., No. 06-1128, 2006 WL 3191234, at *3 (D.D.C. Nov. 2, 2006) (concluding that agency "conducted a search that was reasonable," even though no records were located); Judicial Watch v. Rossotti, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) ("Perfection is not the standard by which the reasonableness of a FOIA search is measured."); Garcia v. 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); Boggs v. United States, 987 F. Supp. 11, 20 (D.D.C. 1997) (noting that the role of the court is to determine the reasonableness of the search, "not whether the fruits of the search met plaintiff's aspirations"); Freeman v. DOJ, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish."). But see Raulerson, No. 96-120, slip op. at 5 (D.D.C. Feb. 26, 1999) (suggesting that the agency's failure to locate complaints filed by plaintiff, the existence of which the agency did not dispute, "casts substantial doubt" on the adequacy of the agency's search).

[160] 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))); Truitt v. Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990); see Rugiero v. DOJ, 257 F.3d 534, 547 (6th Cir. 2001) ("The FOIA requires a reasonable search tailored to the nature of the request."); Campbell, 164 F.3d at 28 (same); Maynard, 986 F.2d at 559 (explaining that adequacy of search "depends upon the facts of each case"); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *7 (D. Minn. Oct. 24, 2005) (finding the agency's search sufficient "in light of the facts of this case"); Landmark Legal
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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.[161] Moreover, the D.C. Circuit has held that when the subject of a request is involved in several separate matters, but information is sought regarding only one of them, an agency is not obligated to extend its search to other files or to other documents that are referenced in records retrieved in response to the initial search, so long as that search was reasonable and complete in and of itself.[162]

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, nonconclusory, and submitted in good faith."[163] Such declarations should show "that the search method was

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[160](...continued)
Found. v. EPA, 272 F. Supp. 2d 59, 62 (D.D.C. 2003) (citing Weisberg, 745 F.2d at 1485); LaRouche v. DOJ, No. 90-2753, 2001 U.S. Dist. LEXIS 25416, at *5 (D.D.C. July 5, 2001) ("An examination of the . . . search must take into account the totality of the circumstances.").

[161] See Ramstack, 607 F. Supp. 2d at 108 (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"); Lechliter v. DOD, 371 F. Supp. 2d 589, 595 (D. Del. 2005) ("A requestor may not challenge the adequacy of a search after an agency limits the scope of a search in response to direction from the requestor."); Votehemp, Inc. v. DEA, No. 02-985, slip op. at 8-9 (D.D.C. Oct. 15, 2004) (concluding that narrowed search was adequate as agency and plaintiff had agreed to search of only three offices); Nation Magazine v. Dep't of State, No. 92-2303, 1995 WL 17660254, at *7 (D.D.C. Aug. 18, 1995) (holding search, which was limited to single DEA field office based on information supplied in request, to be "particularly appropriate here due to the fact that DEA must manually search its noninvestigative records").

[162] Morley, 508 F.3d at 1121 (holding that FOIA does not require agencies to search for records referenced in released responsive documents); Steinberg, 23 F.3d at 552 (concluding that "[otherwise] an agency . . . might be forced to examine virtually every document in its files, following an interminable trail of cross-referenced documents like a chain letter winding its way through the mail"); see also Davy v. CIA, 357 F. Supp. 2d 76, 84 (D.D.C. 2004) (finding that adequacy of agency's search was not undermined by fact that records referenced in released documents were not provided to plaintiff; the "FOIA cannot be used to troll for documents, which, if they even exist, appear barely tangential to the subject of" a request); Canning v. 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). See generally Campbell, 164 F.3d at 28 ("[T]he proper inquiry is whether the requesting party has established a sufficient predicate to justify searching for a particular type of record.").

[163] Pollack v. BOP, 879 F.2d 406, 409 (8th Cir. 1989); see Miller v. U.S. Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1986) ("An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith."); Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. (continued...)

reasonably calculated to uncover all relevant documents."[164] This ordinarily is accomplished

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[163](...continued)
1983) (explaining that the government may rely upon relatively detailed, non-conclusory declarations made in good faith in order to demonstrate reasonableness of its search); Perry, 684 F.2d at 127 ("[A]ffidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA."); Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978) (finding agency's description of withheld material to be "specifically described and justified"); 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."); 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.").

[164] Oglesby, 920 F.2d at 68 (declaring that although agency was not required to search "every" record system, "[a]t the very least, [it] was required to explain in its affidavit that no other record system was likely to produce responsive documents"); see Church of Scientology 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); Schoenman, 2009 WL 763065, at *11 (concluding that agency explained "in a reasonably detailed and nonconclusory manner" its reason for only searching two of its four directorates); Ferranti v. ATF, 177 F. Supp. 2d 41, 47 (D.D.C. 2001) ("Affidavits that include search methods, locations of specific files searched, descriptions of searches of all files likely to contain responsive documents, and names of agency personnel conducting the search are considered presumptively sufficient."), summary affirmance granted, No. 01-5451, 2002 WL 31189766, at *1 (D.C. Cir. Oct. 2, 2002); see also Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002) (reversing grant of summary judgment because "nothing in the record certif[ies] that all the records . . . have been produced"); Steinberg, 23 F.3d at 552 (finding description of search inadequate when it failed "to describe in any detail what records were searched, by whom, and through what process"); Peay v. DOJ, No. 04-1859, 2006 WL 83497, at *2 (D.D.C. Jan. 12, 2006) (denying summary judgment because agency did not describe Federal Records Center search or explain why particular archival box that it located and focused on there "would likely contain all responsive documents"); Judicial Watch v. FDA, 407 F. Supp. 2d 70, 74 (D.D.C. 2005) (finding that agency declarations sufficiently described search by detailing "scope and method used" to search for records and by providing "details about the specific offices" searched), aff'd in pertinent part, rev'd in other part & remanded on other grounds, 449 F.3d 141 (D.C. Cir. 2006); Antonelli v. ATF, No. 04-1180, 2005 WL 3276222, at *11 (D.D.C. Aug. 16, 2005) (rejecting an agency's declaration that merely stated which offices were "contacted in an attempt to locate any responsive documents" but that did not "describe the searches undertaken or the file systems searched"); Tarullo v. DOD, 170 F. Supp. 2d 271, 274 (D. Conn. 2001) (deciding that absence in agency's declaration of description of scope and nature of search "makes it impossible" to find that search was reasonable); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 34 F. Supp. 2d 28, 46 (D.D.C. 1998) (denying unprecedented partial summary judgment motion filed by agency against itself and requiring "restrictive and rigorous" search because of "egregious" agency conduct); Law Firm of Tidwell Swaim & Assocs. v. Herrmann, No. 3:97-2097, 1998 WL 740765, at *4 (N.D. Tex. Oct. 16, 1998) (denying summary judgment because of dispute as to proper scope of agency search). But see Maynard, 986 F.2d at 560 (refusing to find that (continued...)

by a declaration that identifies the types of files that an agency maintains, states the search terms that were employed to search through the files selected for the search, and contains an averment that all files reasonably expected to contain the requested records were, in fact, searched.[165] By contrast, agency declarations have been found inadequate when they do not contain sufficiently detailed descriptions of the search.[166]

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[164](...continued)
district court abused its discretion when it denied as untimely plaintiff's motion for reconsideration based on allegation that agency "improperly limited its search").

[165] See, e.g., 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); 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"); Citizens for Responsibility and Ethics in Wash. v. NARA, 583 F. Supp. 2d 146, 168 (D.D.C. 2008) (holding that agency conducted reasonable search based on declaration which described search methods used, location of specific files, description of files containing responsive information, and names of personnel conducting search); Citizens for Responsibility and Ethics in Wash., 535 F. Supp. 2d at 162 (concluding that agency's declaration complied with FOIA requirements as it detailed how "all files likely to contain responsive materials were searched, by whom they were searched, and in what manner"); Schmidt v. DOD, No. 3:04-1159, 2007 WL 196667, at *2 (D. Conn. Jan. 23, 2007) (finding that agency conducted adequate search based on the agency's affidavits which detailed "the timeliness of the search, the manner in which the search was conducted, the specific places that were searched, and the retrieval of the relevant documents"); Citizens for Responsibility & Ethics in Wash. v. DOJ, 405 F. Supp. 2d 2, 3 (D.D.C. 2005) (concluding that agency conducted adequate search, because its declarations "set forth the terms and nature of . . . [the] search and, perhaps even more significantly, they state[d] that the locations most likely to contain responsive documents were extensively searched"); Kidd v. DOJ, 362 F. Supp. 2d 291, 295 (D.D.C. Mar. 30, 2005) (finding an agency's search adequate because its declaration sufficiently described "records and databases searched . . . general processes employed in the searches . . . dates the searches were performed . . . the offices which conducted searches . . . and the records located"); Landmark Legal Found., 272 F. Supp. 2d at 66 (finding a search affidavit to be 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"); Garcia v. DOJ, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("To fulfill the adequate search requirement of the [FOIA], the government should identify the searched files and recite facts which enable the district court to satisfy itself that all appropriate files have been searched."); see also Harrison v. BOP, No. 07-1543, 2009 WL 1163909, at *6 (D.D.C. May 1, 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").

[166] See, e.g., Morley, 508 F.3d at 1121-22 (remanding case to district court because agency's declaration did not sufficiently describe scope and method of search conducted); Schoenman, 2009 WL 763065, at *16 (ordering agency to provide further descriptions with respect to manner in which two of its directorates conducted searches); Rodriguez v. McLeod, No. 08-0184, 2008 WL 5156653, at *4 (E.D. Cal. Dec. 9, 2008) (holding that agency's declaration was (continued...)

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 sufficient in FOIA litigation cases to fulfill the "personal knowledge" requirement of Rule 56(e) of the Federal Rules of Civil Procedure.[167]

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[166](...continued)
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); Aguirre v. SEC, 551 F. Supp. 2d 33, 61 (D.D.C. 2008) (describing agency's declaration as inadequate because declaration failed to provide search terms or methods used); Bonaparte, 531 F. Supp. 2d at 122 (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); Kean v. NASA, 480 F. Supp. 2d 150, 157 (D.D.C. 2007) (describing agency's declaration as inadequate because it provided neither information on databases searched nor methodology and search terms used); Toolasprashad v. BOP, No. 06-1187, 2006 WL 3290130, at *1 (D.D.C. Nov. 13, 2006) (denying agency's motion for summary judgment because declaration neither described search that yielded records nor specified "search terms" used); Jefferson v. BOP, No. 05-848, 2006 WL 3208666, at *7 (D.D.C. Nov. 7, 2006) (concluding that the agencies' declarations were inadequate because they did not "describe the systems of records each agency maintains, detail[] the method of retrieving records, or aver[] that the agency identified and searched all files reasonably likely to contain responsive records"); McCoy v. United States, No. 1:04-CV-101, 2006 WL 463106, at *13 (N.D. W. Va. Feb. 24, 2006) (denying EOUSA's motion for summary judgment as to the adequacy of its search, because the declaration "failed to set forth the methods and records systems used by the EOUSA to conduct [its] search"); Gilchrist v. DOJ, No. 05-1540, 2006 WL 463257, at *3 (D.D.C. Feb. 24, 2006) (denying an agency's motion for summary judgment because its declaration "neither describes the records searched nor the method by which agency staff conducted the search"); 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 an agency's declaration to be inadequate where it contained "no information about the search terms and the specific files searched" and failed to specifically aver that "all files likely to contain responsive records were searched"); Boyd v. U.S. Marshals Serv., No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *2-3 (D.D.C. Mar. 15, 2002) (rejecting declarations that did not identify search terms used, locations searched, and reasons for searching only particular locations).

[167] See, e.g., 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
(continued...)

(For a 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,[168] once that obligation is satisfied, the agency's position can be rebutted "only by

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[167](...continued)
completed by his predecessor); 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"); Ginarte v. Rice, No. 06-2074, 2007 WL 2111039, at *2 (D.D.C. July 23, 2007) (same); Lewis v. EPA, No. 06-2660, 2006 WL 3227787, at *3 (E.D. Pa. Nov. 3, 2006) (holding that the agency employee's declaration was admissible because the employee's "statements [were] based either on 'personal examination' of the responsive documents or on information provided to him by employees under his supervision"); Brophy v. DOD, No. 05-360, 2006 WL 571901, at *5 (D.D.C. Mar. 8, 2006) ("Although the government's declarants here did not physically perform the searches for responsive records, they satisfy the requirement of personal knowledge and qualify as competent witnesses concerning the FOIA searches."); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 160-61 (D.D.C. 2004) (ruling that declarations from employee who coordinated agency's searches satisfied personal knowledge requirement); Kay v. FCC, 976 F. Supp. 23, 33 n.29 (D.D.C. 1997) ("Generally, declarations accounting for searches of documents that contain hearsay are acceptable."), aff'd, 172 F.3d 919 (D.C. Cir. 1998) (unpublished table decision); Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (ruling that agency employee with "firsthand knowledge" of relevant files was appropriate person to supervise search undertaken by contractor); Spannaus v. DOJ, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992) (finding affidavit of agency employee sufficient when third party claimed to have knowledge of additional documents and employee contacted that individual); cf. Bingham v. DOJ, No. 05-0475, 2006 WL 3833950, at *3-4 (D.D.C. Dec. 29, 2006) (concluding that the declarant had sufficient knowledge of the subject matter and, "therefore, need not have been employed by the responding agency at the time of the facts underlying the requested records"); Homer J. Olsen, Inc. v. U.S. Dep't of Transp. Fed. Transit Admin., No. 02-00673, 2002 WL 31738794, at *5 n.4 (N.D. Cal. Dec. 2, 2002) (sustaining objection to declaration from employee who had no personal knowledge about what records were produced by regional office in response to a request). But see 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 inadmissable because no evidence that declarant directly supervises field offices); 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).

[168] See Patterson, 56 F.3d at 840; Maynard, 986 F.2d at 560; Miller, 779 F.2d at 1378; Weisberg, 705 F.2d at 1351; Kean, 480 F. Supp. 2d at 156 ("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."); Williams v. U.S. Attorney's Office, No. 96-1367, slip op. at 5 (D.D.C. Sept.
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showing that the agency's search was not made in good faith,"[169] because agency declarations are "entitled to a presumption of good faith."[170] Consequently, a requester's "'[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that

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[168](...continued)
21, 1999) (explaining that to prove adequacy of search, agency's affidavit should describe "where and how it looked for responsive records" and "what it was looking for"); Bennett v. DEA, 55 F. Supp. 2d 36, 40 (D.D.C. 1999) (pointing out that affidavit must provide details of scope of search; "simply stating that 'any and all records' were searched is insufficient").

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

[170] 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)); see, e.g., Coyne v. United States, 164 F. App'x 141, 142 (2d Cir. 2006) (per curiam) (citing Grand Cent. P'ship, 166 F.3d at 489); Peltier v. FBI, No. 03-CV-9055, 2005 WL 735964, at *4 (W.D.N.Y. Mar. 31, 2005) (citing Carney, 19 F.3d at 812); Butler v. SSA, No. 03-0810, slip op. at 5 (W.D. La. June 25, 2004), 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) (citing Carney, 19 F.3d at 812), aff'd in part, rev'd in part on other grounds & remanded, 432 F.3d 78 (2d Cir. 2005); Piper, 294 F. Supp. 2d at 24 (citing Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981)).

the agency conducted a reasonable search for them.'"[171] 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.[172] It has been held

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[171] Steinberg, 23 F.3d at 552 (quoting SafeCard, 926 F.2d at 1201); see Kucernak v. FBI, No. 96-17143, 1997 WL 697377, at *1 (9th Cir. Nov. 4, 1997) ("Mere allegations that the government is shielding or destroying documents does [sic] not undermine the adequacy . . . of the search."); Oglesby, 920 F.2d at 67 n.13 ("[H]ypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of the agency's search."); Concepcion v. FBI, 606 F. Supp. 2d 14, 30 (D.D.C. 2009) (holding that "plaintiff's speculation as to the existence of additional records, absent support for his allegations of agency bad faith, does not render the searches inadequate"); Willis v. DOJ, 581 F. Supp. 2d 57, 72 (D.D.C. 2008) ("Mere speculation about the existence of other documents is insufficient to overcome the presumption of good faith accorded to a FOIA affidavit."); Nat'l Inst. of Military Justice v. DOD, 404 F. Supp. 2d 325, 350 (D.D.C. 2005) (upholding the agency's search, and explaining that the plaintiff's "conclusory assertion" failed to overcome "the detailed declarations submitted by the [agency]"); Citizens for Responsibility & Ethics in Wash., 405 F. Supp. 2d at 5 (rejecting plaintiff's assertion that additional documents must exist "given the magnitude of the [alleged] scandal" that was the subject of its request); Lair v. U.S. Dep't of the Treasury, No. 03-827, 2005 WL 645228, at *4 (D.D.C. Mar. 21, 2005) (explaining that the plaintiff's "insistence that the ATF controls specific additional documents . . . does not alter the court's determination of adequacy"); Jones-Edwards v. Appeal Bd. of the NSA/Cent. Sec. Serv., 352 F. Supp. 2d 420, 422 (S.D.N.Y. 2005) (alternative holding) ("Plaintiff's belief . . . that the NSA did not make a reasonable search -- because if it had it would have found something -- is not enough to withstand . . . [the agency's] motion for summary judgment."), aff'd, 196 F. App'x 36, 37 (2d Cir. 2006); Flowers v. IRS, 307 F. Supp. 2d 60, 67 (D.D.C. 2004) (stating that "'purely speculative claims about the existence and discoverability of other documents'" are not enough to rebut presumption of good faith (quoting SafeCard, 926 F.2d at 1200)); Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State, 818 F. Supp. 1291, 1295 (N.D. Cal. 1992) ("Plaintiff's incredulity at the fact that no responsive documents were uncovered . . . does not constitute evidence of unreasonableness or bad faith."); see also Students Against Genocide v. Dep't of State, 257 F.3d 828, 839 (D.C. Cir. 2001) ("[T]hat the Department gave SAGE more information than it requested does not undermine the conclusion that its search was reasonable and adequate."); Boyd v. Criminal Div., DOJ, No. 04-1100, 2005 WL 555412, at *4 (D.D.C. Mar. 9, 2005) (rejecting claims that searches were inadequate as plaintiff did not identify any particular missing records or suggest that there were other files that should have been searched). 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").

[172] See Twist v. Gonzales, 171 F. App'x 855, 855 (D.C. Cir. 2005) (ruling that failure to locate specific documents does not render search inadequate or demonstrate that search was conducted in bad faith); Nation Magazine, 71 F.3d at 892 n.7 ("Of course, failure to turn up [a specified] document does not alone render the search inadequate."); Citizens Comm'n, 45 F.3d at 1328 (adequacy of search not undermined by inability to locate 137 out of 1000 volumes of

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that "[n]othing in the law requires the agency to document the fate of documents it cannot find."[173] On occasion, though, courts have required agencies to provide additional details about why particular records could not be found,[174] or even to seek out the assistance of an

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[172](...continued)
responsive material, absent evidence of bad faith, and when affidavit contained detailed, nonconclusory account of search); Maynard, 986 F.2d at 564 ("'The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it.'" (quoting Miller, 779 F.2d at 1385)); Elliott v. NARA, No. 06-1246, 2006 WL 3783409, at *3 (D.D.C. Dec. 21, 2006) ("An agency's search is not presumed unreasonable because it fails to find all the requested information."); Burnes v. CIA, No. 05-242, 2005 WL 3275895, at *2 (D.D.C. Sept. 14, 2005) ("An agency's failure to find a particular document does not undermine the determination that the search was adequate."); Judicial Watch v. 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" an agency search for misplaced personnel records); Tolotti v. IRS, No. 97-003, 2000 WL 1274235, at *1 (D. Nev. July 14, 2000) ("Obviously the agency cannot produce destroyed documents."); 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").

[173] Roberts v. DOJ, No. 92-1707, 1995 WL 356320, at *2 (D.D.C. Jan. 28, 1993); see 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."); 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."); Canning v. DOJ, 567 F. Supp. 2d 85, 92 (D.D.C. 2008) (explaining that although evidence suggests that additional responsive records may exist, agency met search requirement); 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"); cf. Physicians Comm. for Responsible Med. v. Glickman, 117 F. Supp. 2d 1, 4 (D.D.C. 2000) (acknowledging that individuals might have had personal "emails and telephone conversations," but nevertheless declaring that "[t]here is no evidence . . . that the agency ever had [these] records," despite plaintiff's insistence to the contrary).

[174] See Boyd, 2002 U.S. Dist. LEXIS 27734, at *4 (stating that the agency's declaration should (continued...)

employee closely related to specific records.[175] And when an agency does subsequently locate additional documents, or 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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[174](...continued)
have explained why a particular report, which was known to exist, was not located, and requiring the agency to "explain its failure to locate this report in a future motion"); Trentadue v. FBI, No. 04-772, slip op. at 5-6 (D. Utah May 5, 2004) (finding search insufficient in light of specific evidence proffered by plaintiff that certain documents do exist and were not found through FBI's automated search); Tran v. 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).

[175] 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").

[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 the argument that later-produced records call the adequacy of a search into question, because "[i]t would be unreasonable to expect even the most exhaustive search to uncover every responsive file"); Goland, 607 F.2d at 370 (refusing to undermine validity of agency's prior search because one week following decision by court of appeals agency had discovered numerous, potentially responsive, additional documents several months earlier); Fischer v. DOJ, 596 F. Supp. 2d 34, 43 (D.D.C. 2009) (finding search adequate even though agency failed to initially locate field office records due to administrative coding error); Muhammad v. U.S. Customs & Border Prot., 559 F. Supp. 2d 5, 8 (D.D.C. 2008) ("[T]he fact that the agency initially failed to disclose two pages from the Atlanta field office's case file due to human error does not render the search inadequate or suggest bad faith on the agency's part."); Peay v. DOJ, No. 04-1859, 2006 WL 1805616, at *1 (D.D.C. June 29, 2006) (noting that newly discovered responsive records were not evidence of agency bad faith, but rather was "oversight and, at worst, ineptness on the part of the previous reviewer"); Nat'l Inst. of Military Justice, 404 F. Supp. 2d at 333-34 (stating that "[a]lthough the agency was not initially diligent, that alone does not demonstrate bad faith, especially in light of the subsequent efforts to search for responsive records"); Corbeil v. 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 the "continuing discovery and release of documents does not provide that the original search was inadequate, but rather shows good faith on the part of the agency that it continues
(continued...)

Mootness and Other Grounds for Dismissal

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

In a FOIA lawsuit, the courts can grant a requester relief only when an agency has improperly withheld agency records.[177] Therefore, if during litigation 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.[178] Likewise, in cases where a FOIA plaintiff's complaint only alleges an

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[176](...continued)
to search for responsive documents"); Campaign for Responsible Transplantation v. FDA, 219 F. Supp. 2d 106, 111 (D.D.C. 2002) (suggesting that the discovery of fifty-five additional documents amounted to a "proverbial 'drop in the bucket'" in light of the voluminous number of documents located as a result of the agency's search); Torres v. CIA, 39 F. Supp. 2d 960, 963 (N.D. Ill. 1999) (rejecting challenge to the adequacy of search when "a couple of pieces of paper -- having no better than marginal relevance" -- were uncovered during additional searches); Klunzinger v. IRS, 27 F. Supp. 2d 1015, 1024 (W.D. Mich. 1998) (concluding that continued release of responsive documents attests to agency's good faith in providing complete response); Gilmore v. NSA, No. 92-3646, 1993 U.S. Dist. LEXIS 7694, at *27 (N.D. Cal. Apr. 30, 1993) (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 Trive 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); 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 5 U.S.C. § 552(a)(4)(B) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980) (explaining that "federal jurisdiction is dependant upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'records'" and that consequently "[j]udicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation" (citing 5 U.S.C. § 552(a)(4)(B))); Summers v. DOJ, 140 F.3d 1077, 1080 (D.C. Cir. 1998) ("When an agency declines to produce a requested document, the agency bears the burden . . . of proving the applicability of claimed statutory exemptions.").

[178] See, e.g., Cornucopia Inst. v. USDA, 650 F.3d 673, 675-78 (7th Cir. 2009) (concluding that agency's production of documents, the completeness of which was uncontested, mooted plaintiff's claims); Yonemoto v. VA, 305 F. App'x 333, 334 (9th Cir. Dec. 8, 2008) (dismissing (continued...)

unreasonable delay in responding to a FOIA request and the agency subsequently responds by processing the requested records, courts have dismissed the FOIA lawsuit as moot.[179] However, in instances where an agency has released documents, but other related issues remain unresolved, courts frequently will not dismiss the action.[180]

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[178](...continued)
plaintiff's FOIA claim as moot where agency produced requested records during discovery process in connection with separate civil action); Brown v. DOJ, 169 F. App'x 537, 540 (11th Cir. 2006) (per curiam) (holding that FOIA claim became moot when documents were released); Lepelletier v. FDIC, 23 F. App'x 4, 6 (D.C. Cir. 2001) (refusing to consider case further because plaintiff "received all -- indeed more than -- the relief he initially sought . . . [c]onsequently, his appeal is moot"); Isasi v. Office of the Att'y Gen., 594 F. Supp. 2d 12, 14 (D.D.C. 2009) (dismissing claim as moot because plaintiff "has already received all of the information to which he is entitled to under the law"); West v. Spellings, 539 F. Supp. 2d 55, 61-63 (D.D.C. 2008) (dismissing remaining claims as moot because agency provided all requested records to plaintiff); cf. 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"); 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); Long v. ATF, 964 F. Supp. 494, 497-98 (D.D.C. 1997) (holding that agency's grant of fee waiver renders moot issue of requester's status for purposes of assessing fees on that request).

[179] See Tri-Valley Cares v. DOE, 203 F. App'x 105, 107 (9th Cir. 2006) ("Eventual production, 'however belatedly, moots FOIA claims.'" (quoting Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002))); see, e.g., Voinche v. FBI, 999 F.2d 962, 963 (5th Cir. 1993) (dismissing case as moot because only issue in case was "tardiness" of agency response, which was made moot by agency disclosure determination); Atkins v. DOJ, No. 90-5095, 1991 WL 185084, at *1 (D.C. Cir. Sept. 18, 1991) ("The question whether DEA complied with the [FOIA's] time limitation in responding to [plaintiff's] request is moot because DEA has now responded to this request."); Tijerina v. Walters, 821 F.2d 789, 799 (D.C. Cir. 1987) ("'[H]owever fitful or delayed the release of information, . . . if we are 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))); 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); Moayedi v. U.S. Customs & Border Prot., 510 F. Supp. 2d 73, 80 (D.D.C. 2007) (stating that agency's "dilatoriness, standing alone, in responding to a FOIA request is not evidence of bad faith").

[180] See Marin Inst. for the Prevention of Drug & Other Alcohol Problems v. HHS, No. 98-17345, 2000 WL 964620, at *1 (9th Cir. July 11, 2000) (finding no mootness when release of document at issue was "surreptitious[]" and not necessarily the document plaintiff had requested); Hudson v. FBI, No. 04-4079, 2005 WL 2347117, at *1-2 (N.D. Cal. Sept. 26, 2005) (continued...)

In Payne Enterprises v. United States,[181] however, the Court of Appeals for the District of Columbia Circuit held that when records are routinely withheld at the initial processing level, but consistently released after an administrative appeal and 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.[182] The defendant agency's "voluntary cessation" of that practice in Payne did not moot the case when the plaintiff challenged the agency's policy as an unlawful wrong that otherwise would continue unremedied.[183]

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[180](...continued)
(refusing to dismiss plaintiff's complaint as moot because, although disputed documents were released and FOIA claims were resolved, related Privacy Act access claims had yet to be adjudicated); Nw. Univ. v. USDA, 403 F. Supp. 2d 83, 86 (D.D.C. 2005) (finding no mootness despite belated release of documents because plaintiff challenged adequacy of defendant's document production); Boyd v. U.S. Marshals Serv., No. 99-2712, 2000 U.S. Dist. LEXIS 14025, at *2 (D.D.C. Sept. 25, 2000) (refusing to dismiss case despite fact that all responsive, non-exempt records were released, because agency "[has] yet to explain [its] redactions or withholdings"); Looney v. Walters-Tucker, 98 F. Supp. 2d 1, 3 (D.D.C. 2000) (refusing to dismiss case as moot where all records located as responsive were produced, because "[i]n a FOIA case, courts always have jurisdiction to determine the adequacy of search"), aff'd per curiam sub nom. Looney v. FDIC, 2 F. App'x 8 (D.C. Cir. 2001); cf. Anderson v. HHS, 907 F.2d 936, 941 (10th Cir. 1990) (declaring that although plaintiff had already obtained all responsive documents in private civil litigation, albeit subject to protective order, plaintiff's FOIA litigation to obtain documents free from any such restriction remained viable).

[181] 837 F.2d 486 (D.C. Cir. 1988).

[182] Id. at 488-93; see also 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. Gilmore v. DOE, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998) (allowing discovery on "pattern and practice" claim of agency delay in processing FOIA requests), dismissed per stipulation, No. 95-0285 (N.D. Cal. Apr. 3, 2000).

[183] Payne Enters., 837 F.2d at 491; see also, e.g., Hercules, Inc. v. Marsh, 839 F.2d 1027, 1028 (4th Cir. 1988) (holding that threat of disclosure of agency telephone directory not mooted by release because new request for subsequent directory pending; agency action thus "capable of repetition yet evading review") (reverse FOIA suit); Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 90-91 (D.C. Cir. 1986) (holding that challenge to fee waiver standards as applied was moot, but challenge to facial validity of standards was ripe and not moot); Nat'l Sec. Archive v. CIA, 584 F. Supp. 2d 144, 146-47 (D.D.C. 2008) (concluding, based on new evidence showing that CIA continued to wrongfully deny plaintiff media status, that plaintiff's claims were not moot); Alley v. HHS, No. 07-0096, 2008 U.S. Dist. LEXIS 106884, at *20 (N.D. Ala. May 8, 2008) (finding that although plaintiff's claim with respect to underlying documents was moot, the "challenge to the policy under which that data was originally withheld is not"); Or. Natural Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1244-45 (D. Or. 2006) (refusing to find mootness, despite release of documents, due to plaintiff's concern regarding future ability to obtain documents in light of agency's "cut-off" and referral regulations). But cf. McDonnell
(continued...)

However, when plaintiffs are unable to demonstrate 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. [184]

FOIA lawsuits have also been dismissed when the plaintiff fails to prosecute the suit,[185]

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[183](...continued)
Douglas Corp. v. NASA, 109 F. Supp. 2d 27, 29 (D.D.C. 2000) (holding that "voluntary cessation" doctrine does not apply in reverse FOIA context; when "the FOIA request underlying the litigation" is withdrawn, the case is moot).

[184] 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. NSA, No. 94-16165, 1995 WL 792079, at *1 (9th Cir. Dec. 11, 1995) (refusing to grant injunction for alleged "systemic agency abuse" in responding to FOIA requests where system of handling requests was "reasonable" and records were "diverse and complex," requiring "painstaking review"); 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 the 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); 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"); Pub. Employees for Envtl. Responsibility 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 a policy or practice violating FOIA, nor a 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 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, 186 F.3d 457 (4th Cir. 1999).

[185] See, e.g., Antonelli v. EOUSA, No. 92-2416, 1994 WL 245567, at *1 (7th Cir. June 6, 1994) (affirming district court's dismissal of Complaint when, seven months after plaintiff's Complaint was found defective for lack of specificity, plaintiff had failed to amend); Geter v. Syndor, No. 08-1863, 2009 WL 320322, at *1-2 (D.D.C. Feb. 9, 2009) (dismissing complaint where plaintiff failed to respond to defendants' motion and, therefore, conceded material facts as characterized by defendants); Idema v. Dep't of State, No. 05-1334, 2007 WL 2258543, at *1 (D.D.C. Aug. 6, 2007) (dismissing action against multiple defendants where plaintiff was granted additional time to respond, informed of consequences of failure to do so, and ultimately failed to respond to defendants' motion); Fuller v. FCI Fort Dix, No. 03-1676, 2006 WL 1550000, at *1 (D.D.C. June 1, 2006) (holding that summary judgment was conceded where the plaintiff "failed to file a response by the extended deadline").

or records are publicly available under a separate statutory scheme upon payment of fees,[186] or if the claims presented are not ripe.[187] Additionally, a FOIA plaintiff's status as a fugitive may warrant dismissal under the "fugitive disentitlement doctrine."[188] (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.[189]

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[186] See Kleinerman v. Patent & Trademark Office, No. 82-295, 1983 WL 658, at *1 (D. Mass. Apr. 25, 1983) (dismissing FOIA action because Patent and Trademark Act gave plaintiff independent right of access provided he paid for records); cf. Perales v. DEA, 21 F. App'x 473, 474 (7th Cir. 2001) (dismissing 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").

[187] See, e.g., 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 the defendants no longer assert a "Glomar" defense, the plaintiff's claim regarding defendants' use of that defense became moot, and that the plaintiff's contention that the defendants were unlawfully withholding documents was not ripe for adjudication as the defendants were in the midst of reviewing and processing the requested documents); Doe v. Veneman, 230 F. Supp. 2d 739, 746 (W.D. Tex. 2002) (dismissing claims regarding "other pending FOIA requests" as "too broad for the Court to effectively review because such requests are numerous, request a variety of information, and are still pending with administrative agencies").

[188] See Maydak v. Dep't of Educ., 150 F. App'x 136, 138 (3d Cir. 2005) (affirming the district court's dismissal of plaintiff's FOIA suit under the "fugitive disentitlement doctrine" because "there was enough of a connection between Maydak's fugitive status and his FOIA case to justify application of the doctrine" (citing Ortega-Rodriguez v. United States, 507 U.S. 234, 246-49 (1993) (concluding that "absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during 'the ongoing appellate process,' the justifications advanced for dismissal of fugitives' pending appeals generally will not apply) (citation omitted))); see also Doyle v. DOJ, 668 F.2d 1365, 1365 (D.C. Cir. 1981) (upholding the district court's dismissal of the plaintiff's FOIA Complaint, and noting that so long as the plaintiff remains a federal fugitive "it is the general rule that he may not demand that a federal court service his complaint"); cf. Shannahan v. IRS, No. 08-452, 2008 WL 4260849, at *1 (W.D. Wa. July 11, 2008) (finding that agency claiming fugitive disentitlement doctrine failed to establish that "the withheld documents related to the alleged fraud committed by plaintiffs" and therefore suggesting that agency "present evidence on summary judgment that its refusal to provide [plaintiffs with requested] documents was based upon FOIA-subject matter exemptions").

[189] 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

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Another reason for dismissing a FOIA lawsuit involves the doctrine of res judicata, sometimes also referred to as "claim preclusion."[190] 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.[191] However, res judicata does not bar a court from considering a FOIA lawsuit when the plaintiff in an earlier, non-FOIA case

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[189](...continued)
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 as plaintiff deceased plaintiff's sister, who was executrix of his estate). 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).

[190] 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).

[191] See Schwarz v. Nat'l Inst. of Corr., No. 98-1230, 1998 WL 694510, at *1 (10th Cir. Oct. 15, 1998) (affirming dismissal of case in accordance with doctrine of res judicata because, despite plaintiff's argument to the contrary, prior action involved the same parties and same claims); Wrenn v. Shalala, No. 94-5198, 1995 WL 225234, at *1 (D.C. Cir. Mar. 8, 1995) (affirming dismissal of requests that were subject of plaintiff's previous litigation, but reversing dismissal on "claims that were not and could not have been litigated in that prior action"); Hanner v. Stone, No. 92-2565, 1993 WL 302206, at *1 (6th Cir. Aug. 6, 1993) (holding that under doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in a prior action") (emphasis added); NTEU v. IRS, 765 F.2d 1174, 1177 (D.C. Cir. 1985) (refusing to consider successive FOIA suits for documents that were "identical except for the year involved"); Willis v. DOJ, 581 F. Supp. 2d 57, 68-69 (D.D.C. 2008) (concluding that plaintiff's FOIA claim against DEA, which he had previously litigated, was barred by doctrine of res judicata and by statute of limitations); Antonelli v. BOP, 569 F. Supp. 2d 61, 63-64 (D.D.C. 2008) (finding that plaintiff was barred by res judicata from contesting agency's violation of statutory time limits because he failed to raise issue in earlier, related case); 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); cf. Taylor v. Sturgell, 128 S. Ct. 2161, 2174-80 (2008) (rejecting virtual representation doctrine because it does not present clear test for nonparty preclusion and remanding to lower courts, in accordance with standard grounds for nonparty preclusion, to determine whether plaintiff acted as agent of another FOIA plaintiff who requested the same records); Peltier v. FBI, No. 02-4328, slip op. at 4-5 (D. Minn. Oct. 24, 2006) (magistrate's recommendation) (dictum) (finding that plaintiff's New York FOIA action appears to preclude the instant case pursuant to the principles of claim and issue preclusion, and further finding that although "the New York FOIA action is presently on appeal[, this] does not undermine the preclusive effect of the [New York] district court's final judgment"), adopted, (D. Minn. Feb. 9, 2007).

involving the same records could not raise a FOIA claim.[192] 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.[193]

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" rule.[194] This rule holds that generally "'[w]here there are two competing lawsuits, the first suit should have priority.'"[195] 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, but both rules proceed from the same goal -- to minimize redundant litigation and thereby conserve

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[192] 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").

[193] See, e.g., Negley v. FBI, 169 F. App'x 591, 594 (D.C. Cir. 2006) (holding that res judicata was inapplicable because both lawsuits -- one to obtain records from Sacramento office and other to obtain records from San Francisco office -- did not involve same "nucleus of facts"; declaring further that the "FOIA does not limit a party to a single request, and because the records maintained by an FBI office may change over time, a renewal of a previous request inevitably raises new factual questions"); Croskey v. U.S. Office of Special Counsel, No. 96-5114, 1997 WL 702364, at *3 (D.C. Cir. Oct. 17, 1997) (finding res judicata inapplicable because document was not in existence when earlier litigation was brought); Hanner v. Stone, No. 92-1579, 1992 WL 361382, at *1 (6th Cir. Dec. 8, 1992) (determining that present claim was not precluded under doctrine of res judicata when appellate court had previously adjudicated claim that was similar, but involved different issue); ACLU v. 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 res judicata despite plaintiff's argument that automatic declassification section of Executive Order 12,958 was unavailable to him in previous lawsuit for same records and fact that it was still unavailable because it was not yet effective); Bernson v. ICC, 635 F. Supp. 369, 371 (D. Mass. 1986) (refusing to accept argument that changed circumstances rendered inapplicable previous decision affirming invocation of FOIA exemption, and dismissing claim based on res judicata).

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

[195] Employers Ins. v. Fox Entm't Group, 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 Biochem Parma, Inc. v. Emory Univ., 148 F. Supp. 2d 11, 13 (D.D.C. 2001) (citing Columbia Plaza Corp. v. Sec. Nat'l Bank, 525 F.2d 620, 627 (D.C. Cir. 1975)) (same) (non-FOIA cases).

judicial resources.[196]

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.[197] For example, if an agency's search for records already has been found to be adequate, a plaintiff is precluded from challenging the sufficiency of that same search in a subsequent action.[198] Similarly, FOIA plaintiffs have been precluded from relitigating an agency's disclosure determinations.[199] Collateral estoppel has not been applied in the FOIA context in those instances where there is not necessarily an expressed or implied legal

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[196] See 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 cases); see also Flynn v. Place, 63 F. Supp. 2d 18, 25 (D.D.C. 1999) (explaining that purpose of res judicata doctrine is to "protect[] adversaries from expensive and vexatious multiple lawsuits, [and] conserve[] judicial resources") (non-FOIA case).

[197] 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); cf. Cotton v. Heyman, 63 F.3d 1115, 1118 nn.1-2 (D.C. Cir. 1995) (holding that doctrine of direct estoppel, which precludes relitigating issue finally decided in "separate proceeding" within same suit, prevented Smithsonian Institution from challenging district court determination that it is subject to FOIA in connection with appeal from an 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).

[198] 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).

[199] 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").

relationship between the plaintiff in the first action and the plaintiff in the successive suit.[200] As with the doctrine of res judicata, collateral estoppel is not applicable to a subsequent lawsuit if there is an intervening, material change in the law or factual predicate.[201]

Vaughn Index

A distinguishing feature of FOIA litigation is that the defendant agency bears the burden of sustaining its action of withholding records.[202] The most commonly used device for meeting this burden of proof is the Vaughn Index, fashioned by the Court of Appeals for the

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[200] See Taylor, 128 S. Ct. at 2173-78 (disapproving theory of "virtual representation," whereby person could be bound by a prior judgement if he was adequately represented by party to earlier proceeding, in favor of traditional notions of nonparty preclusion); Favish v. Office of Indep. Counsel, 217 F.3d 1168, 1171 (9th Cir. 2000) (refusing to find that an attorney who represented plaintiff in a previous case was precluded from relitigating releasability of death-scene photographs of a 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 protected by government in prior reverse FOIA suit over same documents, because interests were not "congruent").

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

[202] See 5 U.S.C. § 552(a)(4)(B) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Natural Res. Def. Council v. NRC, 216 F.3d 1180, 1190 (D.C. Cir. 2000) (explaining that the "FOIA itself places the burden on the agency to sustain the lawfulness of specific withholdings in litigation") (Government in the Sunshine Act case); Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 931 (C.D. Ill. 2002) ("Since the Government is the party refusing to produce the documents, it bears the burden of showing that the documents are not subject to disclosure.").

District of Columbia Circuit in a case entitled Vaughn v. Rosen.[203]

The Vaughn decision requires agencies to prepare an itemized index, correlating each withheld document (or portion) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification.[204] Such an index allows the trial court "to make a rational decision [about] whether the withheld material must be produced without actually viewing the documents themselves . . . [and] to produce a record that will render [its] decision capable of meaningful review on appeal."[205] It also helps to "create balance between the parties."[206]

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[203] 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))).

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

[205] King, 830 F.2d at 219; see, e.g., Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 65 (1st Cir. 2002); Rugiero v. DOJ, 257 F.3d 534, 544 (6th Cir. 2001) (explaining that Vaughn Index enables court to make "independent assessment" of agency's exemption claims); Campaign for Responsible Transplantation v. FDA, 219 F. Supp. 2d 106, 116 (D.D.C. 2002) ("Without a proper Vaughn index, a requester cannot argue effectively for disclosure and this court cannot rule effectively."); Cucci v. DEA, 871 F. Supp. 508, 514 (D.D.C. 1994) ("An adequate Vaughn index facilitates the trial court's duty of ruling on the applicability of certain invoked FOIA exemptions, gives the requester as much information as possible that he may use to present his case to the trial court and thus enables the adversary system to operate."); cf. 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).

[206] Long v. DOJ, 10 F. Supp. 205, 209 (N.D.N.Y. 1998); see, e.g., Judicial Watch, Inc. v. FDA, 449 F.3d 141, 146 (D.C. Cir. 2006) (noting that the agency would have "a nearly impregnable defensive position" but for its burden to justify nondisclosure); Kozacky & Weitzel, P.C. v. United States, No. 07 C 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"); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-0377, 2005 WL 3274073, at *2 (D.D.C. Sept. 22, 2005) ("The purpose of the Vaughn index is to provide fertile ground upon which to germinate the seeds of adversarial challenge."); Edmonds v. FBI, 272 F. Supp. 2d 35, 44 (D.D.C. 2003) (explaining that affidavits must "'strive to correct the asymmetrical distribution of knowledge that characterizes FOIA litigation'" (quoting King, 830 F.2d at 218)); 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).

Thus, if a court finds that an index is not sufficiently detailed, it will often require one that is more detailed.[207] Alternatively, if a Vaughn Index is inadequate to support withholding, courts have sometimes utilized in camera review of the withheld material.[208] (See the further

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[207] 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) (remanding case for a more thorough Vaughn Index); Schoenman v. FBI, 604 F. Supp. 2d 174, 202 (D.D.C. 2009) (finding Vaughn Index "utterly inadequate" and ordering FBI to provide "a single, comprehensive Vaughn Index"); 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); Herrick's Newsletter, 2005 WL 3274073, at *2 (directing agency to "re-file the Vaughn index with specific identifications of 'low 2' and 'high 2' status for the information that is withheld under Exemption 2"); Antonelli v. ATF, No. 04-1180, 2005 WL 3276222, at *9 n.8 (D.D.C. Aug. 16, 2005) (directing the agency "to file a less confusing, detailed declaration and corresponding Vaughn index"); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 120 (D.D.C. 2005) (permitting agencies to submit revised Vaughn Index to correct inadequacies in original); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1089 (C.D. Cal. 2005) (ordering submission of new Vaughn Index because original was too conclusory to support exemption claims); Santos v. DEA, 357 F. Supp. 2d 33, 37-38 (D.D.C. 2004) (requiring supplemental declaration because initial one failed to provide "sufficient detail" to establish connection between exemptions invoked and documents withheld); Madison Mech., Inc. v. NASA, No. 99-2854, 2003 WL 1477014, at *4 (D.D.C. Mar. 20, 2003) (magistrate's recommendation) (recommending that another Vaughn Index be required because of deficiencies in first one), adopted, (D.D.C. Mar. 31, 2003); Wilderness Soc'y v. Bureau of Land Mgmt., No. 01-2210, 2003 WL 255971, at *7 (D.D.C. Jan. 15, 2003), modified, (D.D.C. Feb. 4, 2003) (requiring supplemental Vaughn Index to correct conclusory and generalized exemption claims); Coleman v. FBI, 972 F. Supp. 5, 9 (D.D.C. 1997) (rejecting narratives on "deleted page sheets" that apply to multiple documents and requiring agency to redo index to "inform the court as to the contents of individual documents and the applicability of the various Exemptions"); see also Bryce v. Overseas Private Inv. Corp., No. 96-595, slip op. at 10 (W.D. Tex. Sept. 28, 1998) ("An agency may submit a revised index at any time prior to the summary judgment hearing." (citing Coastal States Gas Corp. v. DOE, 644 F.2d 969, 971, 981 (3d Cir. 1981))); cf. Windel v. United States, No. A02-306, 2004 WL 3363406, at *4 (D. Alaska Sept. 30, 2004) (rejecting the government's attempt to justify withholdings with a letter that "describes in general terms, the exemptions claimed," and ordering submission "of a proper Vaughn index" that contains "sufficient detail regarding the bases for exemption").

[208] See, e.g., Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1082 (9th Cir. 2004) (acknowledging that "[u]nder certain limited circumstances, we have endorsed the use of in camera review of government affidavits as the basis for FOIA decisions"); Fiduccia, 185 F.3d at 1042-43 (continued...)

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

There is no set formula for a Vaughn Index; instead, it is the function, not the form that is important.[209] Indeed, the D.C. Circuit has observed that "a Vaughn index is not a work of

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[208](...continued)
(suggesting likewise that notwithstanding Wiener, 943 F.2d at 979, in camera inspection could by itself be sufficient); Maynard v. CIA, 986 F.2d 547, 557 (1st Cir. 1993) ("Where, as here, the agency, for good reason, does not furnish publicly the kind of detail required for a satisfactory Vaughn index, a district court may review the documents in camera."); Simon v. 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 High Country Citizens Alliance v. Clarke, No. 04-CV-00749, 2005 WL 2453955, at *8 (D. Colo. Sept. 29, 2005) (finding in camera review necessary due to insufficient descriptions of withheld documents in Vaughn Index); Carbe v. ATF, No. 03-1658, 2004 WL 2051359, at *8 n.5 (D.D.C. Aug. 12, 2004) (denying plaintiff's request for in camera inspection, because Vaughn Index adequately described withheld information); Twist v. Ashcroft, 329 F. Supp. 2d 50, 54 (D.D.C. 2004) ("[I]n camera review of the withheld documents (or of the portions withheld) is proper if the agency affidavits are insufficiently detailed to permit review of exemption claims[.]"), aff'd per curiam on other grounds, 171 F. App'x 855 (D.C. Cir. 2004); Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988) ("[W]here a trial court properly reviewed contested documents in camera, an adequate factual basis for the decision exists."); Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 30 (D.D.C. 2003) (commenting that while Vaughn Index description of documents was "slightly ambiguous," correctness of exemption claims was demonstrated through in camera examination), aff'd, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); cf. Judicial Watch, Inc. v. Dep't of the Army, 402 F. Supp. 2d 241, 249 & n.6 (D.D.C. 2005) (ordering in camera inspection to review accuracy of agency's descriptions of withheld information after inadvertent disclosure revealed existence of discrepancies and inaccuracies in Vaughn Index), summary judgment granted in part, 435 F. Supp. 2d 81 (D.D.C. 2006); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1338 (S.D. Fla. 2005) (conducting in camera inspection "to satisfy an 'uneasiness' or 'doubt' that the exemption claim may be overbroad given the nature of the Plaintiff's arguments"); cf. Peltier v. FBI, No. 03-CV-905, 2005 WL 735964, at *11 (W.D.N.Y. Mar. 31, 2005) (acknowledging that "in camera review is particularly frowned upon in the context of Exemption 1 withholdings . . . [h]owever, Defendant's insufficient Vaughn index leaves this Court with no choice but to conduct further review"), renewed mot. for summary judgment granted, 2006 WL 462096, at *2 (W.D.N.Y. Feb. 24, 2006), aff'd, 218 F. App'x 30 (2d Cir. 2007). But see also Wiener, 943 F.2d at 979 (suggesting that "[i]n camera review of the withheld documents by the [district] court is not an acceptable substitute for an adequate Vaughn index").

[209] Jones v. FBI, 41 F.3d 238, 242 (6th Cir. 1994); see Fiduccia, 185 F.3d at 1044 ("Any form . . . may be adequate or inadequate, depending on the circumstances."); Church of Scientology, 30 F.3d at 231 (agreeing that there is no set formula for a Vaughn Index); Gallant v. NLRB, 26 F.3d 168, 172-73 (D.C. Cir. 1994) (holding that justification for withholding provided by agency may take any form as long as agency offers "reasonable basis to evaluate [it]s claim of privilege"); Vaughn v. United States, 936 F.2d 862, 867 (6th Cir. 1991) ("A court's primary focus
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literature; agencies are not graded on the richness or evocativeness of their vocabularies."[210] Likewise, the sufficiency of a Vaughn Index is not determined by reference to the length of its document descriptions.[211] 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.'"[212] As one court has explained:

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

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[209](...continued)
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.) ("[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); Tax Analysts v. IRS, 414 F. Supp. 2d 1, 4-5 (D.D.C. 2006) (recognizing that substance of government's justification for withholding takes precedence over form in which it is presented) (appeal pending); cf. People for the Ethical Treatment of Animals v. USDA, No. 03-195, 2005 WL 1241141, at *4 (D.D.C. May 24, 2005) (stating that the agency "may submit other materials to supplement its Vaughn index, such as affidavits, that give the court enough information to determine whether the claimed exemptions are properly applied" (citing Judicial Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 257 (D.D.C. 2004))).

[210] 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.").

[211] 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.").

[212] 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 an agency's Vaughn Index adequate when it "'enables the court to make a reasoned independent assessment of the claim[s] of exemption'" (quoting Vaughn, 936 F.2d at 866-67)); Hall v. DOJ, 552 F. Supp. 2d 23, 27-28 (D.D.C. 2008) (determining that agency's Vaughn Index is insufficient because it "neither describes the redacted documents with requisite specificity nor correlates its redactions with particular claims of exemption"). But see People for the Am. Way Found. v. NSA, 462 F. Supp. 2d 21, 30 n.5 (D.D.C. 2006) (reminding that "a Vaughn index is not required . . . where it 'could cause the very harm that [the exemption] was intended to prevent'" (quoting Linder v. NSA, 94 F.3d 693, 697 (D.C. Cir. 1996) (non-FOIA case)).

the claimed exemptions.[213]

When a Vaughn Index meets these criteria, it is "'accorded a presumption of good faith.'"[214] It has been held that a Vaughn Index 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.'"[215]

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[213] St. Andrews Park, Inc. v. U.S. Dep't of Army Corps of Eng'rs, 299 F. Supp. 2d 1264, 1271 (S.D. Fla. 2003); see also 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).

[214] 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 entitled to presumption of good faith); Butler v. DEA, No. 05-1798, 2006 WL 398653, at *2 (D.D.C. Feb. 16, 2006) (noting presumption of good faith is accorded to agency affidavits); 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 the propriety of the agency's nondisclosure); Caton v. Norton, No. 04-CV-439, 2005 WL 3116613, at *11 (D.N.H. Nov. 21, 2005) (concluding that mistakes in processing FOIA request, which agency "convincingly explained," were not sufficient to overcome "presumption of good faith" given to its declaration); see also Church of Scientology, 30 F.3d at 233 (explaining that a good-faith presumption is applicable only "when the agency has provided a reasonably detailed explanation for its withholdings . . . court may not without good reason second-guess an agency's explanation, but it also cannot discharge its de novo review obligation unless that explanation is sufficiently specific"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 962 (C.D. Cal. 2003) (explaining that a plaintiff's disagreement with the conclusions reached in a Vaughn Index is not a sufficient basis for challenging it, and observing that "such a challenge is . . . appropriate [only] when the defendant does not provide sufficient explanation of its position to allow for disagreement"), appeal dismissed voluntarily, No. 03-55833 (9th Cir. 2003).

[215] 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

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A document specifically denominated as a "Vaughn Index" per se is not even essential, so long as the nature of the withheld information is adequately attested to by the agency in a declaration, or in an index and declaration combined.[216] What is essential, however, is that

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[215](...continued)
whether documents fell under deliberative process privilege of Exemption 5); Landmark Legal Found., 267 F.3d at 1138 (chiding plaintiff for his criticism of repetitive nature of Vaughn Index, given that "thousands of documents belonged in the same category"); Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (finding adequate, for responsive records consisting of 1000 volumes of 300 to 400 pages each, agency's volume-by-volume summary when Vaughn Indexes "specifically describe the documents' contents and give specific reasons for withholding them"); Davis v. 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 claims have merit); Vaughn, 936 F.2d at 868 (approving category-of-document approach when over 1000 pages were withheld under Exemptions 3, 5, 7(A), 7(C), 7(D), and 7(E)); 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)); 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"); Tax Analysts, 414 F. Supp. 2d at 4 (concluding that agency need not justify withholdings on a document-by-document basis because it invoked only one exemption); Coldiron, 310 F. Supp. 2d at 52 (explaining that repetition in Vaughn Index is to be expected, especially when "each redacted passage concerns the same, classified subject"); NTEU v. U.S. Customs Serv., 602 F. Supp. 469, 473 (D.D.C. 1984) (reasoning that the fact that only one exemption is involved "nullif[ies] the need to formulate the type of itemization and correlation system required by the Court of Appeals in Vaughn"), aff'd, 802 F.2d 525 (D.C. Cir. 1986); Agee v. CIA, 517 F. Supp. 1335, 1337-38 (D.D.C. 1981) (accepting index listing fifteen categories when more specific index would compromise national security); cf. Lardner v. 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).

[216] 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 an agency may "submit other measures in combination with or in lieu of the index itself," such as supporting affidavits, or seek in camera review of the documents); Wishart v. Comm'r, No. 98-17248, 1999 WL 985142, at *1 (9th Cir. Oct. 27, 1999) (suggesting that Vaughn Index is unnecessary if declarations are detailed enough); Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993) (deciding that separate document expressly designated as "Vaughn Index" is unnecessary when agency "declarations are highly detailed, focus on the individual documents, and provide a factual base for withholding each document at issue"); Kozacky & (continued...)

the Vaughn Index expressly indicate for each document that any reasonably segregable information has been disclosed.[217] In this connection, the Court of Appeals for the District of Columbia Circuit has repeatedly held that it is reversible error for a district court not to make a finding of segregability.[218]

Indeed, the D.C. Circuit has even ruled that if the segregability issue has not first been raised by the parties, the district court has "an affirmative duty" to consider the matter "sua sponte."[219] (For further discussions of this issue, see Procedural Requirements, "Reasonably

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[216](...continued)
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 an 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"); Queen v. Gonzales, No. 96-1387, 2005 WL 3204160, at *2 (D.D.C. Nov. 15, 2005) (explaining that "[a]gency affidavits can satisfy Vaughn's requirements" if they are detailed sufficiently to permit de novo review) (appeal pending); Doyharzabal v. Gal, No. 7:00-2995-24, 2004 WL 2444124, at *3 (D.S.C. Sept. 13, 2004) (finding agency's affidavit to be "equivalent" to Vaughn Index); Judicial Watch, 297 F. Supp. 2d at 257 (noting that agency may submit materials in "'any form'" as long as reviewing court has reasonable basis to evaluate exemption claim (quoting Gallant, 26 F.3d at 173)); 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.").

[217] See, e.g., Isley v. EOUSA, No. 98-5098, 1999 WL 1021934, at *7 (D.C. Cir. Oct. 21, 1999) ("The segregability requirement applies to all documents and all exemptions in the FOIA."); Krikorian v. Dep't of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (remanding for segregability determination for "each of the withheld documents"); Hall, 552 F. Supp. 2d at 31 (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 a "blanket declaration that all facts are so intertwined [as] to prevent disclosure under the FOIA" (citing Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 301-02 (D.D.C. 1999))).

[218] See Morley v. CIA, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (remanding to district court because it failed to address segregability issue); Kimberlin v. DOJ, 139 F.3d 944, 950 (D.C. Cir. 1998) (stating that it is reversible error for district court to fail to make segregability finding, and remanding for such a finding); Schiller v. NLRB, 964 F.2d 1205, 1210 (D.C. Cir. 1992) (same).

[219] Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. 1999); see also Hornbeck, 2006 WL 696053, at *7 ("[D]istrict courts are required to consider segregability issues even when the parties have not specifically raised such claims."); Perry-
(continued...)

Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, below.) Questions regarding segregability also may be resolved through in camera inspection of documents by the district court, when necessary.[220] (For a further discussion of in camera inspection, see Litigation Considerations, In Camera Inspection, below.)

When voluminous records are at issue, courts have approved the use of Vaughn Indexes based upon representative samplings of the withheld documents.[221] This special procedure

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[219](...continued)
Torres v. U.S. Dep't of State, 404 F. Supp. 2d 140, 144 (D.D.C. 2005) (noting court's sua sponte duty to consider segregability); Elec. Privacy Info. Ctr., 384 F. Supp. 2d at 111 n.4 (same).

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

[221] See, e.g., Neely v. FBI, 208 F.3d 461, 467 (4th Cir. 2000) (suggesting that, on remand, district court "resort to the well-established practice . . . of randomly sampling the documents in question"); Solar Sources, 142 F.3d at 1038-39 (approving use of sample of 6000 pages out of five million); Jones, 41 F.3d at 242 (approving sample comprising two percent of total number of documents at issue); Meeropol v. Meese, 790 F.2d 942, 956-57 (D.C. Cir. 1986) (allowing sampling of every 100th document when approximately 20,000 documents were at issue); Weisberg v. 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); Schoenman, 604 F. Supp. 2d at 196 ("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 documents."); Nat'l Res. Def. Council, 388 F. Supp. 2d at 1089 (ordering parties to agree upon "representative sample" from more than 6500 documents that will provide basis for Vaughn Index); Jefferson v. O'Brien, No. 96-1365, slip op. at 5 (D.D.C. Feb. 22, 2000) (approving sample index of approximately four percent of responsive records); see also Wash. Post v. DOD, 766 F. Supp. 1, 15-16 (D.D.C. 1991) (deciding that with more than 14,000 pages of responsive material involved, agency should produce detailed Vaughn Index for sample of files, such sample to be determined by parties or court); cf. Piper v. DOJ, 294 F. Supp. 2d 16, 20 (D.D.C. 2003) (noting that the parties agreed to sample of 357 pages out of 80,000 to be discussed in Vaughn Index); Kronisch v. United States, No. 83 CIV. 2458, 1995 WL 303625, at *1, *13 n.1 (S.D.N.Y. May 18, 1995) (holding sampling of fifty documents selected by plaintiff, out of universe of approximately 30,000 pages, to be appropriate basis for resolution of discovery dispute). But see Martinson v. Violent Drug Traffickers Project, No. 95-2161, 1996 WL 571791, at *8 (D.D.C. Aug. 7, 1996) (continued...)

"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.'"[222] 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.[223] The D.C. Circuit has held that an agency "must justify its initial withholdings and is not relieved of that burden by a later turnover of sample documents," and that "the district court must determine whether the released documents were properly redacted [when] initially reviewed."[224]

Some agencies use "coded" Vaughn Indexes -- which break certain FOIA exemptions into several categories, explain the particular nondisclosure rationales for each category, and then mark the exemption and category on the particular documents at issue.[225] Courts have

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[221](...continued)
("This Court does not believe that 173 pages of located documents is even close to being 'voluminous.'"); SafeCard Servs. v. SEC, No. 84-3073, 1988 WL 58910, at *3-5 (D.D.C. May 19, 1988) (concluding that burden of indexing relatively small number of requested documents (approximately 200) was insufficient to justify sampling).

[222] 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); Campaign for Responsible Transplantation v. FDA, 180 F. Supp. 2d 29, 34 (D.D.C. 2001) (approving representative sampling of one of many applications for investigational new drugs, all of which are "essentially uniform," but allowing plaintiff to select one to be sampled); cf. Halpern v. FBI, No. 94-365, 2002 WL 31012157, at *14 (W.D.N.Y. Aug. 31, 2001) (magistrate's recommendation) (opining in dicta that sampling would be inappropriate for the 116 pages at issue), adopted, (W.D.N.Y. Oct. 16, 2001).

[223] See Bonner, 928 F.2d at 1153-54 (explaining that the sample should "uncover[] no excisions or withholdings improper when made," but also noting that "[t]he fact that some documents in a sample set become releasable with the passage of time does not, by itself, indicate any agency lapse"); Meeropol, 790 F.2d at 960 (finding error rate of twenty-five percent "unacceptably high"); Schrecker v. DOJ, 14 F. Supp. 2d 111, 117 (D.D.C. 1998) (ordering reprocessing of all documents because of problems with representative sampling).

[224] 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).

[225] 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, (continued...)

generally accepted the use of such "coded" indexes when "[e]ach deletion was correlated specifically and unambiguously to the corresponding exemption . . . [which] was adequately explained by functional categories . . . [so as to] place[] each document into its historical and investigative perspective."[226] Innovative formats for "coded" affidavits have been found acceptable, so long as they enhance the ultimate goal of overall "descriptive accuracy" of the affidavit.[227]

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.[228] However, this

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[225](...continued)
2005 WL 3204160, at *2 (same).

[226] Keys v. DOJ, 830 F.2d 337, 349-50 (D.C. Cir. 1987); 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); Garcia v. DOJ, 181 F. Supp. 2d 356, 370 (S.D.N.Y. 2002) (accepting adequacy of agency's coded Vaughn Index); Baez v. FBI, 443 F. Supp. 2d 717, 723 (E.D. Pa. 2006) (upholding use of coded Vaughn Index where agency "redacted only identifying information and administrative markings"); 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 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).

[227] 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.

[228] 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
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approach has been found inadequate when the coded categories are too "far ranging" and more detailed subcategories could be provided.[229] 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.[230]

Although an agency ordinarily must justify its withholdings on a page-by-page or document-by-document basis, under certain circumstances courts have approved withholdings of entire, but discrete, categories of records which encompass similar information.[231] Most commonly, courts have permitted the withholding of records under Exemption 7(A) on a category-by-category or "generic" basis.[232] While the outermost contours

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[228](...continued)
confidential sources, it is entirely protected from disclosure."); see also King, 830 F.2d at 221 ("Utilization of reproductions of the material released to supply contextual information about material withheld is clearly permissible, but caution should be exercised in resorting to this method of description."); cf. Fiduccia, 185 F.3d at 1043 (recognizing that a Vaughn Index is "a superfluity" when the plaintiff and the court can ascertain the nature of information withheld by reviewing the redacted documents).

[229] 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).

[230] 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).

[231] See Judicial Watch, Inc., 449 F.3d at 148 (concluding that the agency's "decision to tie each document to one or more claimed exemptions in its index and then summarize the commonalities of the documents in a supporting affidavit is a legitimate way of serving those functions"); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24 (1978) (stating that language of Exemption 7(A) "appears to contemplate that certain generic determinations may be made"); Crooker v. ATF, 789 F.2d 64, 66-67 (D.C. Cir. 1986) (distinguishing between unacceptable "blanket" exemptions and permissible generic determinations); Pully v. IRS, 939 F. Supp. 429, 433-38 (E.D. Va. 1996) (accepting categorization of 5624 documents into twenty-six separate categories protected under several exemptions); see also DOJ v. Landano, 508 U.S. 165, 179 (1993) ("There may well be other generic circumstances in which an implied assurance of confidentiality fairly can be inferred."); DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776 (1989) (instructing that "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction"); cf. Coleman v. FBI, 972 F. Supp. 5, 8 (D.D.C. 1997) ("For an agency to break from the norm of a document-by-document index, the agency must at least argue that a 'categorical' index is warranted.").

[232] See, e.g., Robbins Tire, 437 U.S. at 218-23 (endorsing government's position "that a particularized, case-by-case showing is neither required nor practical, and that witness (continued...)

of what constitutes acceptable "generic" Exemption 7(A) Vaughn declarations are sometimes unclear,[233] 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.[234] Moreover, when "a claimed FOIA exemption consists of a generic [exemption], dependent upon the category of records rather than the subject matter which each individual record contains [so that] resort to a Vaughn index is futile,"[235] such generic descriptions have generally been found to satisfy an agency's Vaughn obligation with regard to other

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[232](...continued)
statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure [under Exemption 7(A)] while the hearing is pending"); Solar Sources, 142 F.3d at 1040 (reiterating that detailed Vaughn Index is not generally required in Exemption 7(A) cases); In re DOJ, 999 F.2d 1302, 1309 (8th Cir. 1993) (en banc); 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); W. Journalism Ctr. v. Office of the Indep. Counsel, No. 96-5178, 1997 WL 195516, at *1 (D.C. Cir. Mar. 11, 1997) ("[A]ppellee was not required to describe the records retrieved in response to appellants' request, or the harm their disclosure might cause, on a document-by-document basis, as appellee's description of the information contained in the three categories it devised is sufficient to permit the court to determine whether the information retrieved is exempt from disclosure."); see also Citizens Comm'n, 45 F.3d at 1328 (for responsive records consisting of 1000 volumes of 300 to 400 pages each, volume-by-volume summary held adequate when Vaughn Indexes sufficiently describe the documents' contents and give specific reasons for withholding them"); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *3 (D. Minn. Oct. 24, 2005) (recognizing propriety of categorical approach to justify use of Exemption 7(A)).

[233] 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).

[234] See In re DOJ, 999 F.2d at 1309 (citing Bevis, 801 F.2d at 1389-90); Manna v. DOJ, 815 F. Supp. 798, 806 (D.N.J. 1993); see also Dickerson, 992 F.2d at 1433 (enumerating categories of information withheld); Judicial Watch, Inc. v. FBI, No. 00-745, 2001 WL 35612541, at *5 (D.D.C. Apr. 20, 2001) (same); Curran, 813 F.2d at 476 (same); May, 1991 WL 328041, at *3-4 (same); Docal v. Bennsinger, 543 F. Supp. 38, 44 n.12 (M.D. Pa. 1981) (enumerating categories of "interference"); cf. Curran, 813 F.2d at 476 (stating that FBI affidavit met Bevis test and therefore finding it unnecessary to determine whether Bevis test is too demanding).

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

exemptions as well.[236]

In a broad range of contexts, most courts have refused to require agencies to file public Vaughn Indexes that are so detailed as to reveal sensitive information the withholding of which is the very issue in the litigation.[237] Therefore, in camera affidavits are frequently

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[236] See Reporters Comm., 489 U.S. at 779-80 (authorizing the "categorical" protection of information under Exemption 7(C)); Gallant, 26 F.3d at 173 (approving categorical withholding of names under Exemption 6); Church of Scientology, 792 F.2d at 152 (finding generic exemption under IRS Exemption 3 statute appropriate if "affidavit sufficiently detailed to establish that the document or group of documents in question actually falls into the exempted category"); Antonelli v. FBI, 721 F.2d 615, 617-19 (7th Cir. 1983) (holding that no index required in third-party request for records when agency categorically neither confirmed nor denied existence of records on particular individuals absent showing of public interest in disclosure); Brown v. FBI, 658 F.2d 71, 74 (2d Cir. 1981) (concluding that itemized and indexed justification unnecessary with respect to third party request for records); 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."); Pully, 939 F. Supp. at 433-38 (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 (protecting withholdings under both Exemption 7(A) and Exemption 3); NTEU, 602 F. Supp. at 472-73 (finding no index required for forty-four crediting plans withheld under Exemption 2). But see Judicial Watch, Inc., 402 F. Supp. 2d at 251 ("The fact that federal employees have an identifiable privacy interest in avoiding disclosures of information that could lead to annoyance or harassment . . . does not authorize a 'blanket exemption' for the names of all government employees."); McNamara v. 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"); cf. Church of Scientology, 30 F.3d at 234 ("[A] categorical approach to nondisclosure is permissible only when the government can establish that, in every case, a particular type of information may be withheld regardless of the specific surrounding circumstances.").

[237] See, e.g., Landano, 508 U.S. at 180 ("To the extent that the Government's proof may compromise legitimate interests, of course, the Government still can attempt to meet its burden with in camera affidavits."); Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004) ("The risk to intelligence sources and methods comes from the details that would appear in a Vaughn index . . . ."); Lion Raisins, 354 F.3d at 1084 (vouching that an agency need not "disclose facts that would undermine the very purpose of its withholding"); Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1093 (9th Cir. 1997) ("Indeed we doubt that the agency could have introduced further proof without revealing the actual contents of the withheld materials."); Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996) ("The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document without actually disclosing information that deserves

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utilized in Exemption 1 cases when public descriptions of responsive documents would compromise national security.[238] (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,[239] in Exemption 7(A) cases,[240]

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[237](...continued)
protection."); Maynard, 986 F.2d at 557 (emphasizing that although public declaration "lacked specifics, a more detailed affidavit could have revealed the very intelligence sources or methods that the CIA wished to keep secret"); Lewis, 823 F.2d at 380 ("[A] Vaughn index of the documents here would defeat the purpose of Exemption 7(A). It would aid [the requester] in discovering the exact nature of the documents supporting the government's case against him earlier than he otherwise would or should."); Curran, 813 F.2d at 476 (agency should not be forced "to resort to just the sort of precise description which would itself compromise the exemption"); Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 742 (9th Cir. 1980) (recognizing that "the government need not specify its objections in such detail as to compromise the secrecy of the information"); Baez, 443 F. Supp. 2d at 723 ("[I]t is hard to see how the government could have provided . . . more information about the redactions without disclosing the redacted information itself."); Odle, 2006 WL 1344813, at *9 (explaining that the Vaughn Index must "disclose 'as much as possible without thwarting the claimed exemption's purposes'" (quoting Wiener, 943 F.2d at 977)); Herrick's Newsletter, 2005 WL 3274073, at *4 ("The Court will not require an agency to describe the withheld material with such specificity as to result in the constructive equivalent of actual disclosure."); Berman v. CIA, 378 F. Supp. 2d 1209, 1215-16 (E.D. Cal. 2005) (recognizing that because the CIA's declaration "is part of the public record," it must of necessity support the withholding of intelligence sources and methods through the use of "terms that are general").

[238] See, e.g., Doyle v. FBI, 722 F.2d 554, 556 (9th Cir. 1983) (approving use of in camera affidavits in certain cases involving national security exemption); Edmonds, 272 F. Supp. 2d at 46 (approving the use of an in camera affidavit because "extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed"); Pub. Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 22 (D.D.C. 1995) (same); Peltier, 2006 WL 462096, at *1 (allowing submission of in camera Vaughn Index to justify withholding pursuant to Exemption 1), aff'd, 218 F. App'x 30 (2d Cir. 2007); see also CIA v. Sims, 471 U.S. 159, 179 (1985) (recognizing that "the mere explanation of why information must be withheld can convey [harmful] information").

[239] 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.").

[240] See, e.g., Alyeska Pipeline Serv. v. EPA, No. 86-2176, 1987 WL 17071, at *3 (D.D.C. Sept. 9, 1987) ("[R]equiring a Vaughn index in this matter will result in exactly the kind of harm to defendant's law enforcement proceedings which it is trying to avoid under exemption 7(A)."), aff'd on other grounds, 856 F.2d 309 (D.C. Cir. 1988); Dickerson v. DOJ, No. 90-60045, 1991 WL
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in Exemption 7(C) cases,[241] and in Exemption 7(D) cases.[242] 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.[243]

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.[244] Efforts to compel the preparation of Vaughn Indices prior to the filing of an agency's dispositive motion are often denied as premature,[245] but have been granted in some instances.[246]

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[240](...continued)
337422, at *3 (E.D. Mich. July 31, 1991), aff'd, 992 F.2d 1426 (6th Cir. 1993).

[241] See 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).

[242] See, e.g., Carpenter v. DOJ, 470 F.3d 434, 442 (1st Cir. 2006) (explaining that, in the instant Exemption 7(C) case, "[e]ven if [plaintiff] had asserted a valid public interest, the appropriate method for a detailed evaluation of the competing interests would have been through an in camera review because a standard Vaughn index might result in disclosure of the very information that the government attempted to protect"); Landano, 508 U.S. at 180 (ruling that government can meet its burden with in camera affidavits in order to avoid identification of sources in Exemption 7(D) withholdings); Church of Scientology, 30 F.3d at 240 n.23 (same); Keys, 830 F.2d at 349 (announcing that there is no requirement to produce Vaughn Index in "degree of detail that would reveal precisely the information that the agency claims it is entitled to withhold"); Doe v. 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.").

[243] See Lion Raisins, 354 F.3d at 1084 (overturning district court decision that relied on in camera review of sealed declaration, and remanding for creation of Vaughn Index); Armstrong v. Executive Office of the President, 97 F.3d 575, 580-81 (D.C. Cir. 1996) (citing Lykins v. 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).

[244] 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."); 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).

[245] 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
(continued...)

"Reasonably Segregable" Requirements

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt."[247] Added as part of the 1974 FOIA amendments,[248] this provision requires agencies to apply exemptions to specific segments of information within a record, rather than to the

[245](...continued)
exemptions."); Gerstein v. CIA, No. 06-4643, 2006 WL 3462659, at *5 (N.D. Cal. Nov. 29, 2006) (denying plaintiff's request for Vaughn Index because agencies had not yet 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").

[246] 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 the 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).

[247] 5 U.S.C. § 552(b) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (sentence immediately following exemptions).

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

document as a whole.[249] The Court of Appeals for the District of Columbia Circuit has held that to be reasonably segregable the segments of information, if disclosed, must have some meaning.[250] Furthermore, courts have not required segregation where, due to the format of the requested record, it is not technically feasible to segregate the exempt information from the nonexempt information.[251]

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[249] 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 Cent., Inc. v. Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977))); see also Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, at 1 (Mar. 19, 2009) (advising agencies to "take reasonable steps to segregate and release nonexempt information"), available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a 'New Era of Open Government'" (posted 4/17/2009); *FOIA Post*, "OIP Guidance: Segregating and Marking Documents for Release in Accordance with the OPEN Government Act" (posted 10/23/08) (providing guidance regarding segregation of documents for release in light of statutory provisions of OPEN Government Act).

[250] See Mead Data Ctr., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977) (observing that a "court may decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases or even sentences which taken separately or together have minimal or no information content"); 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-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"); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists, because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words"); cf. Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) ("[C]ourts should not order segregation when such a process would be significantly unwieldy.").

[251] See, e.g., Antonelli v. BOP, 591 F. Supp. 2d 15, 26-27 (D.D.C. 2008) (holding that BOP properly withheld recorded telephone conversation in its entirety pursuant to Exemption 7(C), because agency does not have capability to reasonably segregate plaintiff's portion of conversation); Swope v. DOJ, 439 F. Supp. 2d 1, 7 (D.D.C. 2006) (concluding that "the exempt and nonexempt portions of the telephone conversations could not be reasonably segregated," based on the BOP's explanation that it lacked the technical capability to do so); Butler v. Fed.

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Although, as a general rule, "[t]he 'segregability requirement applies to all . . . documents and all exemptions in the FOIA,'"[252] there is no duty to segregate materials which are, by definition, wholly exempt from disclosure.[253] To meet this requirement, an agency in its declaration must address the issue "with reasonable specificity,"[254] and not base its determination upon its own assessment of the value of the information to the requester.[255]

Traditionally, the district court's segregability obligation arose upon a plaintiff's specific complaint or argument about the defendant agency's compliance with that statutory

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[251](...continued)
Bureau of Prisons, No. 05-643, 2005 WL 3274573, at *5 (D.D.C. Sept. 27, 2005) (holding that because the agency relied on a rudimentary tape recorder to segregate information "the exempt and non-exempt portions of telephone conversation could not be reasonably segregated").

[252] Judicial Watch, Inc. v. DOJ, 432 F.3d 366, 371 (D.C. Cir. 2005) (quoting Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C. Cir. 1992)) (citations omitted); see 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").

[253] Judicial Watch, Inc., 432 F.3d at 371 (holding that "[i]f a document is fully protected as [attorney] work product, then segregability is not required").

[254] Armstrong v. Executive Office of the President, 97 F.3d 575, 580 (D.C. Cir. 1996); see Barnard v. DHS, 598 F. Supp. 2d 1, 25 (D.D.C. 2009) (stating that "[a]lthough an agency's justification need not compromise the nature of the withheld information, its explanation should at least detail what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document"); Elec. Privacy Info Ctr. v. TSA, No. 03-1846, 2006 WL 626925, at *8 (D.D.C. Mar. 12, 2006) (explaining that a "line-by-line" review is not required as 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"); Judicial Watch v. HHS, 27 F. Supp. 2d 240, 246 (D.D.C. 1998) ("If a court is to make specific findings of segregability without conducting in camera review in every FOIA case, the government simply must provide more specific information in its Vaughn affidavits.").

[255] 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"); 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)).

requirement.[256] In Trans-Pacific Policing Agreement v. United States Customs Service,[257] however, the D.C. Circuit treated this obligation as a sua sponte requirement for the district court -- i.e., one to be met automatically even if the plaintiff had not raised the issue -- and it reversed a district court judgment on that basis alone.[258]

Because of the FOIA's segregation requirement, an agency cannot seek to "justify withholding an entire document simply by showing that it contains some exempt material."[259] As a result of Trans-Pacific, even in the absence of a challenge by a FOIA plaintiff as to the issue of segregability, a district court may deny an agency's motion for summary judgment if its declarations are conclusory or do not adequately demonstrate that all reasonably segregable, nonexempt information has been disclosed.[260] (For a further discussion of

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[256] See, e.g., Summers v. DOJ, 140 F.3d 1077, 1081 (D.C. Cir. 1998); Judicial Watch v. HHS, 27 F. Supp. 2d 240, 246-47 & n.2 (D.D.C. 1998).

[257] 177 F.3d 1022 (D.C. Cir. 1999).

[258] Id. at 1027 (indicating that district court had duty to consider reasonable segregability even though requester never sought segregability finding); see 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, No. 98-5098, 1999 WL 1021934, at *7 (D.C. Cir. Oct. 21, 1999) (explaining that district court erred in failing to make segregability finding even though plaintiff failed to raise issue at trial); 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."). But cf. Nicolaus v. FBI, 24 F. App'x 807, 809 (9th Cir. 2001) (refusing to consider plaintiff's segregability argument because he failed to raise it in his opening appellate brief).

[259] Mead Data, 566 F.2d at 260; see Kimberlin v. DOJ, 139 F.3d 944, 950 (D.C. Cir. 1998).

[260] See, e.g., 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 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"); Lawyers' Comm. for Civ. Rts. of S.F. Bay Area v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *10 (N.D. Cal. Sept. 30, 2008) (finding agency failed to satisfy burden where it made conclusory statements, rather than providing reasons for its inability to segregate material); 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"); Carter, Fullerton & Hayes, LLC v. FTC, 520 F. Supp. 2d 134, 148 (D.D.C. 2007) (holding that "defendant's generic declaration that deliberative factual content is inextricably intertwined with the basis for withholding and is therefore, not segregable, does not constitute a sufficient explanation of segregability"); Pa. Dep't of Pub. Welfare v. HHS, No. 05-1285, 2006 WL 3792628, at *17 (W.D. Pa. Dec. 21, 2006) (concluding that agency's declaration is too broad and fails to provide factual recitation as to segregability); Voinche v.

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summary judgment requirements, see Litigation Considerations, Summary Judgment, below.) Still, courts have at times made their own segregability determinations, even in the absence of an adequate analysis in an agency's declaration.[261] Finally, even where a court of appeals rules for an agency with respect to the substantive application of the FOIA exemptions, it can still remand the matter to the district court, if that lower court initially failed to make a segregability finding.[262] Nevertheless, as sometimes occurs at the district court level, the

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[260](...continued)
FBI, 412 F. Supp. 2d 60, 69 (D.D.C. 2006) (denying summary judgment as to Exemption 7(E) because the agency provided "nothing but conclusory statements as to the impossibility of segregating any portions of the released material without even citing specifically which withheld documents it was referring to"); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1106 (C.D. Cal. 2005) (finding that the segregability analysis is not met based on a "boilerplate statement . . . , which conclusorily asserts [that] all reasonably segregable information has been released"); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *4 (D. Minn. Oct. 24, 2005) (ordering agency to provide detailed affidavits as record is insufficient to enable determination as to whether agency has sustained its burden of reasonable segregability), reconsideration denied, 2006 WL 208783 (D.D.C. Jan. 26, 2006); Edmonds Inst. v. Dep't of the Interior, 383 F. Supp. 2d 105, 110 (D.D.C. 2005) (directing defendant to produce more detailed Vaughn Index because its "generalized paragraph on segregability" does not suffice).

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

[262] See 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"); see also James Madison Project v. NARA, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (per curiam) (remanding, despite ruling in favor of the government on exemptions, for a "more precise finding" on segregability); McSheffrey v. EOUSA, 13 F. App'x 3, 4 (D.C. Cir. 2001) (remanding with explicit instructions that the district court "determine whether any portion of these documents can be segregated for release"); Isley, 1999 WL 1021934, at *7 (remanding case for segregability finding); Kimberlin, 139 F.3d at 950 ("[W]e must remand this case to the district court to determine whether any of the withheld documents contains material that can be segregated and disclosed . . . ."); cf. Johnson v. EOUSA, 310 F.3d 771, 777 (D.C. Cir. 2002) (approving of district court's sua sponte segregability de-
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appellate court itself can make the segregation determinations.[263] (For a discussion of document segregation at the administrative level, see Procedural Requirements, "Reasonably Segregable" Obligation, above.)

In Camera Inspection

The FOIA specifically authorizes in camera examination of documents,[264] however, the district courts have "broad discretion" to decide if this type of review "is necessary to determine whether the government has met its burden."[265] Courts typically exercise their

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[262](...continued)
termination).

[263] 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, the 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").

[264] See 5 U.S.C. § 552(a)(4)(B) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also S. Conf. Rep. No. 93-1200, at 9 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6287.

[265] Loving v. DOD, 550 F.3d 32, 41 (D.C. Cir. 2008) (citing Armstrong v. Executive Office of the President, 97 F.3d 575, 577-78 (D.C. Cir. 1996)); see, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) ("The in camera review provision is discretionary by its terms[.]"); Peltier v. FBI, 563 F.3d 754, 761 (8th Cir. 2009) (finding, where district court reviewed sample of pages withheld, its "failure to conduct an in camera review of all the withheld documents" did not constitute reversible error); Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 377 n. 34 (4th Cir. 2009) (noting that "it is within the discretion of the district court to determine whether in camera inspection is needed in order to make a de novo determination of the claims of exemption"); 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, No. 97-35930, 1998 WL 658662, at *1 n.3 (9th Cir. Sept. 14, 1998) ("Section 552(a)(4)(B) empowers, but does not require, a district court to examine the contents of agency records in camera . . . ."); Parsons v. Freedom of Info. Act Officer, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) (explaining that district court has discretion to conduct in camera inspection, but that it is neither "favored nor necessary" so long as adequate factual basis for decision exists);
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discretionary authority to order in camera inspection in exceptional rather than routine cases,[266] because such review circumvents the adversarial process,[267] and is burdensome for the court to conduct.[268]

In camera review is generally not necessary when agencies meet their burden of proof

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[265](...continued)
Armstrong v. Executive Office of the President, 97 F.3d 575, 579 (D.C. Cir. 1996) (finding that district court did not abuse its discretion when it undertook in camera review of one document, but not of another (similarly characterized) document); Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993) (holding that in camera review "is discretionary and not required, absent an abuse of discretion").

[266] 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"); 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))); PHE, Inc. v. DOJ, 983 F.2d 248, 252-53 (D.C. Cir. 1993) (observing that in camera review is generally disfavored, but permissible on remand arising from inadequate affidavit); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 119 (D.D.C. 2005) ("[C]ourts disfavor in camera inspection and it is more appropriate in only the exceptional case."); Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 304 (D.D.C. 1999) ("'[I]n camera review should not be resorted to as a matter of course . . . .'" (quoting Quiñon v. FBI, 86 F.3d 1222, 1228 (D.C. Cir. 1996)).

[267] See 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))); Nevada v. DOE, 517 F. Supp. 2d 1245, 1254 (D. Nev. 2007) (noting that "[t]he index requirement serves to allow the requester to contest through the adversarial process the contention that a document falls under an exemption and prevents burdensome and non-adversarial review of ex parte submissions from becoming the norm").

[268] See, e.g., Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978) ("In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt.'"); Ctr. for Biological Diversity v. OMB, No. 07-4997, 2008 WL 5129417, at *13 (N.D. Cal. Dec. 4, 2008) (requiring agency to submit a revised Vaughn Index rather than conduct an in camera inspection which would entail reviewing voluminous amount of records); Robert v. HHS, No. 01-4778, 2005 WL 1861755, at *6 (E.D.N.Y. Aug. 1, 2005) (declaring that courts should not "spend scarce judicial resources for in camera review where defendant's affidavits are sufficiently descriptive and make clear that the privileges asserted apply").

by means of sufficiently detailed affidavits.[269] However, when agency affidavits are insufficiently detailed to permit meaningful review, in camera review remains one of the options available to a court to further evaluate an agency's exemption claims.[270]

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[269] See, e.g., Loving, 550 F.3d at 41 (determining that in camera inspection is unnecessary where the district court relied on "the description of the documents sent forth in the Vaughn Index and the agency's declaration that it released all segregable material"); Assoc. Press v. DOJ, 549 F.3d 62, 67 (2d Cir. 2008) (concluding that, "in light of relatively detailed nature of the [agency's] declarations," district court's decision not to conduct in camera review was not an abuse of discretion); 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, No. 98-56656, 2000 WL 60067, at *2 (9th Cir. Jan. 21, 2000) (finding in camera review unnecessary where affidavits were sufficiently detailed); Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992) (rejecting in camera inspection when affidavits and Vaughn Indexes were sufficiently specific); Silets v. DOJ, 945 F.2d 227, 229-32 (7th Cir. 1991) (en banc) (same); Vaughn v. United States, 936 F.2d 862, 869 (6th Cir. 1991) (finding in camera review "neither favored nor necessary where other evidence provides adequate detail and justification"); Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988) (rejecting in camera review because "detailed affidavit was sufficient"); Thompson v. EOUSA, 587 F. Supp. 2d 202, 202 n.1 (D.D.C. 2008) (same); Safeway, Inc. v. IRS, No. 05-3182, 2006 WL 3041079, at *10 (N.D. Cal. Oct. 24, 2006) (denying the plaintiff's request for in camera review because the agency "has sustained its burden of proof with respect to the documents as to which the Court has granted summary judgment").

[270] See, e.g., Rein, 553 F.3d at 377 n. 34 (remanding case because agencies' affidavits did not provide a sufficient basis for withholdings, but noting that district court "may once again exercise its discretion whether to conduct in camera review of the challenged documents, permit the Agencies to submit an adequate Vaughn index summary instead, or opt for a combination of methods"); Stolt-Nielsen Transp. Group Ltd. v. United States, 534 F.3d 728, 734 (D.C. Cir. 2008) (remanding for segregability finding, but leaving to district court's discretion whether more detailed affidavits or in camera review are necessary); Halpern, 181 F.3d at 295 (observing that "[in camera] review would have been appropriate" because agency affidavit was conclusory, but noting that "such action is one best left to the trial court's discretion"; Spirko 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."); El Badrawi v. DHS, 583 F. Supp. 2d 285, 299-322 (D. Conn. 2008) (ordering in camera

(continued...)

Courts have also ordered in camera review in other instances.[271] Where the number of records at issue is relatively small, a court may inspect the documents in camera in order to save both the court and the parties time and resources.[272] Similarly, in cases involving a large

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[270](...continued)
review for four agencies because their declarations and Vaughn Indices contained insufficient detail to justify withholdings); see also Lissner v. U.S. Customs Serv., 241 F.3d 1220, 1223 (9th Cir. 2001) (reversing district court decision on Exemption 7(C) applicability because appellate court's own in camera review revealed "nothing in the unredacted documents that is particularly personal"); Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1082 (9th Cir. 2004) ("Under certain limited circumstances, we have endorsed the use of in camera review of government affidavits as the basis for FOIA decisions."); Fiduccia v. DOJ, 185 F.3d 1035, 1042-43 (9th Cir. 1999) (suggesting, notwithstanding Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991), that in camera inspection could by itself be sufficient). But see Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991) ("In camera review of the withheld documents by the court is not an acceptable substitute for an adequate Vaughn index."); St. Andrews Park, Inc. v. Dep't of Army Corps of Eng'rs, 299 F. Supp. 2d 1264, 1271 & 1275 n. 5 (S.D. Fla. 2003) (declaring in camera review to be "not dispositive" when agency's affidavit found to be inadequate, even while suggesting that exemption claims "appear . . . to be justified").

[271] See, e.g., People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 284, 307 (D.D.C. 2007) (stating that "[i]n camera review may be appropriate when: 'agency affidavits are insufficiently detailed to permit meaningful review of exemption claims,' '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'") (citations omitted); 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); Hull v. Dep't of Labor, No. 04-01264, slip op. at 16 (D. Colo. Dec. 2, 2005) (explaining that the following factors are considered in deciding whether to grant in camera review: "whether the affidavits submitted by the agency [were] too vague to allow review of the agency's claims, whether the number and size of the documents at issue would place an 'onerous burden' on the Court, and any evidence of agency bad faith in withholding the documents"); Dean v. FDIC, 389 F. Supp. 2d 780, 789 (E.D. Ky. 2005) (stating that the following factors should be considered when determining whether in camera review is appropriate: "'(1) judicial economy; (2) actual agency bad faith, either in the FOIA action or in the underlying activities that generated the records requested; (3) strong public interest; and (4) whether the parties request in camera review'" (quoting Rugiero v. DOJ, 257 F.3d 534, 543 (6th Cir. 2001))).

[272] See Quiñon, 86 F.3d at 1228 (suggesting that number of documents is "another . . . factor to be considered" when determining whether in camera review is appropriate); Maynard v. CIA, 986 F.2d 547, 558 (1st Cir. 1993) ("In camera review is particularly appropriate when the documents withheld are brief and limited in number."); Currie v. IRS, 704 F.2d 523, 530 (11th Cir. 1983) ("Thorough in camera inspection of the withheld documents where the information is extensive and the claimed exemptions are many . . . is not the preferred method of (continued...)

number of documents, the court may conduct in camera review of a smaller subset.[273]

Notably, in camera review has been utilized in a case in which the plaintiff alleged that the government had waived its right to claim an exemption.[274] Further, in camera inspection has been used to verify that an agency has released all reasonably segregable information,[275]

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[272](...continued)
determining the appropriateness of the government agency's characterization of the withheld information."); 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); Tax Analysts v. IRS, No. 94-923, 1999 U.S. Dist. LEXIS 19514, at *14 (D.D.C. Nov. 3, 1999) (noting, as factor justifying in camera review, minimal burden on court where only one sentence is to be reviewed); Steinberg v. DOJ, 179 F.R.D. 357, 364 (D.D.C. Apr. 28, 1998) (ordering in camera inspection of seven documents "[i]n the interests of efficiency"); see also Klunzinger v. IRS, 27 F. Supp. 2d 1015, 1028 (W.D. Mich. 1998) ("The withheld documents in this case are far too numerous to be considered the proper subject of an in camera inspection."); Animal Legal Def. Fund, 44 F. Supp. 2d at 304 (rejecting in camera review, but requiring agency to "submit a more detailed affidavit" in order to conserve judicial resources); Smith v. ATF, 977 F. Supp. 496, 503 (D.D.C. 1997) (finding that "judicial economy is best served" by allowing correction of deficient affidavits rather than by in camera review of two documents).

[273] See, e.g., Carter, 830 F.2d at 393 n.16 (suggesting that for voluminous documents, "selective inspection of . . . documents [is] often an appropriate compromise"); N.Y. Pub. Interest Research Group v. EPA, 249 F. Supp. 2d 327, 331 (S.D.N.Y. 2003) (discussing fact that in camera review was conducted of representative sample of documents); Wilson v. CIA, No. 89-3356, 1991 WL 226682, at *3 (D.D.C. Oct. 15, 1991) (ordering fifty-document sample of approximately 1000 pages withheld in whole or in part, selected equally by parties, for in camera examination); Wilson v. 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); Agee v. CIA, 517 F. Supp. 1335, 1336 (D.D.C. 1981) (utilizing "random" in camera review); cf. Young, 972 F.2d at 549 (rejecting a per se rule that would require in camera review "whenever the examination could be completed quickly"). But cf. Lame v. DOJ, 654 F.2d 917, 927 (3d Cir. 1981) (holding in camera sampling of law enforcement documents insufficient).

[274] See 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"); Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (conducting in camera review when affidavits contradicted published report).

[275] 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), application to extend time to file petition for cert. granted, No. 08A1068 (J. Ginsburg, May 29, 2009); Allard K. Lowenstein Intern. Human Rights Project v. DHS, 603 F. Supp. 2d 354, 360-61 (D. Conn. 2009) (noting that agency's affidavits were inadequate and reviewing its exemption claims in camera); Jefferson v. DOJ, No. 01-1418, slip op. at 31 n.13 (D.D.C. Mar. 31, 2003) (continued...)

or to ascertain whether a district court properly ruled on the merits of a case.[276]

Although mere allegations of bad faith have been found to be insufficient to justify use of in camera inspection,[277] the Court of Appeals for the District of Columbia Circuit has noted that such review would be appropriate if there were evidence of bad faith.[278] Even with the submission of adequately detailed affidavits -- and in the absence of any bad faith in the agency's FOIA processing -- in camera inspection has also been undertaken based upon "evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue."[279]

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[275](...continued)
(deciding to hold in abeyance a segregability determination for documents claimed to be exempt on the basis of Exemption 5 of the FOIA until in camera inspection is completed); Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 241 F. Supp. 2d 1342, 1359 (D.N.M. 2002) (noting that "all segregable portions of the documents have been released," a finding verified by in camera inspection).

[276] 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).

[277] See Boyd v. Crim. Div. of DOJ, 475 F.3d 381, 391 (D.C. Cir. 2007) (concluding that district court did not abuse its discretion by failing to conduct in camera review where plaintiff did not show agency affidavits were insufficient and did not offer evidence of bad faith); Rugiero v. DOJ, 257 F.3d 534, 547 (6th Cir. 2001) (finding that the requester failed to demonstrate "strong evidence of bad faith that calls into question the district court's decision not to conduct an in camera review"); Ford v. West, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998) ("'[M]ere allegations of bad faith' should not 'undermine the sufficiency of agency submissions.'" (quoting Minier v. CIA, 88 F.3d 796, 803 (9th Cir. 1996))); Silets, 945 F.2d at 231 (finding mere assertion, as opposed to actual evidence, of bad faith on part of agency insufficient to warrant court's in camera review); Askew v. United States, No. 05-200, 2006 WL 3307469, at *7 (E.D. Ky. Nov. 13, 2006) (holding that "the plaintiff has not overcome the presumption of good faith attending the Vaughn Index and, thus, . . . a wholesale in camera inspection of the documents is not necessary"); Neuhausser v. DOJ, No. 03-531, 2006 WL 1581010, at *4 (E.D. Ky. June 6, 2006) (finding in camera review to be unnecessary because defendant provided detailed Vaughn Index and plaintiff failed to present substantial evidence of bad faith).

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

[279] 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
(continued...)

In camera review often is employed in cases involving national security, where detailed public affidavits may be impracticable.[280] Nevertheless, even in a case involving sensitive national security issues, in camera review has been deemed unnecessary when there is sufficient information on the public record.[281] (For a further discussion of in camera review of classified materials, see Exemption 1, In Camera Submissions and Adequate Public Record, above.) Moreover, even in national security cases, it has been observed that "a district court exercises a wise discretion when it limits the number of documents it reviews in camera."[282] Sometimes in these cases, in addition to in camera inspection, an agency will submit in camera declarations to explain the basis for its withholdings,[283] although the D.C. Circuit has

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[279](...continued)
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 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 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).

[280] See, e.g., Pub. Citizen v. Dep't of State, 11 F.3d 198, 200-01 (D.C. Cir. 1993) (tacitly approving use of in camera inspection to determine whether Exemption 1 protection waived); Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) (finding in camera inspection of classified affidavit appropriate when "[d]isclosure of the details . . . might result in serious consequences to the nation's security"); Elec. Privacy Info. Ctr., 584 F. Supp. 2d at 70-72 (concluding that DOJ's public submissions, in conjunction with its in camera affidavit, justify withholding seven records under Exemptions 1 and 3); Edmonds v. FBI, 272 F. Supp. 2d 35, 46-47 (D.D.C. 2003) (agreeing, after reviewing "the extensive confidential material submitted [for in camera review, that] this is one of those 'occasion[s] when extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed'" (quoting Lykins v. United States, 725 F.2d 1455, 1463 (D.C. Cir. 1984))).

[281] See ACLU v. DOD, 584 F. Supp. 2d 19, 24 (D.D.C. 2008) (finding that in camera review of classified records was not necessary where "there is no indication that these materials were classified 'in order to' conceal violations of the law" and "[t]he declaration credibly outlines the (proper) motives behind the classification decisions").

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

[283] See, e.g., Maynard, 986 F.2d at 557 (noting that in camera declartions filed); Hunt v. CIA, 981 F.2d 1116, 1118 (9th Cir. 1992) (same); Barnard v. DHS, 598 F. Supp. 2d 1, 16-17 (D.D.C. 2009) (finding that Exemption 7 threshold was satisfied based on examination of two in (continued...)

noted that such declarations are generally "disfavored."[284]

Generally, district courts will only review in camera declarations after an agency has created as complete a public record as possible by means of its court submissions.[285]

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[283](...continued)
camera declarations submitted by agency); ACLU v. DOD, 389 F. Supp. 2d 547, 567-68 (S.D.N.Y. 2005) (concluding that there is no segregable information based on in camera review of two classified declarations and Vaughn Index); Peltier v. FBI, No. 03-905, 2005 WL 735964, at *11 (W.D.N.Y. Mar. 31, 2005) (finding need for supplemental Vaughn Index, in camera declaration, or traditional in camera review) (appeal pending); Haddam v. FBI, No. 01-434, slip op. at 12 (D.D.C. Sept. 8, 2004) (noting that "[f]requently the issue of in camera, ex parte affidavits arises in FOIA cases involving Exemption 1"); Edmonds, 272 F. Supp. 2d at 43 (noting agency use of in camera supplement to public declaration); see also Dow Jones Co. v. FERC, 219 F.R.D. 167, 171 (C.D. Cal. 2003) (explaining that agency submitted disputed record in camera); cf. Canning v. DOJ, No. 01-2215, slip op. at 6 (D.D.C. May 27, 2005) (granting the agency's motion for leave to file a declaration in camera because the "declaration is very personal in nature, and releasing any additional information would seriously compromise the secrecy claimed in this case"); Al Najjar v. Ashcroft, No. 00-1472, slip op. at 2 (D.D.C. July 22, 2003) (noting that three DOJ components submitted "substantial portions of their moving papers and Vaughn index in camera and ex parte" in case involving secret, classified evidence pertaining to detainee).

[284] Armstrong, 97 F.3d at 580-81 ("[T]he use of in camera affidavits has generally been disfavored."); see also 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).

[285] See Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1083 (9th Cir. 2004) (holding that "resort to in camera review is appropriate only after [agency] has submitted as much detail in the form of public affidavits and testimony as possible"); Armstrong, 97 F.3d at 580 (holding that district court "must both make its reasons for [relying on an in camera declaration] clear and make as much as possible of the in camera submission available to the opposing party" (citing Lykins, 725 F.2d at 1465)); Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (requiring "as complete a public record as is possible" before examining classified affidavits in camera); see also Barnard,598 F. Supp. 2d at 16 (explaining that court granted leave to submit an in camera affidavit where agency could not release any additional information about investigation without revealing precise information that it sought to withhold); Haddam, No. 01-434, slip op. at 15 (D.D.C. Sept. 8, 2004) (declaring that, after a full in camera review of the record, the court believed that the instant case "involves a set of circumstances necessitating the use of in camera, ex parte submission of affidavits, Vaughn indices and other material normally provided in the public record," and accordingly allowing the agency to rely on these submissions to justify invoking Exemption 1); cf. Pub. Citizen Health Research 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 an affidavit proffered in camera in an Exemption 6 case, because the affidavit was "the only matter available . . . that would have enabled [the court] to properly decide de novo
(continued...)

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.[286]

Summary Judgment

Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved,[287] because "in FOIA cases there is rarely any factual dispute . . . only a legal dispute over how the law is to be applied to the documents at issue."[288] Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which provides, in part, that the "judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact."[289] "[I]f material facts are genuinely in issue or, though undisputed, are susceptible to divergent inferences bearing upon an issue critical to disposition of the case,

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[285](...continued)
the propriety of" the agency's exemption claim).

[286] 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); Weberman, 668 F.2d at 678.

[287] See, e.g., 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."); Harrison v. EOUSA, 377 F. Supp. 2d 141, 145 (D.D.C. 2005) (same); Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs, 183 F. Supp. 2d 1280, 1283 (D. Kan. 2001) ("FOIA cases . . . are especially amenable to summary judgment because the law, rather than the facts, is the only matter in dispute."); Sanderson v. IRS, No. 98-2369, 1999 WL 35290, at *2 (E.D. La. Jan. 25, 1999) (observing that summary judgment is the usual means for disposing of FOIA cases).

[288] 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).

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

summary judgment is not available."[290] 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.[291]

The Court of Appeals for the District of Columbia Circuit has held that "a motion for summary judgment adequately underpinned is not defeated simply by bare opinion or an unaided claim that a factual controversy persists."[292] For example, courts have granted

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[290] Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 314 (D.C. Cir. 1988) (concluding that the agency's affidavit "discharged its burden and that no genuine issue of material fact was presented"); see, e.g., 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); Plazas-Martinez v. DEA, 891 F. Supp. 1, 3 (D.D.C. 1995) ("Plaintiff's submission does create a dispute on an issue of fact; it is not a material issue, however."); Kuffel v. BOP, 882 F. Supp. 1116, 1122 (D.D.C. 1995) (holding that plaintiff's disagreement with application of exemptions does not constitute a dispute as to material facts precluding summary judgment "because he does not put forth any facts to prove that they were wrongfully applied"); cf. Horowitz v. Peace Corps, No. 00-0848, slip op. at 9-10 (D.D.C. Oct. 12, 2001) (denying both parties' motions for summary judgment because of conflicting evidence on the timing of a decision -- a "significant material fact" with respect to the applicability of Exemption 5), aff'd in pertinent part & rev'd in other part, 428 F.3d 271 (D.C. Cir. 2005).

[291] See Ford Motor Co. v. U.S. Customs & Border Prot., No. 06-13346, 2008 WL 4899402, at *7 (E.D. 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); Muhammad v. U.S. Customs & Border Prot., 559 F. Supp. 2d 5, 7 (D.D.C. 2008) (stating that "once the Court determines that the agency has, 'however belatedly, released all nonexempt material, [it has] no further judicial function to perform under the FOIA'" (quoting Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982))); 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); Hornbostel v. Dep't of the Interior, 305 F. Supp. 2d 21, 28 (D.D.C. 2003) (same); St. Andrews Park, Inc. v. U.S. Dep't of the Army Corps. of Eng'rs, 299 F. Supp. 2d 1264, 1269 (S.D. Fla. 2003) ("Defendant's exceeding the prescribed 20-day time limit to adjudicate the FOIA denial appeal does not entitle Plaintiffs to [summary] judgment.").

[292] Alyeska Pipeline, 856 F.2d at 314; see, e.g., Lee v. U.S. Att'y for the S. Dist. of Fl., 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. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991))); 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

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summary judgment when the plaintiff merely raised unsupported claims that the agency was withholding information that already was in the public domain.[293] Summary judgment has 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.[294] Moreover, a plaintiff -- even one appearing pro se -- will be found to have conceded the government's factual assertions if he fails to contest them, once it is clear that he understands his responsibility to do so.[295]

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[292](...continued)
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); Judicial Watch, Inc. v. HHS, 27 F. Supp. 2d 240, 243-44 (D.D.C. 1998) (explaining that plaintiff's "bare suspicion" will not call into question adequacy of agency's search); see also Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978) ("Conclusory allegations unsupported by factual data will not create a triable issue of fact.").

[293] See Grandison v. DOJ, 600 F. Supp. 2d 103, 116-117 (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))).

[294] Master v. FBI, 926 F. Supp. 193, 197-98 (D.D.C. 1996), summary affirmance granted, 124 F.3d 1309 (D.C. Cir. 1997) (unpublished table decision); see also Piper v. 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").

[295] See Geter v. Sydnor, No. 08-1863, 2009 U.S. Dist. LEXIS 9510, at *1-2 (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"); Nuzzo v. FBI, No. 95-1708, 1996 WL 741587, at *2 (D.D.C. Oct. 8, 1996) (granting defendant agency's unopposed summary judgment motion); 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
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In a FOIA case, the agency has the burden of justifying nondisclosure,[296] and it must sustain its burden by submitting detailed affidavits or declarations[297] that identify the documents at issue and explain why they fall under the claimed exemptions.[298] A federal statute specifically permits unsworn declarations (i.e., without notarizations) to be utilized in all cases in which affidavits otherwise would be required.[299] (For a further discussion of Vaughn Indexes, see Litigation Considerations, Vaughn Index, above.)

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.'"[300] Summary judgment may be granted solely on the basis of agency affidavits if they are clear, specific, reasonably detailed, describe the withheld information in

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[295](...continued)
litigation deadlines before dismissing case).

[296] See 5 U.S.C. § 552(a)(4)(B) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see, e.g., DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989); Wishart v. Comm'r, No. 98-17248, 1999 WL 985142, at *1 (9th Cir. June 25, 1999); Coastal States Gas Corp. v. DOE, 617 F.2d 854, 868 (D.C. Cir. 1980); Ramstack v. Dep't of Army, 607 F. Supp. 2d 94, 105 (D.D.C. 2009) (stating that "the defendant agency has the burden of justifying nondisclosure"); James Madison Project v. CIA, 605 F. Supp. 2d 99, 106 (D.D.C. 2009) (same).

[297] See, e.g., O'Harvey v. Office of Workers' Compensation Programs, No. 96-33015, 1997 WL 31589, at *1 (9th Cir. Jan. 21, 1997) (holding that when the district court relied on the agency's denial letter "[w]ithout an affidavit or oral testimony, [it] lacked a factual basis to make its decision"); Judicial Watch, Inc. v. Dep't of Army, 402 F. Supp. 2d 241, 245 (D.D.C. 2005) (noting that an agency may meet its burden "by providing the requester with a Vaughn index, adequately describing each withheld document and explaining the exemption's relevance"); Roman v. NSA, No. 07-4502, 2009 WL 303686, at *4 (E.D.N.Y. Feb. 9, 2009) (observing that agency affidavits that provide "reasonably detailed explanations why any of the withheld documents fall within an exemption are sufficient to sustain an agency's burden").

[298] See Summers v. DOJ, 140 F.3d 1077, 1080 (D.C. Cir. 1998); King v. DOJ, 830 F.2d 210, 217 (D.C. Cir. 1987); Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973); Barnard v. DHS, 598 F. Supp. 2d 1, 8 (D.D.C. 2009) (reasoning that "summary judgment may be granted on the basis of the agency's accompanying affidavits or declarations if they describe 'the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith'" (quoting Military Audit Project v. Casey, 656 F. 2d 724, 738 (D.C. Cir. 1981))).

[299] 28 U.S.C. § 1746 (2006) (providing for use of unsworn declarations under the penalty of perjury); see Summers v. DOJ, 999 F.2d 570, 572-73 (D.C. Cir. 1993).

[300] 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 Ctr. for Medicare Advocacy, Inc. v. HHS, 577 F. Supp. 2d 221, 232 (D.D.C. 2008) (same).

a factual and nonconclusory manner, and there is no contradictory evidence on the record or evidence of agency bad faith.[301] If all of these requisites are met, such affidavits are usually accorded substantial weight by the courts.[302] By contrast, when agency declarations are not sufficiently detailed, courts have denied summary judgment.[303]

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[301] See Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007); see, e.g., Roman, 2009 WL 303686, at *6-7 (granting summary judgment to agency where plaintiff made conclusory allegations and failed to produce evidence that agency acted in bad faith); L.A. Times Commc'ns v. Dep't of the Army, 442 F. Supp. 2d 880, 899-900 (C.D. Cal. 2006) (granting summary judgment based on the agency's detailed and nonconclusory declarations, and noting that the 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 & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 8 (D.D.C. 2001) (pointing out that a "mere assertion of bad faith is not sufficient to overcome a motion for summary judgment" (citing Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979))), aff'd, 334 F.3d 55 (D.C. Cir. 2003); Barvick 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"); Hemenway v. Hughes, 601 F. Supp. 1002, 1004 (D.D.C. 1985) (recognizing that in FOIA cases, summary judgment does not hinge on existence of genuine issue of material fact, but rather on whether agency affidavits are reasonably specific, demonstrate logical use of exemptions, and are not controverted by evidence in record or by bad faith) (applying standard developed in national security context to Exemption 6).

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

[303] 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'"); 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)).

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.[304] Conversely, 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.'"[305]

Rule 56(e) of the Federal Rules of Civil Procedure provides that the affidavit must be based upon the personal knowledge of the affiant, must demonstrate the affiant's competency to testify as to matters stated, and must set forth only facts that would be admissible in evidence.[306] However, courts have not given weight to "gratuitous recitations of the affiant's own interpretation of the law.[307]

The affidavit or declaration of an agency official who is knowledgeable about the way in which information is processed and is familiar with the documents at issue satisfies the

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[304] See Wolf, 473 F.3d at 374 (noting that "a reviewing court 'must take into account . . . that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm'" (quoting Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980))); Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 927 (D.C. Cir. 2003) (crediting the government's predictive judgments concerning harm to national security that could result from release of requested information); Gardels, 689 F.2d at 1106 (recognizing that there is "necessarily a region for forecasts in which informed judgment as to potential harm should be respected"); Hoch v. CIA, 593 F. Supp. 675, 683-84 (D.D.C. 1984), aff'd, 807 F.2d 1227 (D.C. Cir. 1990) (unpublished table decision).

[305] 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., 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 1285, 1289 (4th Cir. 1987) (Exemption 7(A)); Curran v. DOJ, 813 F.2d 473, 477 (1st Cir. 1987) (Exemption 7(A)); Gardels, 689 F.2d at 1106 n.5 (Exemptions 1 and 3); People for the Am. Way Found. v. NSA/Cent. Sec. Serv., 462 F. Supp. 2d 21, 33-34 (D.D.C. 2006) (Exemption 1); Edmonds v. DOJ, 405 F. Supp. 2d 23, 27-30 (D.D.C. 2005) (Exemption 1); Whalen v. U.S. Marine Corps, 407 F. Supp. 2d 54, 56-59 (D.D.C. 2005) (Exemptions 1 and 3); Wheeler v. DOJ, 403 F. Supp. 2d 1, 6-7, 10-12 (D.D.C. 2005) (Exemption 1); Kay v. FCC, 867 F. Supp. 11, 20-22 (D.D.C. 1994) (Exemption 7(A)); Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405, 410-11 (D.D.C. 1983) (Exemptions 2 and 7(E)).

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

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

personal knowledge requirement.[308] Similarly, in instances in which an agency's search is questioned, an affidavit of an agency employee responsible for coordinating the search efforts has been found to satisfy the personal knowledge requirement.[309] Likewise, in justifying the

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[308] See, e.g., Spannaus, 813 F.2d at 1289 (holding that declarant's attestation "to his personal knowledge of the procedures used in handling [the] request and his familiarity with the documents in question" is sufficient); Barnard, 598 F. Supp. 2d at 19 (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"); 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); Gerstein v. DOJ, No. 03-04893, 2005 U.S. Dist. LEXIS 41276, at *13-14 (N.D. Cal. Sept. 30, 2005) (denying the plaintiff's motion to strike the agency's declaration, inasmuch as the declarant permissibly included "facts relayed from individuals who had first-hand knowledge," and because the declarant had "first-hand knowledge of what happens when a court seals a warrant"); Hoffman v. DOJ, No. 98-1733, slip op. at 7 (W.D. Okla. Apr. 16, 1999) (finding personal knowledge requirement was met because declarant was "aware of what was done by virtue of information provided to him in his official capacity"); 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); cf. Kamman, 56 F.3d at 49 (rejecting affidavit that revealed that signer "did not even review the actual documents at issue" and attested only "that the documents are in a file that is marked with the name of a taxpayer other than [plaintiff]"). But cf. Timken Co. v. U.S. Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,975 n.9 (D.D.C. June 24, 1983) (rejecting attestations of affiant who merely sampled documents that staff had reviewed for him).

[309] 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 caselaw to require that an agency effectively establish by a series of sworn affidavits a 'chain of custody' over its search process. The format of the proof submitted by defendant -- declarations of supervisory employees, signed under penalty of perjury -- is sufficient for purposes of both the statute and Fed. R. Civ. P. 56."); Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) ("[A]n agency need not submit an affidavit from the employee who actually conducted the search. Instead, an agency may rely on an affidavit of an agency employee responsible for supervising the search."); SafeCard 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"); 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"); Brophy v. DOD, No. 05-360, 2006 WL 571901, at *4 (D.D.C. Mar. 8, 2006) (stating that declarations, from agency personnel who supervised but did not conduct a given search, "that contain hearsay in recounting of searches for documents are generally acceptable"); cf. Prison Legal News v. Lappin, 603 F. Supp. 2d 124, 127-28 (D.D.C.

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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.[310]

Discovery

Discovery is the exception, not the rule, in FOIA cases.[311] The decision to grant discovery and the conditions under which it is permitted are within the discretion of the district court.[312] In the limited instances where discovery is determined to be appropriate,

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[309](...continued)
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").

[310] See Wolf, 473 F.3d at 375 n.5 (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); McTigue v. DOJ, No. 84-3583, slip op. at 8-9 (D.D.C. Dec. 3, 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987).

[311] See, e.g., 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."); Van Mechelen v. Dep't of the Interior, No. 05-5393, 2005 WL 3007121, at *5 (W.D. Wash. Nov. 9, 2005) (observing that "discovery is not ordinarily part of a FOIA case"); Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions."); Hardy v. DOD, No. 99-523, 2001 WL 3435945, at *4 (D. Ariz. Aug. 27, 2001) ("[D]iscovery is not favored in FOIA cases."); Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 25 (D.D.C. 2000) ("[D]iscovery in a FOIA action is generally inappropriate."); Pub. Citizen Health Research Group v. FDA, 997 F. Supp. 56, 72 (D.D.C. 1998) ("Discovery is to be sparingly granted in FOIA actions."), aff'd in part, rev'd in part & remanded, 185 F.3d 898 (D.C. Cir. 1999).

[312] See 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 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); Nolan v. DOJ, 973 F.2d 843, 849 (10th Cir. 1992); N.C. Network for Animals, Inc. v. USDA, No. 90-1443, 1991 WL 10757, at *4 (4th Cir. Feb. 5, 1991) ("The district court should exercise its discretion to limit discovery in this as in all FOIA cases, and may enter summary judgment on the basis of agency affidavits when they are sufficient to resolve issues . . . ."); Petrus v. Brown, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions
(continued...)

courts ordinarily confine it to the scope of an agency's search, its indexing and classification procedures, and similar factual matters.[313]

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."[314]

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[312](...continued)
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).

[313] 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); 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 29779, at *19-20 (N.D. Ill. Apr. 10, 2008) (directing agency to answer several of plaintiff's interrogatories concerning nature and adequacy of its search); Bangoura v. Dep't of the Army, No. 05-0311, 2006 WL 3734164, at *6 (D.D.C. Dec. 8, 2006) (allowing limited discovery regarding adequacy of agency's search); 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, 997 F. Supp. at 72 (holding that discovery is limited to "investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like").

[314] 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., SafeCard Servs. v. SEC, 926 F.2d 1197, 1200-02 (D.C. Cir. 1991) (affirming decision to deny discovery as to adequacy of search, on ground that agency's affidavits were sufficiently detailed); Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), vacated in other part & reh'g denied, 607 F.2d 367 (D.C. Cir. 1979); Schoenman v. FBI, No. 04-2202, 2009 WL 763065, at *28 (D.D.C. Mar. 19, 2009) (finding discovery request regarding application of Exemptions 1 and 3 unnecessary where agency's declarations "provide reasonably detailed, nonconclusory explanations as to [its] reliance on those Exemptions" and "court is satisfied that no factual dispute remains as to [its] withholdings"); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 284, 308 (D.D.C. 2007) (denying plaintiff's request to compel discovery because defendant's declaration and Vaughn Index "are adequate and reasonably detailed"); Ginarte v. Rice, No. 06-2074, 2007 WL 2111039, at *3 (D.D.C. July 23, 2007) (denying discovery where agency documented that it conducted a thorough search for responsive records); Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, No. 05-00806, 2006 WL
(continued...)

The major exception to this limited scope of discovery is when the plaintiff raises a sufficient question as to the agency's good faith in processing documents; in such instances, discovery has been permitted.[315] On the other hand, when plaintiff merely makes unsubstantiated claims that an agency has acted in bad faith, discovery has been denied.[316] Courts likewise

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[314](...continued)
3628954, at *11 (D.D.C. Dec. 12, 2006) (finding no extraordinary basis to grant discovery because alleged deficiencies in agency's affidavits are not legally significant and there is no evidence of bad faith); Reid v. USPS, No. 05-294, 2006 WL 1876682, at *5 (S.D. Ill. July 5, 2006) (denying discovery because "[d]efendant's submissions are adequate on their face"); Fla. Immigrant Advocacy Ctr. 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"); see also Becker, 34 F.3d at 406 (finding that district court did not err by granting summary judgment to government without addressing plaintiff's motion for discovery; explaining that the judge "must have been satisfied that discovery was unnecessary when she concluded that the IRS's search was reasonable and ruled in favor of the IRS on summary judgment").

[315] See, e.g., Carney v. DOJ, 19 F.3d 807, 812 (2d Cir. 1994) ("In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.") (citations omitted); Alley v. HHS, No. 07-0096, 2008 U.S. Dist. LEXIS 106884, at *19-20 (N.D. Ala. May 8, 2008) (granting plaintiff leave to conduct limited discovery to flesh out his claim that agency "has a policy of unreasonably denying FOIA requests that take over two hours to process and/or that require it to create computer programming"); Martinez v. SSA, No. 07-95112, 2007 WL 4458121, at *3 (D. Colo. Dec. 13, 2007) (allowing discovery "to probe the SSA's good faith in processing the request and in asserting generally the privacy exemption without undertaking a segregability analysis" in light of agency's "boilerplate privacy objection" and lack of analysis regarding segregation) (magistrate's recommendation); Trentadue v. FBI, No. 04-772, 2007 WL 2781880, at *2 (D. Utah Sept. 20, 2007) (allowing, in light of agency's failure to produce certain documents that it had referenced, plaintiff to take and videotape depositions of two federal prisoners in order to better "identify the existence of other records responsive to his FOIA request that have not been produced") (appeal pending); Citizens for Responsibility & Ethics in Wash. v. DOJ, No. 05-2078, 2006 WL 1518964, at *3-6 (D.D.C. June 1, 2006) (granting the plaintiff's motion for discovery in the form of time-limited depositions because the plaintiff raised a sufficient question of bad faith on the part of government to "warrant limited discovery for the purpose of exploring the reasons behind [purported] delays in processing [plaintiff's] FOIA requests"); Caton v. Norton, No. 04-439, 2005 WL 1009544, at *5 (D.N.H. May 2, 2005) (holding that plaintiff's showing of bad faith entitled him to limited discovery regarding allegedly altered document); Gilmore v. DOE, 33 F. Supp. 2d 1184, 1190 (N.D. Cal. 1998) (permitting discovery when plaintiff claimed existence of pattern and practice of unreasonable delay in responding to FOIA requests, but limiting discovery to agency's "policies and practices for responding to FOIA requests, and the resources allocated to ensure its compliance the FOIA time limitations").

[316] See, e.g., Wood, 432 F.3d at 85 (affirming denial of discovery, and holding that the (continued...)

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.[317]

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[316](...continued)
"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 v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) (finding discovery unwarranted based on plaintiff's "speculation that there must be more documents" and that agency acted in "bad faith" by not producing them); Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (finding discovery unwarranted when court convinced that agency "has acted in good faith and has 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"); Judicial Watch, Inc. v. U.S. Secret Serv., 579 F. Supp. 2d 154, 159 (D.D.C. 2008) (denying discovery where plaintiff did not demonstrate "sufficient evidence of bad faith"); Wolf v. CIA, 569 F. Supp. 2d 1, 10 (D.D.C. 2008) (concluding that mere assertions of an agency's bad faith do not provide sufficient basis for ordering discovery); Ford Motor Co. v. U.S. Customs & Border Protect., No. 06-13346, 2008 WL 4899402, at *11 (E.D. Mich. Aug. 1, 2008) (denying plaintiff's request for discovery because it "failed to provide concrete evidence of bad faith and has not raised any substantial questions regarding the substantive content of [the agency's] declarations") (magistrate's recommendation), adopted in relevant part, (E.D. Mich. Nov. 12, 2008); 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"); Kay v. FCC, 976 F. Supp. 23, 34 n.35 (D.D.C. 1997) (concluding that because plaintiff failed to submit "concrete evidence of bad faith," discovery was actually sought only to discredit agency declaration), aff'd, 172 F.3d 919 (D.C. Cir. 1998) (unpublished table decision).

[317] See 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 failed to "state with particularity the facts [which] he believes discovery will reveal [that are] sufficient to create a genuine issue of material fact"); 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); 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
(continued...)

In addition, courts have denied discovery when a FOIA plaintiff attempts to probe the agency's "thought processes" for claiming particular exemptions.[318] Moreover, discovery has been disallowed when a plaintiff seeks to utilize it as a way to uncover the contents of the withheld documents themselves.[319]

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 underlying reasons for undertaking such investigations.[320] Courts have also refused to allow a plaintiff to use

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[317](...continued)
280645, at *2 (D.D.C. Feb. 6, 2006) (stating that the plaintiff's Rule 56(f) declaration merely addresses "his and the public's interest in the disclosure of documents relating to the assassination of President John F. Kennedy, rather than [his] inability to file his opposition to Defendant's motion for summary judgment," and finding that the plaintiff's argument therefore is not a basis for allowing discovery); Judicial Watch, Inc. v. DOJ, No. 99-1883, slip op. at 16 (D.D.C. June 9, 2005) (denying discovery under because plaintiff did not adequately demonstrate any need for it).

[318] 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").

[319] See, e.g., Lane, 523 F.3d at 1135 (9th Cir. 2008) (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 Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988) (finding plaintiff not entitled to discovery that would be tantamount to disclosure of contents of exempt documents); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (affirming denial of discovery when directed to substance of withheld documents at issue); 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 Advocacy Ctr., 380 F. Supp. 2d at 1343 (observing that discovery is impermissible when the plaintiff is seeking to obtain "information [that] would not be available to it under the FOIA and may be classified or otherwise protected by disclosure by statute").

[320] See RNR Enters. v. SEC, 122 F.3d 93, 98 (2d Cir. 1997) (finding no abuse of discretion in (continued...)

discovery "as a fishing expedition [for] investigating matters related to separate lawsuits."[321]

In addition, "'curtailment of discovery'" has been found particularly appropriate when the court undertakes an in camera review.[322] Moreover, discovery has been denied when it is sought prior to the time the government moves for summary judgment and submits its supporting affidavits and memorandum of law.[323]

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[320](...continued)
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."); see also Freedman v. DOJ, No. 78-4257, slip op. at 3-4 (D. Kan. Jan. 3, 1990) (denying discovery concerning electronic surveillance investigative practices).

[321] 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,, 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); 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).

[322] 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"); 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).

[323] 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
(continued...)

Lastly, it is worth noting that courts have held that in appropriate cases the government can conduct discovery against a FOIA plaintiff[324] and in some cases have permitted a FOIA plaintiff to take discovery against a private citizen.[325]

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[323](...continued)
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 the discovery "sought to short-circuit the agencies' review of the voluminous amount of documentation requested"); Military Audit Project, 656 F.2d at 750 (finding no abuse of discretion where agency affidavits were not "inadequate . . . let alone conclusory"); 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 only to test adequacy of search).

[324] See, e.g., In re Engram, No. 91-1722, 1992 WL 120211, at *3 (4th Cir. June 2, 1992) (per curiam) (permitting discovery regarding how plaintiff obtained defendant's document as relevant to issue of waiver under Exemption 5); Weisberg v. 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).

[325] Compare In re Shackelford, No. 93-25, slip op. at 1 (D.D.C. Feb. 19. 1993) ("[P]laintiff's effort to depose two former FBI Special Agents, now retired, concerning the purpose and conduct of the investigation of John Lennon over twenty years ago, is beyond the scope of allowable discovery in a [FOIA] action."), with Trentadue, 2007 WL 2781880, at *2 (permitting plaintiff to take depositions of two federal prisoners in order to probe sufficiency of FBI's search); Judicial Watch, Inc. v. Dep't of Commerce, No. 95-133, 2000 WL 33243469, at *1-2 (D.D.C. Dec. 5, 2000) (allowing discovery to be taken regarding White House e-mails sent to and from the Department of Commerce and the Democratic National Committee "that would reasonably lead to evidence that the DOC was not complying with [plaintiff's] first FOIA request"), and Judicial Watch, Inc. v. Dep't of Commerce, 34 F. Supp. 2d 28, 33-35 (D.D.C. 1998) (noting in passing that depositions had been taken of several former agency employees), partial summary judgment granted, 83 F. Supp. 2d 105 (D.D.C. 1999). Cf. Forest Guardians v. U.S. Forest Serv., No. 99-615, slip op. at 4 (D.N.M. Mar. 29, 2000) (disallowing discovery by information submitters against FOIA requesters, who had received submitted records from defendant agency in redacted form, when discovery was sought for purpose of determining whether requesters made further disclosures) (reverse FOIA case).

Waiver of Exemptions in Litigation

Because the FOIA directs district courts to review agency actions de novo,[326] an agency is not barred from invoking a particular exemption in litigation merely because that exemption was not cited in responding to the request at the administrative level.[327] 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."[328] However, failure to raise an exemption in a timely fashion in litigation at the district court level may result in its waiver.[329]

Although an agency is not generally required to plead its exemptions in its answer

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[326] 5 U.S.C. § 552(a)(4)(B) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[327] 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); Sinito v. DOJ, No. 87-0814, 2000 U.S. Dist. LEXIS 22504, at *25 (D.D.C. July 12, 2000) ("[A]n agency is not barred from invoking a particular exemption in litigation merely because that exemption was not cited in responding to the request at the administrative level."); Frito-Lay v. EEOC, 964 F. Supp. 236, 239 (W.D. Ky. 1997) ("[A]n agency's failure to raise an exemption at any level of the administrative process does not constitute a waiver of that defense."); Farmworkers Legal Servs. v. U.S. Dep't of Labor, 639 F. Supp. 1368, 1370-71 (E.D.N.C. 1986) ("The relevant cases universally hold that exemption defenses are not too late if initially raised in the district court."); see also Pohlman, Inc. v. SBA, No. 4:03CV01241, slip op. at 26 (E.D. Mo. Sept. 30, 2005) (concluding that agency was not barred from invoking Exemption 3 in litigation merely because Exemption 3 was not raised at administrative level); Leforce & McCombs, P.C. v. HHS, No. 04-176, slip op. at 13 (E.D. Okla. Feb. 3, 2005) (explaining that privilege claim under Exemption 5 is not waived by agency's failure to invoke it at administrative stage); Conoco, Inc. v. 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); Gilday v. DOJ, No. 85-292, slip op. at 5 (D.D.C. July 22, 1985) (ruling that agency rationale asserted initially in litigation in defense of denial of fee waiver cannot correct shortcomings of administrative record).

[328] Stonehill v. IRS, 558 F.3d 534, 535 (D.C. Cir. 2009).

[329] 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").

to a complaint,[330] 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.'"[331] 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.[332]

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[330] 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"); Johnson v. BOP, No. 90-H-645-E, slip op. at 4-5 (N.D. Ala. Nov. 1, 1990); Farmworkers Legal Servs., 639 F. Supp. at 1371; Berry v. DOJ, 612 F. Supp. 45, 47 (D. Ariz. 1985). 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).

[331] 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)); see also 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.).

[332] See, e.g., Reliant Energy Power Generation v. FERC, 520 F. Supp. 2d 194, 201-202 (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 completed"), appeal dismissed, No. 98-5249 (D.C. Cir. Oct. 7, 1998); cf. 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); Senate

(continued...)

Generally, however, in the absence of mitigating factors, discussed below, an agency's failure to adequately preserve its exemption positions at the district court level has resulted in waiver -- not only during the initial district court proceedings,[333] but also at the appellate level,[334] and even following a remand.[335]

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 no longer applicable due to the completion of the underlying law enforcement

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[332](...continued)
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").

[333] 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 a motion for reconsideration to present new exemption claims, partly because defendant did not show "why, through the exercise of due diligence, it could not have presented this evidence before judgment was rendered"), remanded per stipulation, No. 99-5317 (D.C. Cir. Nov. 2, 2000); Miller v. Sessions, No. 77-C-3331, 1988 WL 45519, at *1-2 (N.D. Ill. May 2, 1988) (holding "misunderstanding" on part of government counsel of court's order to submit additional affidavits insufficient to overcome waiver, and denying motion for reconsideration); Powell v. 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).

[334] 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).

[335] 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").

proceedings.[336] 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,"[337] 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.[338]

Three years later, when another D.C. Circuit panel was presented with a similar situation, in August v. FBI, it 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."[339] Significantly, that panel emphasized the fact that the full court in Jordan v. DOJ[340] had adopted a "flexible approach to handling belated invocations of FOIA exemptions," which it said actually was "affirmed" in Maydak.[341] 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.[342]

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,[343] the primary issue was whether a requested record should be

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[336] 218 F.3d 760, 767 (D.C. Cir. 2000).

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

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

[339] 328 F.3d 697, 699 (D.C. Cir. 2003) (quoting Senate of P.R., 823 F.2d at 581).

[340] 591 F.2d 753.

[341] 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").

[342] August, 328 F.3d at 700 (citing Jordan); see, e.g., 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"); 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 2 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).

[343] 359 F.3d 295 (D.C. Cir. 2004).

considered a congressional document or an "agency record."[344] 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.[345] 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."[346] Similarly, in LaCedra v. EOUSA,[347] 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."[348]

Referral to Special Counsel and Limitations on Filing Frivolous Suits

The FOIA does not authorize any award of monetary damages to a requester.[349] The

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[344] Id. at 597.

[345] Id. at 598.

[346] Id. at 603.

[347] 317 F.3d 345 (D.C. Cir. 2003).

[348] Id. at 348.

[349] See Cornucopia Inst. v. USDA, 560 F.3d 673, 675 n.1 (7th Cir. 2009) (stating that "[p]laintiff's are not entitled to monetary damages for violations of the FOIA," because the statute "authorizes only injunctive relief"); Eltayib v. U.S. Coast Guard, 53 F. App'x 127, 127 (D.C. Cir. 2002) (declaring that the FOIA "does not authorize the collection of damages"); O'Toole v. IRS, 52 F. App'x 961, 962 (9th Cir. 2002) (same); O'Meara v. IRS, No. 97-3383, 1998 WL 123984, at *1 (7th Cir. Mar. 12, 1998) ("FOIA . . . does not authorize sanctions as a remedy for failure to disclose documents. Instead, courts are limited to ordering the production of agency records, and assessing reasonable attorney fees and litigation costs against the United States."); Davis v. Att'y Gen., 562 F. Supp. 2d 156, 159 (D.D.C. 2008) (noting that "the FOIA does not provide for monetary damages"); Pickering-George v. Registration Unit, 553 F. Supp. 2d 3, 4 (D.D.C. 2008) (holding that plaintiff "may not recover monetary damages" based on agency's failure to respond to his FOIA request which it had no record of receiving); Serrano v. DOJ, No. 01-0521, 2001 WL 1190993, at *2 n.1 (E.D. La. Oct. 5, 2001) ("FOIA does not authorize an action for money damages against the agency or its personnel."); Butler v. Nelson, No. 96-48, 1997 WL 580331, at *3 (D. Mont. May 16, 1997) ("Section 552 of Title 5 includes a comprehensive and defined list of remedies available; the conspicuous absence of a provision allowing an action for money damages convinces the court that Plaintiff may not seek damages under the FOIA."); cf. Crumpton v. Stone, 59 F.3d 1400, 1406 (D.C. Cir. 1995) (holding that agency's decision to disclose information under FOIA constitutes "a discretionary function exempt from suit under the [Federal Tort Claims Act]"); Sterling v. United States, 798 F. Supp. 47, 48 & n.2 (D.D.C. 1992) (ruling that neither FOIA nor Administrative Procedure Act, 5 U.S.C.

(continued...)

FOIA does, however, provide that if agency employees act arbitrarily or capriciously to withhold information they may be subject to disciplinary action. 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 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.[350]

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.[351] Although plaintiffs occasionally allege that this provision has been triggered, courts have declined to order a referral to the Office of Special Counsel in the absence of all three prerequisites.[352]

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[349](...continued)
§§ 701-706 (2000), authorizes award of monetary damages for alleged improper disclosure), summary affirmance granted, No. 93-5264 (D.C. Cir. Mar. 11, 1994).

[350] 5 U.S.C. § 552(a)(4)(F)(i)(2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (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).

[351] 5 U.S.C. § 552(a)(4)(F)(i).

[352] See, e.g., 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 a 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 though agency's action was "incomplete and untimely" and "not in good faith," there was no evidence of arbitrary or capricious behavior), motion for
(continued...)

Additionally, a provision of the Whistleblower Protection Act of 1989 authorizes the Office of Special Counsel to investigate certain allegations concerning arbitrary or capricious withholding of information requested under the FOIA.[353] Courts have also occasionally considered the applicability of 28 U.S.C. § 1927, which provides that costs and attorneys fees may be available where a litigant "multiplies the proceedings in a case unreasonably and vexatiously."[354]

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."[355] However, claims of "bad faith" actions by a government

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[352](...continued)
fees & costs granted, slip op. at 14 (W.D. Mich. Apr. 2, 1999) (magistrate's recommendations), adopted, (W.D. Mich. Aug. 17, 1999); Judicial Watch, Inc. v. Dep't of Commerce, 34 F. Supp. 2d 28, 43 n.9 (D.D.C.) (finding "merit in the view that the district court should be more willing to refer disciplinary matters to the Office of Special Counsel when agencies act arbitrarily and capriciously," but declining to consider appropriateness of referral until conclusion of litigation), further discovery ordered, 34 F. Supp. 2d 47 (D.D.C. 1998), partial summary judgment granted, 83 F. Supp. 2d 105 (D.D.C. 1999); Gabel v. IRS, No. 97-1653, 1998 WL 817758, at *5-6 (N.D. Cal. June 25, 1998) (declining to issue 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); 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 the Office of Inspector General and/or Office of Special Counsel); Norwood v. FAA, No. 83-2315, slip op. at 20 (W.D. Tenn. Dec. 11, 1991) (finding that when a court denies fees on the ground that the plaintiff is proceeding pro se, "the issuance of written findings pursuant to 5 U.S.C. § 552(a)(4)(F) would be inappropriate since both prerequisites have not been met"), aff'd in part & rev'd in part on other grounds, 993 F.2d 570 (6th Cir. 1993).

[353] 5 U.S.C. § 1216(a)(3) (2006).

[354] 28 U.S.C. § 1927 (2006). Compare Pac. Fisheries, Inc. v. IRS, 539 F.3d 1143, 1146-47 (9th Cir. 2008) (noting that agency reached settlement regarding compensation to plaintiff where district court concluded that agency violated 28 U.S.C. § 1927 by "'unreasonably and vexatiously multipl[ying] proceedings' by refusing to disclose documents for almost two years and then producing the disclosed documents on the day that dispositive motions were due"), with Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *16 (D. Minn. Aug. 23, 2007) (declining to impose fees under 28 U.S.C. § 1927 because although court "expressed great frustration with SEC's litigation tactics," it found that its delay in raising a fee issue was "neither clearly unreasonable nor vexatious").

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

agency ordinarily are considered in the context of whether to grant attorney fees.[356]

As to FOIA plaintiffs, generally their "mere litigiousness alone does not support the issuance of an injunction" against filing further lawsuits.[357] Nevertheless, where plaintiffs have had a history of initiating frivolous claims, court have required them to seek leave of court before filing further FOIA actions.[358]

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[356] See, e.g., 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 documents processed at no further cost to plaintiff because of unreasonable delay in processing FOIA request), aff'd on other grounds, 844 F.2d 1407 (10th Cir. 1988). But see also Carlson v. USPS, No. 02-5471, 2005 WL 756573, at *9-10 (N.D. Cal. Mar. 31, 2005) (denying plaintiff's motion for sanctions because agency's "conduct did not rise to level of bad faith"); cf. United States ex. rel. Miller v. Holzmann, No. 95-1231, 2007 U.S. Dist. LEXIS 21681, at *20-21 (D.D.C. Mar. 9, 2007) (finding that government's conduct regarding destruction of FOIA records in context of a False Claims Act case was sanctionable, but waiting for trial testimony to be completed in order to craft appropriate sanction "to best ascertain effect of the loss of documents") (non-FOIA case).

[357] 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'").

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

(continued...)

In a related vein, the Prison Litigation Reform Act of 1995[359] provides that an action in forma pauperis cannot be filed by a prisoner who, on three or more prior occasions while incarcerated, "brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted."[360] Although this statute applies only to suits that have been brought in federal court, it applies both to federal prisoners and to state prisoners alike.[361]

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[358](...continued)
(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 the plaintiff's "litigation history in the EDNY is vexatious," based on the twenty-four FOIA cases filed in the EDNY, which "have required a substantial use of judicial resources at considerable expense to Defendants"); Schwarz v. Dep't of the Treasury, 131 F. Supp. 2d 142, 148 (D.D.C. 2000) (threatening plaintiff with dismissal of claims as "malicious" if she makes any future attempts to litigate claims that already have been resolved against her), summary affirmance granted, No. 00-5453 (D.C. Cir. May 10, 2001); Peck v. Merletti, 64 F. Supp. 2d 599, 603 (E.D. Va. 1999) (noting plaintiff's "continued pursuit of nonexistent information . . . and the drain on valuable judicial and law enforcement resources," requiring that plaintiff's future filings comply with "Federal Rule of Civil Procedure 8 in regards to 'a short and plain statement of the claim'" (quoting Fed. R. Civ. P. 8(a)(2))); Hunsberger v. DOE, No. 96-0455, slip op. at 2 (D.D.C. Mar. 14, 1996) (enjoining plaintiff from filing any further civil actions without first obtaining leave of court because "[p]laintiff's numerous actions have demanded countless hours from this Court"); Wrenn v. Gallegos, No. 92-3358, slip op. at 1-2 (D.D.C. May 26, 1994) (barring plaintiff's future filings absent prior leave of court, because plaintiff "has been adjudicated a vexatious litigant in several other forums and remains so in this court"); cf. Crooker v. U.S. Marshals Serv., 641 F. Supp. 1141, 1143 (D.D.C. 1986) (ordering plaintiff to show cause in any subsequent lawsuit why his claims were not barred by res judicata where he had filed nearly fifty FOIA cases over span of eight years and routinely failed to oppose motions to dismiss).

[359] 28 U.S.C. § 1915A (2006).

[360] Id. § 1915A(b)(1); see, e.g., Carroll v. Dep't of Navy, No. 09-0077, 2009 WL 792293, at *1 (D.D.C. Mar. 24, 2009) (holding that "[p]laintiff is not eligible to proceed in forma pauperis because he has accumulated more than 'three strikes' for the purposes of the PLRA"); Butler v. DOJ, 492 F.3d 440, 446-47 (D.C. Cir. 2007) (denying plaintiff's request to proceed forma in pauperis where court dismissed five past FOIA actions for failure to prosecute and fifteen other FOIA cases were dismissed as a result of motion for summary judgment, motion to dismiss or for failure to respond); see also Patterson v. FBI, No. 08-186, 2008 U.S. Dist. LEXIS 49431, at *4-7 (E.D. Va. June 27, 2008) (dismissing plaintiff's FOIA action as frivolous for the purposes of Prisoner Litigation Reform Act where plea agreement barred him from making requests related to his criminal case).

[361] See Wiggins v. Huff, No. 98-1072, 1998 WL 226300, at *11 (N.D. Cal. Apr. 28, 1998) (dismissing state prisoner's FOIA suit against federal agency); Willis v. FBI, No. 96-276, slip op. at 1-2 (W.D. Mich. Oct. 21, 1996) (ordering warden of state prison to "place a hold on (continued...)

Considerations on Appeal

As noted previously, an exceptionally large percentage of FOIA cases are decided by means of summary judgment.[362] While a decision granting a motion for summary judgment usually is immediately appealable, that is not generally the case with any other orders that are issued during the course of a FOIA lawsuit.[363] For example, the grant of an Open America stay of proceedings is not a decision that is immediately appealable.[364] Similarly, it has been held that an "interim" award of attorney fees is not appealable until

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[361](...continued)
plaintiff's prisoner account" to provide for payment of filing fee).

[362] See 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.").

[363] See, e.g., Citizens for Ethics and Responsibility 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 the 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, No. 99-6084, 1999 WL 1012451, at *1 (2d Cir. Oct. 14, 1999) (holding that partial grant of summary judgment is not final order); 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 a 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).

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

the conclusion of the district court proceedings in the case.[365] A district court's determination with respect to a FOIA plaintiff's fee category likewise is not subject to interlocutory appeal.[366]

Where there is a final order requiring that an agency disclose the relevant records, courts typically grant the government's request for a stay because release of the information would disrupt the status quo and cause irreparable harm by mooting the issue on appeal.[367]

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 Columbia,[368] First,[369] Second,[370] Fifth,[371] Sixth,[372] and Eighth Circuits[373] have applied a de

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[365] 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).

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

[367] See, e.g., HHS v. Alley, 129 S. Ct. 1667 (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"); Wash. Post v. DHS, No. 06-5337 (D.C. Cir. Nov. 1, 2006) ("[Agency] has satisfied the stringent standards required for a stay pending appeal."); Nat'l Council of La Raza v. 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); People for Am. Way Found. v. Dep't of Educ., 518 F. Supp. 2d 174, 179 (D.D.C. 2007) (granting stay to agency pending appeal); 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 an order requiring agency to search and review its operational files because court's order was procedural in nature, agency did not demonstrate likelihood of success, or show that public interest would be served by immediate appeal, or that it would suffer irreparable harm).

[368] See Consumers' Checkbook v. HHS, 554 F.3d 1046, 1049-50 (D.C. Cir. 2009) (reviewing de novo district court's grant of summary judgment); Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 57 (D.C. Cir. 2003) ("We review the district court's grant of summary

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[368](...continued)
judgment de novo."); Landmark Legal Found. v. IRS, 267 F.3d 1132, 1134 (D.C. Cir. 2001) (referring to standard of review as "de novo"); Summers v. DOJ, 140 F.3d 1077, 1079 (D.C. Cir. 1998) ("[I]t is well-understood law that '[w]e review orders granting summary judgment de novo.'" (quoting Gallant v. NLRB, 26 F.3d 168, 171 (D.C. Cir. 1994))); see also Petroleum Info. Corp. v. Dep't of the Interior, 976 F.2d 1429, 1433 & n.3 (D.C. Cir. 1992) ("This circuit applies in FOIA cases the same standard of appellate review applicable generally to summary judgments." (explicitly contrasting Ninth Circuit's "clearly erroneous" standard, and more favorably citing Wash. Post Co. v. HHS, 865 F.2d 320, 325-26 & n.8 (D.C. Cir. 1989))).

[369] 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.").

[370] 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); Perlman v. DOJ, 312 F.3d 100, 104 (2d Cir. 2002) ("We review an agency's decision to withhold records under FOIA de novo").

[371] 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).

[372] See 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."), cert. denied, 534 U.S. 1134 (2002); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at *1 (6th Cir. Feb. 6, 1998) (deciding appeal "[u]pon de novo review"); Abraham & Rose, P.L.C. v. United States, 138 F.3d 1075, 1077 (6th Cir. 1998) (holding that grant of summary judgment is reviewed de novo on appeal). But see Vonderheide v. IRS, No. 98-4277, 1999 WL 1000875, at *1 (6th Cir. Oct. 28, 1999) ("Where an appeal concerns a factual attack on subject matter jurisdiction, this court reviews the factual findings of the district court for clear error and the legal conclusions de novo.").

[373] See 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); Missouri v. Dep't of the Interior, 297 F.3d 745, 749 n.2 (8th Cir. 2002) (aligning the court with the Sixth, Tenth, and D.C. Circuits in "establish[ing] the de novo standard of review generally applicable in summary judgment cases"). But see Johnston v. DOJ, No. 97-2173, 1998 WL 518529, at *1 (8th Cir. Aug. 10, 1998) ("We review the district court's factual findings for clear error and its
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novo standard of review. By contrast, the Courts of Appeals for the Third[374] and Seventh Circuits[375] 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 decision is clearly erroneous. Similarly, the Fourth,[376] Ninth,[377] Tenth,[378] and Eleventh Circuits[379] generally

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[373](...continued)
legal conclusions de novo.").

[374] 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).

[375] 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).

[376] See Rein v. U.S. Patent & Trademark Office, 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, 2002 WL 22999456, at *1 (4th Cir. Dec. 23, 2004) (articulating the standard of review in this case as "limited to determining whether the district court had an adequate factual basis for its decision and whether upon this basis the decision was clearly erroneous"); cf. Hanson v. Agency for Int'l Dev., 372 F.3d 286, 290 (4th Cir. 2004) (stating that grant of summary judgment in FOIA action is issue of law, which is reviewed de novo); Heily v. Dep't of Commerce, 69 F. App'x 171, 173 (4th Cir. July 3, 2003) (per curiam) (same).

[377] See Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1149 (9th Cir. 2008) (explaining that "whether a particular set of documents gives the court an adequate factual basis" is reviewed de novo, and if "an adequate factual basis exists to support the district court's decision," then district court's decisions are reviewed under "either the clearly erroneous or de novo standard of review, depending on whether the district court's conclusions are primarily factual or legal"); Lane v. Dep't of Interior, 423 F.3d 1128, 1135 (9th Cir. 2008) (same); MacLean v. DOD, 240 F. App'x 751, 753 (9th Cir. 2007) (same); Carlson v. USPS, 504 F.3d 1123, 1126 (9th Cir. 2007) (rejecting argument that more deferential standard of review should apply to agency's determination that records fell within scope of Exemption 3 and instead reviewing under two-part test); Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 432 F.3d 945, 947 (9th Cir. 2005) (stating that district court is given deference on factual findings, which are reviewed only for clear error, but that application of particular FOIA exemption is reviewed de novo); Frazee v.
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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, in these circuits, most often is reviewed de novo. The end result has "caused some confusion" in the standard for appellate review for FOIA cases in these circuits,[380] 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'"[381] and the de novo review standard that is used to determine "'whether a document fits within one of FOIA's prescribed exemptions.'"[382] 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.[383]

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[377](...continued)
U.S. Forest Serv., 97 F.3d 367, 370 (9th Cir. 1996) (describing "special standard" of review of factual issues, i.e., whether adequate factual basis supports district court's ruling, appellate court overturns only if ruling "is clearly erroneous").

[378] See Trentadue v. Integrity Comm., 501 F.3d 1215, 1226 (10th Cir. 2007) ("Whether a FOIA exemption justifies withholding a record is a question of law that we review de novo.") (emphasis added); 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 Stewart v. Dep't of Interior, 554 F.3d 1236, 1241 (10th Cir. 2009) (reviewing de novo agency's decision to withhold records under the FOIA); 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).

[379] 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 the facts are not in dispute and the 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 the 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 the 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 a "district court's determinations under the FOIA are reviewed for clear error").

[380] 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.").

[381] Id. at 1409 (quoting Ethyl Corp., 25 F.3d at 1246).

[382] Id.

[383] See Enviro Tech Int'l, Inc., 371 F.3d at 374 (recognizing split amongst circuits as to (continued...)

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"[384] is de novo.[385] 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.[386] 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,"[387] that rule would be entitled to judicial deference.[388] In any event, once an agency has acted upon the underlying request for which expedited access was requested, the FOIA itself removes jurisdiction from the courts to review the agency's decision on the issue of expedition.[389]

On appeal, a court of appeals generally will only reverse the lower court's decision to deny discovery if the court has abused its discretion.[390] A FOIA case, which is brought

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[383](...continued)
appropriate standard of review in FOIA cases, and further noting inconsistencies within Seventh Circuit).

[384] 5 U.S.C. § 552(a)(6)(E)(i) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[385] 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).

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

[387] 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").

[388] 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.").

[389] 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 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.").

[390] See Sharkey, 250 F. App'x at 287 (reviewing denial of discovery for abuse of discretion); Anderson v. HHS, 80 F.3d 1500, 1507 (10th Cir. 1996) (holding that district court decision to deny further discovery on attorney fees issue "was not an abuse of discretion"); Church of Scientology v. IRS, 991 F.2d 560, 562 (9th Cir. 1993) (reviewing court's denial of discovery "under the abuse of discretion standard"), vacated in part on other grounds & remanded, No.
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under the Administrative Procedure Act,[391] is reviewed only with reference to whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," based upon the "whole [administrative] record."[392] (For a further discussion of this point, see Reverse FOIA, Standard of Review, below.)

It is noteworthy that in a routine FOIA case where the merits and law of the case are so clear as to justify summary disposition, summary affirmance or reversal at the appellate stage may be appropriate.[393] Additionally, although an otherwise routine case may be remanded solely on the basis that the district court failed to make a segregability finding,[394] courts of appeal still may opt to make a segregability determination based on

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[390](...continued)
91-15730 (9th Cir. July 14, 1994); Meeropol v. Meese, 790 F.2d 942, 960 (D.C. Cir. 1986) (stating that "a district court's refusal to allow discovery will be reversed only upon a finding that the district court abused its discretion").

[391] 5 U.S.C. §§ 701-706 (2006).

[392] AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 318 (1979)); see Canadian Commer. Corp. v. Dep't of Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008) (explaining, in the context of reverse FOIA case, that decision issued by agency to release confidential business information will be set aside "if and only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law'" (quoting 5 U.S.C. § 706(2)(A))); Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991) (explaining that agency decisions to release information under FOIA are "informal adjudications" reviewed under arbitrary and capricious standard of Administrative Procedure Act); Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, 133 F.3d 1081, 1083 (8th Cir. 1998) (same); see also Doe v. Veneman, 230 F. Supp. 2d 739, 747 (W.D. Tex. 2002) (recognizing that "reverse" FOIA suits are "cognizable under the Administrative Procedures [sic] Act") aff'd in pertinent part & rev'd in part on other grounds, 380 F.3d 807, 813-14 (5th Cir. 2004); cf. Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1187 n.6 (8th Cir. 2000) (explaining that review ordinarily is based upon administrative record, but noting that de novo review could be appropriate if it is shown that agency's "factfinding procedures in ["reverse"] FOIA cases are inadequate").

[393] See, e.g., Bestor v. FBI, No. 08-5076, 2008 WL 5640702, at *1 (D.C. Cir. Dec. 23, 2008) (granting agency's motion for summary affirmance); Pickering-George v. ATF, No. 08-5140, 2008 WL 5706004, at *1 (D.C. Cir. Dec. 8, 2008) (same); West v. Jackson, No. 06-5281, 2007 WL 1723362, at *1 (D.C. Cir. 2007) (same).

[394] See, e.g., Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1116 (D.C. Cir. 2007) (stating that if the district court approves agency's withholdings without a finding on segregability, then "remand is required even if the requester did not raise the issue of segregability before the court"); James Madison Project v. NARA, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (denying summary affirmance in part and remanding for "a more precise finding by the district court as to segregability"); Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. 1999) ("[T]he District Court had an affirmative duty to consider the segregability issue sua sponte."); Kimberlin v. DOJ, 139 F.3d 944, 949-50 (D.C. Cir. 1998)
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the record presented before the lower court.[395] (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 FOIA plaintiffs.[396] Similarly, agencies that do not raise or preserve all exemption claims at the district court level risk waiving these claims at the appellate level.[397] (See Litigation Considerations, Waiver of Exemptions in Litigation, above.)

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[394](...continued)
(remanding because district court failed to make segregability finding).

[395] 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).

[396] See, e.g., Judicial Watch, Inc. v. United States, 84 F. App'x 335, 338 (4th Cir. 2004) (refusing to entertain new arguments from appellant on adequacy of agency's search, despite appellant's characterization of them as "further articulation" of points made below); Blanton v. 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, No. 96-15266, 1997 WL 51514, at *3 (9th Cir. Feb. 5, 1997) (declining to consider a challenge to a separate FOIA request that was not "mentioned in the complaint or any other pleading before the district court"); McCutchen v. HHS, 30 F.3d 183, 186-87 (D.C. Cir. 1994) (refusing to consider correctness of agency's interpretation of FOIA request when issue was raised for first time on appeal); see also Students Against Genocide v. Dep't of State, 257 F.3d 828, 835 (D.C. Cir. 2001) (refusing to consider argument made for first time in appellate reply brief); OSHA/Data/CIH, Inc. v. Dep't of Labor, 220 F.3d 153, 169 n.35 (3d Cir. 2000) (refusing to permit supplementation of record on appeal). But see also Trans-Pac., 177 F.3d at 1027 (allowing segregability issue to be raised for first time on appeal, because "appellants' failure to raise segregability certainly was not a knowing waiver of that argument").

[397] See 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 (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) (determining new exemption claims waived when raised for first time after district court ruled against agency on its motion for summary judgment); Ray v. DOJ, 908 F.2d 1549, 1551 (11th Cir. 1990) (same); cf. August v. FBI, 328 F.3d 697, 700-701 (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
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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.[398]

[397](...continued)
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").

[398] 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).