Litigation Considerations Part 2

The discussion below will follow a rough chronology of a portion of a typical FOIA lawsuit – from a discussion of summary judgment through considerations on appeal. Part 1 of Litigation Considerations contains a discussion of the threshold question of whether jurisdictional prerequisites have been met, to discovery.

Summary Judgment

Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved[1] 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."[2] Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which provides, in part, that summary judgment shall be granted "if the movant shows that there is no

[1] See World Publ'g Co. v. DOJ, 672 F.3d 825, 832 (10th Cir. 2012) ("In general, FOIA request cases are resolved on summary judgment."); Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1243 (11th Cir. 2008) ("'Generally, FOIA cases should be handled on motions for summary judgment, once the documents in 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. OSHA, 280 F.3d 539, 543 (5th Cir. 2002) ("Summary judgment resolves most FOIA cases."); Moore v. Bush, 601 F. Supp. 2d 6, 12 (D.D.C. 2009) ("FOIA cases are typically and appropriately decided on motions for summary judgment."); Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs, 183 F. Supp. 2d 1280, 1283 (D. Kan. 2001) ("FOIA cases . . . are especially amenable to summary judgment because the law, rather than the facts, is the only matter in dispute."); Sanderson v. IRS, No. 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).

[2] Gray v. Sw. Airlines, Inc., 33 F. App'x 865, 868 n.1 (9th Cir. 2002) (citing Schiffer v. FBI, 78 F.3d 1405, 1409 (9th Cir. 1996)) (non-FOIA case); see Yonemoto v. VA, 686 F.3d 681, 688 (9th Cir. 2012) ("Because facts in FOIA cases are rarely in dispute, most such cases are decided on motions for summary judgment.").

genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[3]

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.'"[4] The FOIA provides that in litigation, the agency has the burden of justifying nondisclosure.[5] Agencies typically meet their burden by submitting detailed declarations[6] that identify the documents at issue and explain why they fall under the claimed exemptions.[7] Relatedly, a defendant agency that has referred records to an originating agency for processing ordinarily satisfies its obligation by including with its own court submissions declarations from those originating agencies which address any withholdings made in the referred records.[8] (For a further discussion

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[3] Fed. R. Civ. P. 56(a); see, e.g., Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 315 (D.C. Cir. 1988) (concluding that agency's affidavit "discharged its burden and that no genuine issue of material fact was presented"); Milton v. DOJ, 596 F. Supp. 2d 63, 66-67 (D.D.C. 2009) (applying Rule 56 to defendant's motion for summary judgment and finding no genuine issue of material fact because plaintiff failed to dispute any of defendant's factual assertions).

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

[5] See 5 U.S.C. § 552(a)(4)(B) (2018); DOJ v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989); Campaign for Responsible Transplantation v. FDA, 511 F.3d 187, 190 (D.C. Cir. 2007); Wishart v. Comm'r of Internal Revenue, 199 F.3d 1334, 1334 (9th Cir. 1999) (unpublished table decision).

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

[7] See, e.g., Shapiro v. DOJ, 893 F.3d 796, 799 (D.C. Cir. 2018) ("If an agency's affidavit describes the justifications for withholding the information with specific detail" and "demonstrates that the information withheld logically falls within the claimed exemption . . . then summary judgment is warranted" (quoting ACLU v. DOD, 628 F.3d 612, 619 (D.C. Cir. 2011))); ACLU v. DOJ, 681 F.3d 61, 69 (2d Cir. 2012) (finding summary judgment appropriate "where the agency affidavits '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 Wilner v. NSA, 592 F.3d 60, 73 (2d Cir. 2009))); Berman v. CIA, 501 F.3d 1136, 1140 (9th Cir. 2007) (same).

[8] See, e.g., King v. DOJ, 772 F. Supp. 2d 14, 20 (D.D.C. 2010) (finding that DEA justified its withholdings with respect to records referred to it by means of detailed declaration and Vaughn Index); Keys v. DHS, 570 F. Supp. 2d 59, 63-72 (D.D.C. 2008) (evaluating

of agency referral and consultation practices, see Procedural Requirements, Consultations and Referrals.) Summary judgment may be granted solely on the basis of agency declarations if they are clear, specific, reasonably detailed, describe the withheld information in a factual and nonconclusory manner, and there is no contradictory evidence on the record or evidence of agency bad faith.[9] By contrast, when agency declarations are not sufficiently detailed, courts have denied summary judgment.[10] (For a further discussion of declarations, see Litigation Considerations, Declarations.)

The Court of Appeals for the District of Columbia Circuit has held that "purely speculative" or unsupported claims raised by FOIA plaintiffs are not sufficient to overcome the presumption of good faith accorded to agency declarations.[11]

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additional submissions from defendant agency showing how four other agencies processed referred records).

[9] See, e.g., ACLU, 681 F.3d at 69; ACLU v. DOD, 628 F. 3d 612, 619 (D.C. Cir. 2011); L.A. Times Commc'ns v. Dep't of the Army, 442 F. Supp. 2d 880, 899-900 (C.D. Cal. 2006) (granting summary judgment based on agency's detailed and nonconclusory declarations, and noting that agency's position "is not controverted by contrary evidence in the record or any evidence of agency bad faith"); Lane v. DOJ, No. 02-6555, 2006 WL 1455459, at *11 (E.D.N.Y. May 22, 2006) (granting summary judgment "because the defendants provide a detailed and non-conclusory affidavit that indicates there is no genuine factual dispute"); Assassination Archives & Res. Ctr. v. CIA, 177 F. Supp. 2d 1, 8 (D.D.C. 2001) (pointing out that "mere assertion of bad faith is not sufficient to overcome a motion for summary judgment" (citing Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979))), aff'd, 334 F.3d 55 (D.C. Cir. 2003); Barvick v. Cisneros, 941 F. Supp. 1015, 1018 (D. Kan. 1996) (declaring that summary judgment is available "when the agency offers adequate affidavits establishing that it has complied with its FOIA obligations").

[10] See, e.g., Rein v. U.S. Pat. & Trademark Off., 553 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 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 contained only conclusory and generalized allegations); Lombard v. U.S. Dep't of State, No. 11-2755, 2012 WL 3780455, at *2 (E.D. La. Aug. 31, 2012) (denying agency's motion for summary judgment because "conclusory allegations that [defendant] made an appropriate response are insufficient to merit summary relief"); Voinche v. FBI, 46 F. Supp. 2d 26, 31 (D.D.C. 1999) (denying summary judgment when agency provided conclusory affidavit to support invocation of Exemption 7(A)).

[11] SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200, 1202 (D.C. Cir. 1991) (holding that plaintiff's "purely speculative" claims concerning adequacy of agency's search "support neither the allegation that [agency's] search procedures were inadequate, nor an inference that it acted in bad faith"); accord CareToLive v. FDA, 631 F.3d 336, 345 (6th Cir. 2011) (observing that "'speculation that the information requested must exist also does not

Moreover, courts often take into account an agency's predictive judgment with respect to potential harm, particularly in cases in which disclosure would compromise national security.[12] Courts have consistently held that "'a requester's opinion disputing the risk created by disclosure is not sufficient to preclude summary judgment for the

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establish that the search was unreasonable'" (quoting Steinburg v. DOJ, 23 F.3d 548, 552 (D.C. Cir. 1994))); Alyeska Pipeline Serv. V. EPA, 856 F.2d 309, 314 (D.C. Cir. 1988) (holding that "a motion for summary judgement adequately underpinned is not defeated simply by bare opinion or an unaided claim that a factual controversy persists"); 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."); 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."); see also Hall v. CIA, 881 F. Supp. 2d 38, 62 (D.D.C. 2012) (granting in part agency's motion for summary judgment, finding that agency not required to search for records that plaintiffs speculate should have been created because no indication these records actually were created); Mingo v. DOJ, 793 F. Supp. 2d 447, 452 (D.D.C. 2011) ("An agency's declarations are 'accorded a presumption of good faith, which cannot be rebutted by purely speculative claims'" (quoting, in part, SafeCard Servs., 926 F.2d at 1200)); Span v. DOJ, 696 F. Supp. 2d 113, 119 (D.D.C. 2010) (determining that plaintiff's "boilerplate allegations of bad faith do not constitute the 'specific facts' required to threaten the good faith presumption" (quoting DOJ v. Tax Analysts, 492 U.S. 136, 142 (1989))); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 518 (S.D.N.Y. 2010) (noting that "[o]nce the adequacy of the Government's affidavits is established, they benefit from a presumption of good faith, which 'cannot be rebutted by purely speculative claims about the existence and discoverability of other documents'") (citation omitted); Grandison v. DOJ, 600 F. Supp. 2d 103, 116-17 (D.D.C. 2009) (finding that plaintiff's assertions and 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); Sephton v. FBI, 365 F. Supp. 2d 91, 97 (D. Mass. 2005) (declaring that plaintiff's evidence "is insufficient to rebut the presumption of good faith" given to agency's affidavits), aff'd, 442 F.3d 27 (1st Cir. 2006).

[12] See ACLU, 681 F.3d at 69 (stating that court has "'consistently deferred to executive affidavits predicting harm to the national security and have found it unwise to undertake a searching judicial review'" (quoting Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 927 (D.C. Cir. 2003))); ACLU v. DOD, 628 F.3d 612, 619 (D.C. Cir. 2011) ("Because courts 'lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case,' we 'must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'") (internal citations omitted); Houghton v. NSA, 378 F. App'x 235, 237 (3d Cir. 2010) ("In the context of a national security exemption to disclosure under FOIA Exemption One, courts 'afford substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'" (quoting Mil. Audit Project v. Casey, 656 F.2d 724, 738 (D.D.C. 1981))).

agency when the agency possessing the relevant expertise has provided sufficiently detailed affidavits.'"[13]

Additionally, plaintiffs – even those appearing pro se – have been found to have conceded the government's assertions if they fail to contest them, once it is clear that they understand their responsibility to do so.[14]

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.[15] Summary judgment has

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[13] Allnet Commc'n v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (quoting Struth v. FBI, 673 F. Supp. 949, 954 (E.D. Wis. 1987)); see, e.g., ACLU, 628 F.3d at 623-26 (Exemption 1); Alyeska Pipeline Serv., 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 v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982) (Exemptions 1 and 3).

[14] See Augustus v. McHugh, 870 F. Supp. 2d 167, 171-73 (D.D.C. 2012) (granting defendant's motion for summary judgment as conceded where plaintiff failed to challenge agency's justifications for withholding certain information); Skybridge Spectrum Found. v. FCC, 842 F. Supp. 2d 65, 77-79 (D.D.C. 2012) (granting FCC's motion for summary judgment on basis that plaintiff conceded merits of FCC's withholding decisions, but additionally finding that agency's affidavits were sufficient to support its motion for summary judgment); Davis v. DOJ, No. 09-0008, 2009 U.S. Dist. LEXIS 69318, at*1 (D.D.C. Aug. 7, 2009) (granting FBI's motion for summary judgment as conceded where court advised pro se plaintiff as to obligation to file an opposition and warned plaintiff as to consequences of failure to do so); 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"); cf. Ruotolo v. IRS, 28 F.3d 6, 8-9 (2d Cir. 1994) (finding that although plaintiffs were generally aware of summary judgment rules, district court should have specifically notified them of consequences of not complying with litigation deadlines before dismissing case).

[15] See Jacobs v. BOP, 725 F. Supp. 2d 85, 89 (D.D.C. 2010) (ruling that "BOP's untimely response does not entitle plaintiff to summary judgment in his favor"); Schmidt v. Shah, No. 08-2185, 2010 WL 1137501, at *10 (D.D.C. Mar. 18, 2010) (noting that "'a lack of timeliness or compliance with FOIA deadlines does not preclude summary judgment for an agency, nor mandate summary judgment for the requester'") (citation omitted); Ford Motor Co. v. U.S. Customs & Border Prot., No. 06-13346, 2008 WL 4899402, at *7 (E.D. 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'") (citation omitted), adopted in pertinent part, 2008 WL 4899401 (E.D. Mich. Nov. 12, 2008); Tri-Valley Cares v. DOE, No. 03-3926, 2004 WL 2043034, at *18 (N.D. Cal. Sept. 10, 2004) ("[A] lack of timeliness does not preclude summary judgment for an agency in a FOIA case."), aff'd in pertinent part & remanded, No. 04-17232, 2006 WL 2971651 (9th Cir. Oct. 16, 2006); St. Andrews Park, Inc. v. U.S. Dep't of the Army Corps. of Eng'rs, 299 F. Supp. 2d 1264, 1269 (S.D. Fla. 2003) ("Defendant's exceeding the prescribed 20-day time limit to adjudicate the FOIA denial appeal does not entitle Plaintiffs to [summary] judgment.").

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.[16]

Standard of Review

The standards and procedures that apply to FOIA lawsuits are atypical within the field of administrative law. First, the usual "substantial evidence" standard of review of agency action is replaced in the FOIA by a de novo review standard.[17] Second, the defendant agency maintains the burden of proof to justify its decision to withhold any information.[18]

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[16] Master v. FBI, 926 F. Supp. 193, 197-98 (D.D.C. 1996), aff'd 124 F.3d 1309 (D.C. Cir. 1997) (unpublished table decision); see also Am. Mgmt. Servs., LLC v. Dep't of the Army, 842 F. Supp. 2d 859, 870 (E.D. Va. 2012) (finding that errors in Vaughn Index, which were remedied by Army, "are not sufficient grounds for striking the entire index or questioning the good faith of the Army"), aff'd, 703 F.3d 724 (4th Cir. 2013); Piper v. DOJ, 294 F. Supp. 2d 16, 22-24 (D.D.C. 2003) (finding "no material issue to rebut the Government's good faith presumption in the processing of [plaintiff's] FOIA request" merely because of "gaps in the serialization of the files"); cf. McGehee v. DOJ, 800 F. Supp. 2d 220, 237-38 (D.D.C. 2011) (denying, in part, FBI's motion for summary judgment where Vaughn Index fails to provide specific information about missing pages and numerous redactions "render[ing] it impossible" for court to determine that all reasonably segregable information was disclosed).

[17] See 5 U.S.C. § 552(a)(4)(B) (2018); see also DOJ v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989) (noting that FOIA "directs the district courts to 'determine the matter de novo'" (quoting 5 U.S.C. § 552(a)(4)(B)); DiBacco v. Dep't of Army, 926 F.3d 827, 832 (D.C. Cir. 2019) (noting that standard of review in FOIA cases is de novo); Bloomberg, L.P. v. Bd. of Governors of the Fed. Res. Sys., 601 F.3d 143, 147 (2d Cir. 2010) ("The agency's decision that the information is exempt from disclosure receives no deference; accordingly, the district court decides de novo whether the agency has sustained its burden.").

[18] See 5 U.S.C. § 552(a)(4)(B); U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (explaining that it is the 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.'"); Reps. Comm., 489 U.S. at 755 (stating that "[u]nlike 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'" (quoting 5 U.S.C. § 552(a)(4)(B)); DiBacco, 926 F.3d at 834 (D.C. Cir. 2019) (noting that agency bears burden of proof to justify withholdings); Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1194 (9th Cir. 2011) ("'FOIA's strong presumption in favor of disclosure means that an agency that invokes one of the statutory exemptions to justify the withholding of any requested documents or portions of documents

In certain contexts, however, courts modify these standards. For example, when Exemption 1, or Exemption 3 in conjunction with national security-related statutes, are invoked, most courts apply a highly deferential standard of review in order to avoid compromising national security.[19] (See the discussion under Exemption 1, Standard of Review). Fee waiver issues 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.[20] (For a further discussion of fee waiver review standards, see Fees and Fee Waivers, Fee Waivers.) Additionally, in instances where the requester seeks expedition under the statutorily based "compelling need"[21] standard and an agency denies that request for expedition, courts review that decision de novo.[22] Significantly, however, the Court of

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bears the burden of demonstrating that the exemption properly applies to the documents.'" (quoting Lahr v. NTSB, 569 F.3d 964, 973 (9th Cir. 2009))).

[19] See, e.g., Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1182-83 (11th Cir. 2019) (finding that district court "did not err by deferring to the [FBI's] affidavit supporting the Exemption 1 claim" and district court "owed substantial deference to the [FBI's] invocation of Exemption 3" because "agency decisions to protect information governed by the National Security Act . . . 'are worthy of great deference given the magnitude of the national security interests and potential risks at stake'" (quoting CIA v. Sims, 471 U.S. 159, 179 (1985))); ACLU v. DOD, 628 F.3d 612, 624 (D.C. Cir. 2011) (reiterating that "'[i]n the FOIA context, we have consistently deferred to executive affidavits predicting harm to national security, and have found it unwise to undertake searching judicial review'") (citation omitted); Larson v. Dep't of State, 565 F.3d 857, 865 (D.C. Cir. 2009) (same); Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007) ("Although the court has 'consistently maintained that vague, 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))).

[20] 5 U.S.C. § 552(a)(4)(A)(vii); see, e.g., Stewart v. U.S. Dep't of the Interior, 554 F.3d 1236, 1241 (10th Cir. 2009) ("We review a FOIA fee waiver decision de novo, and limit our review to the record before the agency."); Jud. Watch, Inc. v. Rosotti, 326 F.3d 1309, 1311 (D.C. Cir. 2003) (same).

[21] 5 U.S.C. § 552(a)(6)(E)(i)(I).

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

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."[23]

Evidentiary Showing

A distinguishing feature of FOIA litigation is that "the burden is on the agency to sustain its action."[24] In order to prevail on summary judgment, a defendant agency must demonstrate that all responsive, non-exempt records have been disclosed.[25] An agency generally meets this evidentiary burden by submitting a non-conclusory affidavit or declaration[26]—along with a Vaughn Index of withholdings if appropriate[27]—that describes the agency's search for responsive records[28] and the basis for any withholdings made pursuant to the FOIA.[29] If applicable, a defendant agency's evidentiary showing must also establish reasonably foreseeable harm from the disclosure of withheld

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

[24] 5 U.S.C. § 552(a)(4)(B) (2018); see, e.g., Nat. Res. Def. Council v. NRC, 216 F.3d 1180, 1190 (D.C. Cir. 2000) (explaining that "FOIA itself places the burden on the agency to sustain the lawfulness of specific withholdings in litigation").

[25] See, e.g., Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978) ("In order to prevail on an FOIA motion for summary judgment, 'the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.'" (quoting Nat'l Cable Television Ass'n, Inc. v. FCC, 479 F.2d 183, 186 (1973))).

[26] See 28 U.S.C. § 1746 (providing for use of unsworn declarations under penalty of perjury); see also, e.g., Goland, 607 F.2d at 352.

[27] See, e.g., Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

[28] See, e.g., Freedom Watch, Inc. v. NSA, 783 F.3d 1340, 1345 (D.C. Cir. 2015) (noting that "'an agency may establish the adequacy of its search by submitting reasonably detailed, nonconclusory affidavits describing its efforts'" (quoting Baker & Hostetler LLP v. Dep't of Com., 473 F.3d 312, 318 (D.C. Cir. 2006))).

[29] See, e.g., King v. DOJ, 830 F.2d 210, 217 (D.C. Cir. 1987) (agency may meet its burden of justifying withholdings by filing declarations describing material withheld and manner in which it falls within exemption claimed); see also, e.g., Carney v. DOJ, 19 F.3d 807, 812 n.1 (2d Cir. 1994); Summers v. DOJ, 999 F.2d 570, 572-73 (D.C. Cir. 1993).

information,[30] and that all non-exempt information has been reasonably segregated for release.[31] Finally, these agency submissions must provide sufficient detail to enable the court to conduct a de novo review of the agency's action on the request, as required by the FOIA statute.[32] (For further discussion of summary judgment in FOIA litigation, see Litigation Considerations, Summary Judgment, above.)

Declarations

The affidavit or declaration of an agency official who is knowledgeable about the way in which information is processed and is familiar with the documents at issue has been found to satisfy the "personal knowledge" requirement for summary judgment declarations.[33] When an agency's search is challenged, a declaration from an agency

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[30] See, e.g., Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 369 (D.C. Cir. 2021).

[31] See, e.g., Mead Data Cent., Inc. v. Dep't of the Air Force, 566 F.2d 242, 260-61 (D.C. Cir. 1977).

[32] See, e.g., *Shapiro v. DOJ*, 893 F.3d 796, 799 (D.C. Cir. 2018) ("In ruling on summary judgment, courts may rely on non-conclusory agency affidavits demonstrating the basis for withholding if they are not contradicted by contrary evidence in the record or by evidence of the agency's bad faith.")

[33] See Fed. R. Civ. P. 56(e); see also Adamowicz v. IRS, 402 F. App'x 648, 650 (2d Cir. 2010) (rejecting plaintiff's claim that declaration was based on hearsay where declarant "maintained supervisory responsibility over the first FOIA request and worked directly with IRS attorneys . . . the two individuals identified as potentially having relevant records – to compile and review responsive documents"); Spannaus v. DOJ, 813 F.2d 1285, 1289 (4th Cir. 1987) (holding that declarant's attestation "to his personal knowledge of the procedures used in handling [the] request and his familiarity with the documents in question" is sufficient); Inst. for Pol'y Stud. v. CIA, 885 F. Supp. 2d 120, 134 (D.D.C. 2012) (denying plaintiff's motion to strike portions of agency's declarations for lack of personal knowledge because "[a] declarant is deemed to have personal knowledge if he has a general familiarity with the responsive records and procedures used to identify those records and thus is not required to independently verify the information contained in each responsive record"); Am. Mgmt. Servs., LLC v. Dep't of Army, 842 F. Supp. 2d 859, 867 (E.D. Va. 2012) (finding declaration adequate where "it is apparent from [the declarant's] specific averments regarding personal knowledge, his position in the [agency], his role in this matter, and the contents of the declaration itself, that [he] has personal knowledge of the procedures used in handling [plaintiff's] request and familiarity with the documents at issue"), aff'd, 703 F.3d 724 (4th Cir. 2013); Barnard v. DHS, 598 F. Supp. 2d 1, 19 (D.D.C. 2009) (rejecting plaintiff's argument that declarations contained inadmissible hearsay because "FOIA declarants may include statements in their declarations based on information they have obtained in the course of their official duties"); Gerstein v. DOJ, No. 03-04893, 2005 U.S. Dist. LEXIS 41276, at *14-16 (N.D. Cal. Sept. 30, 2005) (denying plaintiff's motion to strike agency's declaration because declarant permissibly included "facts relayed from individuals who had first-hand knowledge" and had "first-hand knowledge of what happens when a court seals a warrant").

employee responsible for supervising or coordinating the search efforts has been found to satisfy the personal knowledge requirement.[34] It is not necessary that the agency employee who actually performed the search supply a declaration describing the search.[35]

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[34] See Schoeffler v. USDA, 795 F. App'x 526, 527 (9th Cir. 2020) (per curiam) ("[W]hile non-expert witnesses ordinarily may testify only as to matters within their personal knowledge, an agency's declarations in FOIA cases are exempt from that 'personal knowledge requirement.'" (quoting Garris v. FBI, 937 F.3d 1284, 1292-93 (9th Cir. 2019))); DiBacco v. Dep't of Army, 926 F.3d 827, 833 (D.C. Cir. 2019) (holding that although some information was relayed to declarant by subordinates, declarations in FOIA cases may include such information without running afoul of Rule 56); SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (ruling that employee "in charge of coordinating the [agency's] search and recovery efforts [is] the most appropriate person to provide a comprehensive affidavit"); see also Patterson v. IRS, 56 F.3d 832, 841 (7th Cir. 1995) (holding appropriate declarant's reliance on standard search form completed by predecessor); Flores v. DOJ, 391 F. Supp. 3d 353, 362 (D.D.C. 2019) (holding that although declarants were not personally involved in every part of search, declarations sufficiently establish declarants' personal knowledge of relevant FOIA procedures and search methods employed); Nat. Res. Def. Council v. Wright-Patterson Air Force Base, No. 10-3400, 2011 WL 3367747, at *4 (S.D.N.Y. Aug. 3, 2011) (concluding agency declarants are adequate where declarant supervised searches and processing, and reviewed administrative appeal); Lewis v. EPA, No. 06-2660, 2006 WL 3227787, at *3 (E.D. Pa. Nov. 3, 2006) (holding agency employee's declaration admissible because employee's "statements [were] based either on 'personal examination' of the responsive documents or on information provided to him by employees under his supervision"); cf. Prison Legal News v. Lappin, 603 F. Supp. 2d 124, 127-28 (D.D.C. 2009) (requiring agency to conduct new search or to provide new search declaration when declarant did not "outline the 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"); Rosenfeld v. DOJ, No. 07-3240, 2008 WL 3925633, at *12 (N.D. Cal. Aug. 22, 2008) (concluding that declarant's statements with respect to field offices were inadmissible because no evidence was provided that declarant directly supervises field offices); Bingham v. DOJ, No. 05-0475, 2006 WL 3833950, at *3-4 (D.D.C. Dec. 29, 2006) (concluding that declarant had sufficient knowledge of subject matter and, "therefore, need not have been employed by the responding agency at the time of the facts underlying the requested records").

[35] See 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 v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) (same); Our Childs. Earth Found. v. Nat. Marine Fisheries Serv., No. 14-4365, 2015 WL 6331268, at *2 (N.D. Cal. Oct. 21, 2015) ("[T]he court does not need to have an affidavit from each person engaged in the search; such a practice would be exceptionally cumbersome on the government, and needlessly so."); cf. Hardimon v. United States, No. 18-5371, 2019 U.S. App. LEXIS 22412, at *2-3 (D.C. Cir. July 26, 2019) (per curiam) (finding "argument that the declarations impermissibly rely on second-hand information is

In justifying the withholding of classified information under Exemption 1, courts have found that the declarant 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.[36]

In order to carry the government's evidentiary burden, agency declarations must be relatively detailed, non-conclusory and submitted in good faith.[37] In turn, agency declarations are "entitled to a presumption of good faith."[38] Courts have disregarded legal conclusions contained in agency declarations and denied summary judgment in instances where the agency declarant's statements are conclusory.[39]

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unavailing, because declarations may depend on second-hand information, where, as here, the information provided 'is not at all speculative'" (quoting SafeCard Servs., Inc., 926 F.2d at 1201)).

[36] See Wolf v. CIA, 473 F.3d 370, 375 n.5 (D.C. Cir. 2007) (finding that declaration reflected personal knowledge as to "the classified nature of information related to the existence or nonexistence of records" where declarant 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) (rejecting plaintiff's argument that declarant must have "substantive expertise" to support classification determination).

[37] See Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978).

[38] 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., White v. DOJ, 16 F.4th 539, 544 (7th Cir. 2021) (noting that declarations submitted by agencies are entitled "to a presumption of good faith"); Havemann v. Colvin, 629 F. App'x 537, 539 (4th Cir. 2015) ("The court is entitled to accept the credibility of such affidavits, so long as it has no reason to question the good faith of the agency."); Coyne v. United States, 164 F. App'x 141, 142 (2d Cir. 2006) (per curiam) (reiterating that agency declarations are entitled to presumption of good faith (citing Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999))); Butler v. SSA, No. 03-0810, slip op. at 5 (W.D. La. June 25, 2004) (same); Piper v. DOJ, 294 F. Supp. 2d 16, 22-24 (D.D.C. 2003) (same) (citing Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981)); cf. Porup v. CIA, 997 F.3d 1224, 1237 (D.C. Cir. 2021) (holding that CIA declaration is "best evidence" of agency policy and finding that plaintiff's argument that agency had to submit document evidence beyond declarant's "'cherry-picked and qualified summary'" is not sufficient to create "'a genuine issue of material fact regarding'" declarant's testimony (quoting plaintiff's brief)).

[39] See, e.g., Callaway v. U.S. Dep't of Treasury, No. 08-5480, 2009 WL 10184495, at *2 (D.C. Cir. June 2, 2009) (per curiam) (remanding to district court for further proceedings where "government's affidavits state only legal conclusions regarding segregability, and the Vaughn index does not explain why responsive documents containing information such as names or administrative codes could not be redacted and released"); Kensington Res. & Recovery v. HUD, 620 F. Supp. 2d 908, 909 n.1 (N.D. Ill. 2009) (disregarding statements in agency's declarations that "constitute legal conclusions or that do not relate to HUD business"); Doolittle v. DOJ, 142 F. Supp. 2d 281, 285 n.5 (N.D.N.Y. 2001) (noting that

Adequacy of Search

In many FOIA suits, the defendant agency will face challenges not only to its reliance on particular exemptions, but also to the nature and extent of its search for responsive documents. Sometimes, that is all that a plaintiff will dispute.[40] (For discussions of administrative considerations in conducting searches, see Procedural Requirements, Searching for Responsive Records.) To prevail in a FOIA action where the adequacy of the search is at issue, the agency must show that it made "'a good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'"[41] 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.'"[42] In other words, "the

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"[t]he practice of submitting legal arguments through the declaration . . . is *improper*, and such arguments will *not* be considered").

[40] 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 only issue); Albaladejo v. ICE, 518 F. Supp. 3d 496, 501 (D.D.C. 2021) ("Because ICE has not produced any responsive records to Plaintiff, the parties' disagreement centers on the adequacy of the agency's search."); People for the Ethical Treatment of Animals v. Bureau of Indian Affs., 800 F. Supp. 2d 173, 177 (D.D.C. 2011) ("The only issue on appeal is the adequacy of defendant's search, since plaintiff does not contest the exemptions invoked by defendant . . . .").

[41] Nation Mag. v. U.S. Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990)); see, e.g., Stalcup v. CIA, 768 F.3d 65, 74 (1st Cir. 2014) (noting that resolution of search claim "turns on whether the agency made a good faith, reasonable effort 'using methods which can be reasonably expected to produce the information requested'" (quoting Oglesby, 920 F.2d at 68)); Morley v. CIA, 508 F.3d 1108, 1114 (D.C. Cir. 2007) ("'The 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., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991))); Gerstein v. CIA, No. 06-4643, 2008 WL 4415080, at *3 (N.D. Cal. Sept. 26, 2008) ("'The adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor.'" (quoting Citizens Comm'n on Hum. Rs. v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995))).

[42] 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 also Citizens Comm'n on Hum. Rts., 45 F.3d at 1328 (same); Nation Mag., 71 F.3d at 892 n.7 (explaining that "the failure to turn up [a] document does not alone render the search inadequate; there is no requirement that an agency produce *all* responsive documents" (citing Perry v. Block, 684 F.3d 121, 128 (D.C. Cir. 1982))); 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

focus of the adequacy inquiry is not on the results."[43] In some situations, such as when an agency neither confirms nor denies the existence of records, or the records are

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single potentially responsive document has been unearthed."); Edelman v. SEC, 239 F. Supp. 3d 45, 51 (D.D.C. 2017) (holding that "the mere fact [plaintiff] has located complainants who assert that they made complaints that do not appear in the SEC's production does not, on its own, cast doubt on the efficacy of the SEC's search"); Vest v. Dep't of the Air Force, 793 F. Supp. 2d 103, 120 (D.D.C. 2011) (finding that "the FOIA does not mandate a 'perfect' search, only an 'adequate' one"); Sephton v. FBI, 365 F. Supp. 2d 91, 101 (D. Mass. 2005) (explaining that FOIA does not require review of "every single file that might *conceivably* contain responsive information"), aff'd, 442 F.3d 27 (1st Cir. 2006). But cf. Immigrant Def. Project v. ICE, No. 14-6117, 2017 WL 2126839 at *2 (S.D.N.Y. May 16, 2017) ("Plaintiffs point to 'tangible evidence' of outstanding materials at the field offices in question, indicating that Defendants' earlier search of these offices was not complete.").

[43] 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 also Mobley v. CIA, 806 F.3d 568, 583 (D.C. Cir. 2015) (finding agency search is "not unreasonable simply because it fails to produce all relevant material" (quoting Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986))); Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) ("'[T]he factual question . . . is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.'" (quoting SafeCard Servs., Inc., 926 F.2d at 1201)); In re Wade, 969 F.2d 241, 249 n.11 (7th Cir. 1992) (declaring that issue is not whether other documents may exist but whether search was adequate); Jud. Watch, Inc. v. DOJ, 373 F. Supp. 3d 120, 124 (D.D.C. 2019) ("The Court declines to invalidate the search simply because it returned a seemingly small number of documents."); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 498 (S.D.N.Y. 2010) (noting that discovery of two additional responsive documents "in an area that the CIA determined would probably not lead to uncovering responsive documents does not render the CIA's search inadequate"); 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 5,000 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)); Jud. Watch v. Rossotti, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) ("Perfection is not the standard by which the reasonableness of a FOIA search is measured."); Garcia v. DOJ, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("The agency is not expected to take extraordinary measures to find the requested records . . . ."); Citizens Against UFO Secrecy, Inc. v. DOD, No. 99-00108, slip op. at 8 (D. Ariz. Mar. 30, 2000) (declaring that "[a] fruitless search result is immaterial if [d]efendant can establish that it conducted a search reasonably calculated to uncover all relevant documents"), aff'd, 21 F. App'x 774 (9th Cir. 2001). But see Raulerson v. Reno, No. 96-120, slip op. at 5 (D.D.C. Feb. 26, 1999) (suggesting that agency's failure to locate complaints filed by plaintiff, existence of which agency did not dispute, "casts substantial doubt" on adequacy of agency's search), summary affirmance granted, No. 99-5300 (D.C. Cir. Nov. 23, 1999).

categorically exempt,[44] courts have found that no search is required.[45] Similarly, some courts have determined that no search is required if such a search would be futile or unduly burdensome.[46]

The adequacy of any FOIA search is necessarily "'dependent upon the circumstances of the case.'"[47] For example, when a requester has limited the scope of their request, either at the administrative stage or in the course of litigation, the requester cannot subsequently challenge the adequacy of the search on the ground that the agency

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[44] See, e.g., Boyd v. EOUSA, No. 16-5133, 2016 WL 6237850, at *1 (D.C. Cir. Sept. 16, 2016) ("It was not necessary for EOUSA to conduct a search for records pertaining to third parties because these records were categorically exempt pursuant to FOIA Exemption 7(C).").

[45] See, e.g., Elec. Priv. Info. Ctr. v. NSA, 678 F.3d 926, 933 (D.C. Cir. 2012) (finding no agency obligation under FOIA to conduct search if agency properly asserted Glomar response); Poulsen v. DOD, 373 F. Supp. 3d 1249, 1277 (N.D. Cal. 2019) ("There is no duty on an agency to 'search' for records about which it properly asserts a *Glomar* response."); Conti v. DHS, No. 12-5827, 2014 WL 1274517, at *24 (S.D.N.Y. Mar. 24, 2014) ("[W]here a *Glomar* response is properly asserted, an agency is not obligated to expend the resources to conduct a search and segregability analysis as to any responsive documents.").

[46] See, e.g., Whitaker v. Dep't of Com., 970 F.3d 200, 207 (2d Cir. 2020) ("[W]here the Government's declarations establish that a search would be futile, the reasonable search required by FOIA may be no search at all.'" (quoting MacLeod v. DHS, No. 15-1792, 2017 WL 4220398, at *11 (D.D.C. Sept. 21, 2017))); Am. Fed'n of Gov't Emps., Loc. 2782 v. U.S. Dep't of Com., 907 F.2d 203, 209 (D.C. Cir. 1990) ("An agency need not honor a request that requires 'an unreasonably burdensome search.'" (quoting Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978))); cf. Moore v. Nat'l DNA Index Sys., 662 F. Supp. 2d 136, 139 (D.D.C. 2009) (finding that where search for records is "literally impossible for the [agency] to conduct - not searching satisfies the FOIA requirement of conducting a search that is reasonably calculated to uncover responsive documents").

[47] Davis v. DOJ, 460 F.3d 92, 103 (D.C. Cir. 2006) (quoting Schrecker v. DOJ, 349 F.3d 657, 663 (D.C. Cir. 2003)); accord Rugiero v. DOJ, 257 F.3d 534, 547 (6th Cir. 2001) ("The FOIA requires a reasonable search tailored to the nature of the request."); Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993) (explaining that adequacy of search "depends upon the facts of each case"); see also Kilmer v. U.S. Customs & Border Prot., No. 17-1566, 2021 WL 1946392, at *10 (D.D.C. May 14, 2021) (noting that "the 'circumstances of the case' include the realities of coordinating a document search across a large executive agency . . . which includes 60,000 employees over numerous offices and regions"); 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.") (citation omitted); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *7 (D. Minn. Oct. 24, 2005) (finding agency's search sufficient "in light of the facts of this case").

limited its search accordingly.[48] However, courts have held that a search is not reasonable if the agency itself interprets the scope of the request too narrowly.[49] Similarly, courts have found searches inadequate if the agency uses search terms that are too narrow and do not include "obvious synonyms and logical variations."[50]

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[48] See Truesdale v. DOJ, 803 F. Supp. 2d 44, 51 (D.D.C. 2011) ("In light of plaintiff's clarification of his request – that is, his insistence that records he seeks were or should have been maintained by the Attorney General – defendant's decision to limit its search to the official records repository for the Office of the Attorney General was reasonable . . . ."); Jarvik v. CIA, 741 F. Supp. 2d 106, 117 (D.D.C. 2010) (finding CIA's search adequate when requester agreed to CIA's offer to narrow scope of initial request and CIA limited its search to that narrowed scope); Lechliter v. DOD, 371 F. Supp. 2d 589, 595 (D. Del. 2005) ("A requestor may not challenge the adequacy of a search after an agency limits the scope of a search in response to direction from the requestor."), aff'd sub nom, Lechliter v. Rumsfeld, 182 F. App'x 113 (3d Cir. 2006).

[49] See Pub. Emps. for Env't Resp. v. U.S. Int'l Boundary & Water Comm'n, 842 F. Supp. 2d 219, 225 (D.D.C. 2012) (determining that agency did not meet search obligation when it narrowly interpreted request "as a call for the agency's opinion on a question and to produce *some* records supporting that unsolicited opinion"); Charles v. Off. of Armed Forces Med. Exam'r, 730 F. Supp. 2d 205, 215 (D.D.C. 2010) ("To allow an agency to restrict the number of documents that it deems responsive during a FOIA search based on its interpretation of the plaintiff's purpose in making the request constitutes an unreasonable limitation . . . ."); Banks v. DOJ, 700 F. Supp. 2d 9, 15 (D.D.C. 2010) (finding agency's search inadequate where requester specifically requested that search not be limited to criminal files but agency seemingly interpreted request as seeking only investigative files).

[50] Jud. Watch, Inc. v. DOJ, 373 F. Supp. 3d 120, 125 (D.D.C. 2019); see also Citizens for Resp. & Ethics in Wash. v. GSA, No. 18-377, 2018 WL 6605862, at *5 (D.D.C. Dec. 17, 2018) ("Part of liberally construing a request is searching for 'synonyms' and 'logical variations' of the words used in the request; an agency may not fish myopically for a 'direct hit on the records' using only 'the precise phrasing' of the request." (quoting Gov't Accountability Project v. DHS, 335 F. Supp. 3d 7, 12-13 (D.D.C. 2018))); Summers v. DOJ, 934 F. Supp. 458, 461 (D.D.C. 1996) (finding search inadequate because search terms used did not include "two of the most common terms used to describe the 'commitment calendars' requested"); cf. Campaign Legal Ctr. v. DOJ, 464 F. Supp. 3d 397, 406 (D.D.C. 2020) (finding agency's search inadequate because it used "a single search term for all of the digital records"), rev'd & remanded in part on other grounds, 34 F.4th 14 (D.C. Cir. 2022); NAACP Legal Def. & Educ. Fund v. DOJ, 463 F. Supp. 3d 474, 486 (S.D.N.Y. 2020) (noting that "[s]earches using only underinclusive 'shorthand phrases' . . . have been found to be unduly restrictive – and thus inadequate" (citing Knight First Amend. Inst. at Columbia Univ. v. DHS, 407 F. Supp. 3d 311, 325 (S.D.N.Y. 2019))); Am. Oversight v. GSA, No. 18-2419, 2020 WL 1911559, at *4-5 (D.D.C. Apr. 20, 2020) (finding search was not reasonably calculated to uncover all responsive records because "[g]iven the breadth of Plaintiff's request . . . the decision to link all search terms with email addresses unreasonably excluded other, non-email records").

Courts have addressed what factual circumstances constitute reasonable leads that agencies should follow when conducting their searches.[51] At the same time, the D.C. Circuit has held that when the subject of a request is involved in several separate matters, but the request seeks information regarding only one of them, an agency is not obligated to extend its search to other files or documents that are referenced in records retrieved in response to the initial search, so long as that initial search was reasonable and complete in and of itself.[52] Additionally, the D.C. Circuit has held that the reasonableness standard

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[51] Compare Reps. Comm. for Freedom of the Press v. FBI, 877 F.3d 399, 407 (D.C. Cir. 2017) (holding that while rare, case lead located in records must be pursued "where the record reveals an agency office directly and conspicuously weigh[ed] in on a pointedly relevant, highly public controversy to which a FOIA request expressly refers"), Byrnes v. DOJ, No. 19-0761, 2021 WL 5422281, at *6-8 (D.D.C. Sept. 29, 2021) (holding that agency's "refusal to search for records related to any of [requester's] clients" who were listed in request "indicates that [agency] failed to follow patently obvious leads . . . ."), Colgan v. DOJ, No. 14-740, 2020 WL 2043828, at *7 (D.D.C. Apr. 28, 2020) ("The FBI's failure to search the system identified in its record as the place where the requested documents might be located or explain why it did not search the location renders its search inadequate."), and Am. Oversight, 2020 WL 1911559 at *6 (holding that information disclosed in produced email "showing the involvement of individuals other than [custodian searched]" required agency to "'revise its assessment of what [was] reasonable . . . to account for leads that emerge[d] during its inquiry'" (quoting Campbell v. DOJ, 164 F.3d 20, 28 (D.C. Cir. 1998))), with Mobley v. CIA, 806 F.3d 568, 582 (D.C. Cir. 2015) (finding that "a request for an agency to search a particular record system - without more - does not invariably constitute a 'lead' that an agency must pursue"), Kowalczyk v. DOJ, 73 F.3d 386, 389 (D.C. Cir. 1996) ("The agency is not required to speculate about potential leads. More specifically, the [FBI] is not obligated to look beyond the four corners of the request for leads . . . ." However, "[t]his is not to say that the agency may ignore what it cannot help but know."), and Pinson v. DOJ, 61 F. Supp. 3d 164, 179 (D.D.C. 2015) (determining that, although some disclosed records reference other documents not disclosed, "standing alone, does not foreclose a grant of summary judgment to the government").

[52] Morley v. CIA, 508 F.3d 1108, 1121 (D.C. Cir. 2007) ("'[M]ere reference to other files does not establish the existence of documents that are relevant to [a] FOIA request. If that were the case, an agency responding to FOIA requests might be forced to examine virtually every document in its files, following an interminable trail of cross-referenced documents like a chain letter winding its way through the mail.'" (quoting Steinberg v. DOJ, 23 F.3d 548, 552 (D.C. Cir. 1994))); see also Albers v. FBI, No. 16-05249, 2017 WL 736042, at *4 (W.D. Wash. Feb. 24, 2017) (finding cross-reference search not required where requester sought all records "pertaining to" subject because "it is not unreasonable to interpret 'pertaining to' in such a way as to search only for the primary subject of a particular matter"); Lewis v. DOJ, 867 F. Supp. 2d 1, 13 (D.D.C. 2011) (finding no agency obligation "to locate or retrieve files from another federal government agency [or] . . . retriev[e] documents which may have been filed in [a] sealed case") (internal citations omitted); 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).

"would be undermined" if a requester were allowed "to dictate, through search instructions, the scope of an agency's search."[53] However, when defending the reasonableness of its search, an agency should be prepared to address why any reasonable search terms or search locations suggested by the requester were not used.[54]

To demonstrate the adequacy of its search, an agency relies upon its declarations, which should be "relatively detailed and nonconclusory and submitted in good faith."[55]

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[53] Mobley, 806 F.3d at 582; see also Dibacco v. U.S. Army, 795 F.3d 178, 191 (D.C. Cir. 2015) (finding that "[defendant's] burden was to show that its search efforts were reasonable and logically organized to uncover relevant documents; it need not knock down every search design advanced by every requester" (citing SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991))); Kowal v. DOJ, 490 F. Supp. 3d 53, 64 (D.D.C. 2020) (holding that requester's "wish for the FBI to have used more search terms does not make the search itself inadequate, and [requester] has no right to dictate the FBI's scope of its search"); McClanahan v. DOJ, 204 F. Supp. 3d 30, 44 (D.D.C. 2016) (determining that "the reasonableness of a search is not measured against the scope dictated by a requester's search instructions, particularly when those instruction do not provide 'clear and certain' 'leads'" (quoting Mobley, 806 F.3d at 582)), aff'd, 712 F. App'x 6 (D.C. Cir. 2018); Media Rsch. Ctr. v. DOJ, 818 F. Supp. 2d 131, 139 (D.D.C. 2011) (noting that there is "'no bright-line rule requiring agencies to use the search terms proposed in a FOIA request'" (quoting Physicians for Hum. Rts. v. DOD, 675 F. Supp. 2d 149, 163-64 (D.D.C. 2009))); cf. Windel v. United States, No. 02-306, 2004 WL 3363406, at *3 (D. Alaska Sept. 30, 2004) (concluding that plaintiff's "mere recitation" that several individuals should have been contacted as part of agency's search did not constitute evidence of bad faith).

[54] See, e.g., Kilmer v. U.S. Customs & Border Prot., No. 17-1566, 2021 WL 1946392, at *11 (D.D.C. May 14, 2021) (finding agency's search reasonable even though some of requester's proposed search terms were not used because search terms used by agency were reasonable and agency explained why it did not adopt certain search terms proposed by requester); Colgan, 2020 WL 2043828, at *6 (finding search inadequate, in part, because "the FBI did not explain why it searched the places it did and rejected searches [requester] suggested"); Am. Oversight v. OMB, No. 18-2424, 2020 WL 1536186, at *5 (D.D.C. Mar. 31, 2020) (reasoning that although "'a FOIA petitioner cannot dictate the search terms'" . . . "the agency must still 'provide[] an explanation as to why the search term was not used,'" and finding "insufficient" agency "justifications for refusing to use the terms suggested" (quoting Bigwood v. DOD, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) & Am. Ctr. for Equitable Treatment, Inc. v. OMB, 281 F. Supp. 3d 144, 152 (D.D.C. 2017))); Am. Ctr. for Equitable Treatment, Inc., 281 F. Supp. 3d at 152 (concluding that "where . . . a FOIA requester suggests search terms that are common in practice, but the agency elects not to use them, the failure of the agency to explain its choices prevents the court from evaluating the reasonableness of the agency's search method"); Wiesner v. FBI, 577 F. Supp. 2d 450, 457-58 (D.D.C. 2008) (holding agency's declaration to be inadequate because agency failed to explain why it did not use additional search terms provided by plaintiff), aff'd, No. 10-5013, 2010 WL 3734097 (D.C. Cir. Sept. 23, 2010).

[55] Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981) (citing Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978)); accord Pollack v. BOP, 879 F.2d 406, 409 (8th Cir.

However, a search declaration need not "set forth with meticulous documentation the details of an epic search for the requested records,"[56] but such declarations should show "that the search method . . . was reasonably calculated to uncover all relevant documents."[57] This is ordinarily accomplished 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.[58] By contrast, agency

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1989); see also Freedom Watch, Inc. v. NSA, 783 F.3d 1340, 1345 (D.C. Cir. 2015) (noting that "'an agency may establish the adequacy of its search by submitting reasonably detailed, nonconclusory affidavits describing its efforts'" (quoting Baker & Hostetler LLP v. Dep't of Com., 473 F.3d 312, 318 (D.C. Cir. 2006))); Havemann v. Colvin, 629 F. App'x 537, 539 (4th Cir. 2015) (same); Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982) ("[A]ffidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA."); Triestman v. DOJ, 878 F. Supp. 667, 672 (S.D.N.Y. 1995) ("[A]ffidavits attesting to the thoroughness of an agency search of its records and its results are presumptively valid.").

[56] Perry, 684 F.2d at 127; Murray v. BOP, 741 F. Supp. 2d 156, 163 (D.D.C. 2010) (same) (quoting Defs. of Wildlife v. U.S. Border Patrol, 623 F. Supp. 2d 83, 92 (D.D.C. 2009)).

[57] Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (declaring that although agency was not required to search "every" record system, "[a]t the very least, [it] was required to explain in its affidavit that no other record system was likely to produce responsive documents"); see, e.g., Manivannan v. DOE, 843 F. App'x 481, 483 (4th Cir. 2021) (per curiam) (finding agency's declaration "met its burden of showing that it 'made a good faith effort to conduct a search . . . using methods which can be reasonably expected to produce the information requested'" (quoting DiBacco v. Dep't of the Army, 926 F.3d 827, 832 (D.C. Cir. 2019))); Hamdan v. DOJ, 797 F.3d 759, 772 (9th Cir. 2015) (finding agency declarations sufficient and noting that "[p]laintiffs were entitled to a reasonable search for records, not a perfect one. And a reasonable search is what they got."); Gatson v. FBI, No. 15-5068, 2017 WL 3783696, at *6 (D.N.J. Aug. 31, 2017) (holding that "search terms and methodology" described in declaration were sufficient and noting that "the relevant inquiry is not whether the Government conducted the most expansive search possible or a perfect search," but rather, whether the search was "reasonably calculated" to uncover responsive records); see also Budik v. Dep't of Army, 742 F. Supp. 2d 20, 31 (D.D.C. 2010) (recognizing agency's declaration "go[es] beyond simply averring that all files likely to include responsive documents were searched").

[58] See, e.g., Porup v. CIA, 997 F.3d 1224, 1237 (D.C. Cir. 2021) (finding agency's declaration described reasonable search where it listed search terms, "explained that subject matter experts worked to determine these . . . search terms, as well as the locations to be searched," and averred that files likely to have responsive records were searched); Hillier v. CIA, No. 19-5339, 2020 WL 2610892, at *1 (D.C. Cir. Apr. 17, 2020) ("[A]n agency may demonstrate the adequacy of its search by submitting a 'reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched.'" (quoting Chambers v. U.S. Dep't of Interior, 568 F.3d 998, 1003 (D.C. Cir. 2009))); Smart-Tek Servs., Inc. v. IRS, 829 F. App'x 224, 225 (9th

Cir. 2020) (holding search reasonable because declaration sufficiently described agency's document-by-document review of more than 140,000 pages for records "with the Companies' identifying information"); Machado Amadis v. Dep't of State, 971 F.3d 364, 369 (D.C. Cir. 2020) (finding search for FOIA file reasonable where declaration explained that only search term used was FOIA request number assigned to file because agency's FOIA records were organized by request number); Mobley, 806 F.3d at 581 (noting courts may rely on affidavits that are reasonably detailed and aver "'that all files likely to contain responsive records (if such records exist) were searched'" (quoting Oglesby, 920 F.2d at 68)); Blixseth v. ICE, No. 19-1292, 2020 WL 210732, at *4 (D.D.C. Jan. 14, 2020) ("Although the Government does not incant the 'magic words' – *i.e.*, that it 'searched *all* locations likely to contain responsive documents' . . . it does state that it searched the offices and databases most likely to contain responsive records . . . ." (quoting Bartko v. DOJ, 167 F. Supp. 3d 55, 64 (D.D.C. 2016))); Bonfilio v. OSHA, 320 F. Supp. 3d 152, 156 (D.D.C. 2018) (finding search description adequate although agency did not specifically state "that it looked for tapes, photos, videos, hard drives, thumb drives, emails, and notebooks" because "FOIA does not require this level of specificity"); Jud. Watch, Inc. v. DOJ, 319 F. Supp. 3d 431, 440 (D.D.C. 2018) (finding agency declarations "provide[d] sufficient detail about the scope and method [of] the [agency's] search for responsive records, the type of searches performed, who performed the searches, and what search terms were used"); Bartko, 167 F. Supp. 3d at 64 (finding that "[defendant] has . . . fully described that methodology in two affidavits and, most importantly, has incanted the 'magic words' concerning the adequacy of the search – namely, the assertion that [it] searched *all* locations likely to contain responsive documents"); Our Child.'s Earth Found. v. Nat. Marine Fisheries Serv., No. 14-4365, 2015 WL 6331268, at *2 (N.D. Cal. Oct. 21, 2015) (finding declaration adequate where it provided precise search terms used and explained "in detail how [agency] determined which folders, files, and emails were selected"); Am. Mgmt. Servs., LLC v. Dep't of the Army, 842 F. Supp. 2d 859, 869-72 (E.D. Va. Jan. 23, 2012) (determining search reasonable where agency's declaration describes in detail procedures used, divisions searched, and results of those efforts), aff'd, 703 F.3d 724 (4th Cir. 2013); Moffat v. DOJ, No. 09-12067, 2011 WL 3475440, at *7-11 (D. Mass. Aug. 5, 2011) (same), aff'd, 716 F.3d 244 (1st Cir. 2013); Kubik v. BOP, No. 10-6078, 2011 WL 4372188, at *2 (D. Or. Sept. 19, 2011) (finding search adequate where declaration "described the search methods employed – including the electronic search terms used, the location of the files searched and the method in which the searched files were created"); Bryant v. CIA, 742 F. Supp. 2d 90, 94-95 (D.D.C. 2010) (finding CIA's declaration sufficient when it described records maintained, general FOIA request processes, steps taken to respond to plaintiff's request, and search terms used); Schwarz v. DOJ, No. 10-0562, 2010 WL 2836322, at *4 (E.D.N.Y. July 14, 2010) (concluding agency search adequate where "[t]he affidavit of each agency demonstrates a thorough, careful search in every place where documents responsive to plaintiffs request might have been located"), aff'd, 417 F. App'x 102 (2d Cir. 2011); Dolin, Thomas & Solomon LLP v. U.S. Dep't of Lab., 719 F. Supp. 2d 245, 255 (W.D.N.Y. 2010) (determining search adequate where agency "has attested to multiple thorough searches for responsive documents, describing in detail the scope of the search, and listing files and persons from whom information was sought"); Jud. 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); Schmidt v. DOD, No. 04-1159, 2007 WL 196667, at *2 (D. Conn. Jan. 23, 2007) (finding that

declarations have been found inadequate when they do not contain sufficiently detailed descriptions of the search.[59]

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agency conducted adequate search based on agency's declarations which detailed "the timeliness of the search, the manner in which the search was conducted, the specific places that were searched, and the retrieval of the relevant documents"); Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, 66 (D.D.C. 2003) (finding search affidavit to be sufficient because it "identifi[ed] the affiants and their roles in the agency, discuss[ed] how the FOIA request was disseminated with their office and the scope of the search, which particular files were searched, and the chronology of the search"); see also Harrison v. BOP, 611 F. Supp. 2d 54, 65 (D.D.C. 2009) (holding as frivolous plaintiff's claim that BOP's searches were inadequate because it did "not identify, by individual name, who was conducting the search"); cf. James Madison Project v. DOJ, 267 F. Supp. 3d 154, 161 (D.D.C. 2017) ("Although a reasonable search of electronic records *may* necessitate the use of search terms in some cases, FOIA does not demand it in all cases involving electronic records.").

[59] See, e.g., Rojas v. FAA, 989 F.3d 666, 677-78 (9th Cir. 2021) (holding that agency's declaration "falls short of what our cases require" because "it does not describe, even in general terms, the number of attorneys involved [in the search], the search methods used, the body of records they examined, or the total time they spent on the search"); Shapiro v. DOJ, 944 F.3d 940, 942-43 (D.C. Cir. 2019) (vacating and remanding after finding agency's search description inadequate to support summary judgment where declaration was silent on "how the agency concluded that the files preliminarily listed as responsive did not relate to [request]," was not clear about disposition of files whose file numbers were redacted, and did "not explain why or how the FBI knew that certain files had been destroyed"); Liounis v. Krebs, No. 18-5351, 2019 WL 7176453, at *1 (D.C. Cir. Dec. 19, 2019) (remanding for further proceedings on search issue because "[a]lthough the government stated that it searched electronic and physical files, it did not specify the types of searches performed or the search terms used," and "the government did not explain whether all files likely to contain responsive materials were searched"); Aguiar v. DEA, 865 F.3d 730, 736 (D.C. Cir. 2017) (remanding because "declaration appears to conclude as a matter of law that the software is not in the agency's 'possession or control,' rather than to explain as a matter of fact that the software was not found") (internal citation omitted); Wadhwa v. VA, 446 F. App'x 516, 520 (3rd Cir. 2011) (unpublished table decision) (remanding as to search where neither declaration submitted by agency discussed search methodology used); Byrnes v. DOJ, No. 19-0761, 2021 WL 5422281, at *6-8 (D.D.C. Sept. 29, 2021) (finding agency's declaration insufficient as it did not specify who custodians were that conducted search or what search terms those custodians used); Albaladejo v. ICE, 518 F. Supp. 3d 496, 503 (D.D.C. 2021) (holding aspect of agency's search inadequate because declaration describing search of specific component "amounts to a three-sentence paragraph and is sparse on details"); Long v. ICE, No. 17-00506, 2020 WL 5994182, at *11 (N.D.N.Y. Oct. 9, 2020) ("[B]ecause of the lack of factual development regarding ICE's capability of searching its database for the type of records Plaintiff seeks, the Court cannot conclude that [the agency] has met its burden of proving its search was adequate."); NAACP Legal Def. & Educ. Fund v. DOJ, 463 F. Supp. 3d 474, 486 (S.D.N.Y. 2020) (holding that because of "the absence of a logical explanation for the search terms it used," search was inadequate); Hardway v CIA, 384 F. Supp. 3d 67, 78 (D.D.C. 2019) (finding agency's description of its search of specific office inadequate because declaration did not indicate whether other record systems may have records, what records systems were searched, why those systems were selected, or how those systems can

While the initial burden rests with an agency to demonstrate the adequacy of its search,[60] once that obligation is satisfied, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith,"[61] because agency

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be queried); Ctr. for Biological Diversity v. EPA, 279 F. Supp. 3d 121, 140-44 (D.D.C. 2017) (finding declaration insufficient because it did not justify agency's search cut-off dates, indicate that all relevant custodians were searched, or indicate that agency searched "instant messages, text messages, or other electronic communications"); Navigators Ins. Co. v. DOJ, 155 F. Supp. 3d 157, 170 (D. Conn. 2016) (finding agency's declaration insufficient because it did not discuss whether paper or electronic files were searched, which databases were searched, who conducted the search, or what search terms were used); Nat'l Day Laborer Org. Network v. ICE, 877 F. Supp. 2d 87, 106 (S.D.N.Y. 2012) ("It is impossible to evaluate the adequacy of an electronic search for records without knowing what search terms have been used."); Davis v. DOD, No. 07-492, 2010 WL 1837925, at *5 (W.D.N.C. May 6, 2010) (finding agency declaration insufficient when it failed to "make clear whether the particular locations searched [were] the only places where responsive information is likely to be located"); 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).

[60] See Havemann, 629 F. App'x at 538 (noting that agency has burden to establish adequacy of search); Patterson v. IRS, 56 F.3d 832, 840 (7th Cir. 1995) (recognizing that agencies have initial burden to demonstrate that search was reasonable and adequate); Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) (same); Miller v. Dep't of State, 779 F.2d 1378, 1378 (8th Cir. 1986) (same); Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (same).

[61] Maynard, 986 F.2d at 560 (citing Miller, 779 F.2d at 1383); see, e.g., Weisberg, 705 F.2d at 1351-52 (rejecting plaintiff's bad faith argument after finding that defendant demonstrated adequate search); 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"); 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); Tota v. United States, No. 99-0445E, 2000 WL 1160477, at *2 (W.D.N.Y. Jul. 31, 2000) (explaining that to avoid summary judgment in favor of agency, plaintiff must show "bad faith," by "presenting specific facts showing that documents exist" that were not produced); cf. Kilmer v. U.S. Customs & Border Prot., No. 17-1566, 2021 WL 1946392, at *10 (D.D.C. May 14, 2021) ("[T]he Court finds that Plaintiff's speculation about CBP's hypothetical misconduct regarding the Women's March is insufficiently specific to serve as 'evidence that the agency's *search*' for records about such misconduct under FOIA 'was not made in good faith.'" (quoting Kowal v. DOJ, 464 F. Supp. 3d 376, 382 (D.D.C. 2020))); Albaladejo, 518 F. Supp. 3d. at 504 (finding search inadequate based on "countervailing evidence presented by Plaintiff, and ICE's failure to address that evidence"); Jud. Watch, Inc. v. U.S. Dep't of Com., 337 F. Supp. 2d 146, 161 (D.D.C. 2004) (finding that plaintiff's attempt to discredit search with its own declaration was "insufficient to overcome

declarations are "entitled to a presumption of good faith."[62] Consequently, "the failure of a search to produce particular documents, or 'mere speculation that as yet uncovered documents might exist,' does not undermine the adequacy of a search."[63] However, a

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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").

[62] 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., White v. DOJ, 16 F.4th 539, 544 (7th Cir. 2021) (noting that affidavits submitted by agencies are entitled "to a presumption of good faith"); Havemann, 629 F. App'x at 539 ("The court is entitled to accept the credibility of such affidavits, so long as it has no reason to question the good faith of the agency."); Coyne v. United States, 164 F. App'x 141, 142 (2d Cir. 2006) (per curiam) (reiterating that agency affidavits are entitled to presumption of good faith (citing Grand Cent. P'ship v. Cuomo, 166 F.3d473, 489 (2d Cir. 1999))); Butler v. SSA, No. 03-0810, slip op. at 5 (W.D. La. June 25, 2004) (same); Piper v. DOJ, 294 F. Supp. 2d 16, 24 (D.D.C. 2003) (same) (citing Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981)).

[63] Lasko v. DOJ, No. 10-5068, 2010 WL 3521595, at *1 (D.C. Cir. Sept. 3, 2010) (quoting Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004)); see, e.g., McDonald v. Barr, 791 F. App'x 277, 278 (2d Cir. 2020) (per curiam) (holding that requester's "speculative arguments that the USPS should have created [responsive] documents in response to an arbitrator's decision are insufficient to rebut the presumption of good faith that attaches to [agency's] affidavits"); Robert v. CIA, 779 F. App'x 58, 59 (2d Cir. 2019) (per curiam) (holding search reasonable and noting that agency declarations "'are accorded a presumption of good faith' and 'cannot be rebutted by purely speculative claims' or bare assertions" (quoting Grand Cent. P'ship, 166 F.3d at 489)); Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1179 (11th Cir. 2019) (holding that even if cited statute required commission to maintain requested transcripts, it would not mean transcripts actually exist, and "[m]ere speculation is not enough to rebut the showing by the Bureau"); Assassination Archives Rsch. Ctr. v. CIA, No. 18-5280, 2019 WL 691517, at *1 (D.C. Cir. Feb. 15, 2019) (finding search adequate notwithstanding fact that agency did not locate several records requester speculated existed); Dibacco v. U.S. Army, 795 F.3d 178, 190-91 (D.C. Cir. 2015) (finding that "adequacy – not perfection – is the standard that FOIA sets," and stating that requester's argument that agency's search was inadequate because it failed to turn up certain records was "losing claim put to bed twenty-five years ago and age has not improved it" (citing Oglesby, 920 F.2d at 67 n.13)); Kucernak v. FBI, 129 F.3d 126, 126 (9th Cir. 1997) (unpublished table decision) ("Mere allegations that the government is shielding or destroying documents does not undermine the adequacy . . . of the search."); Kilmer, 2021 WL 1946392, at *12 ("Plaintiff cannot prove CBP's FOIA search inadequate simply by identifying certain types of omitted documents he expected his FOIA request to yield . . . ."); Elgabrowny v. CIA, No. 17-00066, 2020 WL 1451580, at *8 (D.D.C. Mar. 25, 2020) (holding that "merely because a document exists, or once existed, does not mean that EOUSA possesses it" and that failure to find a specific record is not necessarily sufficient to demonstrate inadequate search); Kintzi v. Off. of the Att'y Gen., No. 08-5830, 2010 WL 2025515, at *6 (D. Minn. May 20, 2010) ("No evidence before the court indicates that the document [plaintiff] seeks exists. Therefore, the court determines that the [agency]

court may find an agency's search inadequate if the review of the record or the evidence presented by the requester "'raises substantial doubt' as to the search's adequacy, 'particularly in view of . . . "positive indications of overlooked materials."'"[64] Even so, courts have held that an agency's belated discovery of documents does not undermine the search adequacy.[65] Indeed, when an agency does subsequently locate additional

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conducted a reasonable search and properly denied [the] request."); Kromrey v. DOJ, No. 09-376, 2010 WL 2633495, at *3 (W.D. Wis. June 25, 2010) ("While plaintiff alleges that there must be more records, he has produced no evidence that there are any additional records, nor does he dispute the fact that the FBI conducted a search reasonably designed to yield documents responsive to his request."), aff'd, 423 F. App'x 624 (7th Cir. 2011); Citizens for Resp. & Ethics in Wash. v. DOJ, 405 F. Supp. 2d 3, 5 (D.D.C. 2005) (rejecting plaintiff's assertion that additional documents must exist "given the magnitude of the [alleged] scandal" that was subject of its request); Bay Area Laws. All. for Nuclear Arms Control v. Dep't of State, 818 F. Supp. 1291, 1295 (N.D. Cal. 1992) ("Plaintiff's incredulity at the fact that no responsive documents were uncovered . . . does not constitute evidence of unreasonableness or bad faith."); cf. Students Against Genocide v. Dep't of State, 257 F.3d 828, 839 (D.C. Cir. 2001) ("[T]hat the Department gave [plaintiff] *more* information than it requested does not undermine the conclusion that its search was reasonable and adequate.").

[64] Reps. Comm. for Freedom of the Press v. FBI, 877 F.3d 399, 402 (D.C. Cir. 2017) (quoting Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326 (D.C. Cir 1999)); see also, e.g., Ctr. for Biological Diversity v. Bureau of Land Mgmt., No. 17-1208, 2021 WL 918204, at *8 (D.D.C. Mar. 9, 2021) (finding "material doubt" in adequacy of agency's search where no notes, drafts, or "Secretary-level communications" concerning creation of Secretarial Order No. 3348 were located, coupled with "notable gaps in DOI's declarations to explain those holes in the record"); 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").

[65] See, e.g., Meeropol v. Meese, 790 F.2d 942, 953 (D.C. Cir. 1986) (rejecting argument that later-produced records call adequacy of search into question because "[i]t would be unreasonable to expect even the most exhaustive search to uncover *every* responsive file"); Kilmer, 2021 WL 1946392, at *11 ("[T]he Court declines to find bad faith or draw inferences against CBP here, based upon the agency's initial inability to locate responsive documents, which it later identified and produced . . . ."); Blixseth v. ICE, No. 19-1292, 2020 WL 210732, at *3 (D.D.C. Jan. 14, 2020) (holding agency's search was adequate although additional records were located after administrative appeal because agency "explained the discrepancy in the results by noting that the post-appeal search used open-keyword searches rather than specific search fields"); Am. Oversight v. DOJ, 401 F. Supp. 3d 16, 26 (D.D.C. 2019) (finding that "the fact that an agency discovers an error in its earlier representations, and thereafter changes course, does not alone displace the good-faith presumption courts accord its declarations"); Lamb v. Millennium Challenge Corp., 334 F.

documents courts generally have accepted this as evidence of the agency's good-faith efforts.[66]

Supp. 3d 204, 212-13 (D.D.C. 2018) (finding defendant's search adequate following supplemental declaration filed by defendant which explained inadvertent omission of document in prior release to plaintiff); Ireland v. IRS, No. 16-02855, 2017 WL 1731679, at *5 (C.D. Cal. May 1, 2017) (holding that fact that some documents were not discovered until second, more exhaustive search does not mean that original search was inadequate); Kalwasinski v. BOP, No. 08-9593, 2010 WL 2541159, at *1 (S.D.N.Y. Mar. 15, 2010) (magistrate's recommendation), adopted, (S.D.N.Y. June 23, 2010) (finding BOP's search reasonable although it did not initially locate responsive records during its first search attempt); Torres v. CIA, 39 F. Supp. 2d 960, 963 (N.D. Ill. 1999) (rejecting adequacy of search challenge when "a couple of pieces of paper – having no better than marginal relevance" – were uncovered during additional searches); cf. North v. DOJ, 774 F. Supp. 2d 217, 223 (D.D.C. 2011) ("T]he agency's previous failure to demonstrate that it conducted an adequate search does not call into question the validity of its new search for responsive records.").

[66] See, e.g., 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."); 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 v. DOD, 371 F. Supp. 2d 589, 595 (D. Del. 2005) (finding that agency acted in good faith by locating additional documents after error associated with its initial search was corrected); W. Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 10 (D.D.C. 2000) (concluding that agency conducted reasonable search and acted in good faith by locating and releasing additional responsive records mistakenly omitted from its initial response, because "it is unreasonable to expect even the most exhaustive search to uncover every responsive file; what is expected of a law-abiding agency is that the agency admit and correct error when error is revealed"), aff'd, 22 F. App'x 14 (D.C. Cir. 2001); cf. Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1257 (11th Cir. 2008) (concluding that with respect to disclosure of additional documents not found at time of initial search, district court correctly did not draw adverse inference against agency based on agency's adequate explanation for late production of records); Fischer v. DOJ, 723 F. Supp. 2d 104, 109 (D.D.C. 2010) (ruling that "mistakes do not imply bad faith" and, "[i]n fact, the agency's cooperative behavior of notifying the Court and plaintiff that it had discovered a mistake, if anything, shows good faith"); 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 Mil. 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).

Moreover, courts have held that delays in responding to requests do not amount to a showing of bad faith or demonstrate that a search was unreasonable.[67] 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.[68] It has been held that "[n]othing in the law requires the agency to document

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[67] See Broward Bulldog, Inc., 939 F.3d at 1178 (finding no adverse inference in agency's delayed response as agency explained that delay was "due to an overwhelming[ly] large backlog of pending . . . requests and litigation"); Navigators Ins. Co. v. DOJ, 155 F. Supp. 3d 157, 169 (D. Conn. 2016) ("The touchstone of the reasonableness inquiry appears to be simply the thoroughness of the search, notwithstanding the tardiness of the results." (quoting S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., No. 06-2845, 2008 WL 2523819, at *16 (E.D. Cal. June 20, 2008))); Budik v. Dep't of Army, 742 F. Supp. 2d 20, 31-35 (D.D.C. 2010) (finding that Army's delay in responding to requests, discrepancies concerning page counts, lack of notice to plaintiff regarding her right to administratively appeal, and improper redaction of signature block are not sufficient to demonstrate bad faith); Brophy v. DOD, No. 05-360, 2006 WL 571901, at *8 (D.D.C. Mar. 8, 2006) (finding that agency's search was conducted in good faith, even though the agency "was deplorably tardy in releasing the documents that were found").

[68] See Schoeffler v. USDA, 795 F. App'x 526, 527 (9th Cir. 2020) (per curiam) (noting that requester's "evidence of the Department's possession of responsive documents is not dispositive or necessarily material to the legally determinative question[] [of] 'whether the *search* for records was adequate'" (quoting Lahr v. NTSB, 569 F.3d 964, 973 (9th Cir. 2009))); Kuzma v. DOJ, 692 F. App'x 30, 32-33 (2d Cir. 2017) (holding that search was reasonable despite fact that agency could not find record that its search suggested existed); Kohake v. Dep't of Treasury, 630 F. App'x 583, 588 (6th Cir. 2015) (finding that "the fact that the IRS may have destroyed certain records pursuant to its policy does not render the search at issue unreasonable"); Stalcup v. CIA, 768 F.3d 65, 74-75 (1st Cir. 2014) ("The omission of a single document in this case does not negate what is otherwise a reasonable inquiry."); Whitfield v. Dep't of Treasury, 255 F. App'x 533, 533-34 (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."); 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 v. Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1986))); Kowal v. DOJ, 490 F. Supp. 3d 53, 67 (D.D.C. 2020) (finding agency's search reasonable although certain types of evidence in requester's possession that would be responsive to request were not located and noting that "the missing items themselves do not show that the search was inadequate"); Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 762 F. Supp. 2d 123, 134 (D.D.C. 2011) (determining search adequate even though agency's search failed to locate responsive record previously posted on agency's website); McGehee v. DOJ, 800 F. Supp. 2d 220, 230 (D.D.C. 2011) (determining that although some enclosures and attachments are missing from production it is not enough "in the context of the FBI's search and the size of its production . . . to render the FBI's search inadequate"); Dorsey v. EEOC, No. 09-519, 2010 WL 3894590, at *3 (S.D. Cal. Sept. 29, 2010) (finding that plaintiff's "conclusory statement" that EEOC "lost or destroyed" responsive records "does not raise an issue of fact precluding summary

the fate of documents it cannot find."[69] On occasion, though, some courts have required agencies to provide additional details about why particular records could not be found.[70] Similarly, the D.C. Circuit has required an agency to seek out the assistance of an employee closely related to specific records when those records could not be found,[71] but the District Court for the District of Columbia has not expanded that obligation to require individual components within an agency to seek out additional information held by other components to aid in the processing of the request.[72]

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judgment" in favor of agency); 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); cf. Santana v. DOJ, 828 F. Supp. 2d 204, 209 (D.D.C. 2011) (determining FOIA provides no remedy in situation where records sought are no longer within government's possession); Callaway v. U.S. Dep't of the Treasury, 824 F. Supp. 2d 153, 157 (D.D.C. 2011) (noting that Court's authority is limited to agency records that existed at time agency conducted search and even if agency had unredacted records at one time, "it is not now obligated to create them . . . or retrieve them").

[69] Roberts v. DOJ, No. 92-1707, 1995 WL 356320, at *2 (D.D.C. Jan. 29, 1993); see also 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. . . ."); Hardway v. CIA, 384 F. Supp. 3d 67, 76 (D.D.C. 2019) (noting that "FOIA does not permit [requesters] to demand 'proof' that particular records they requested were destroyed" and if requester wants those records they are free to submit a new request); 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.").

[70] See 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); Boyd v. U.S. Marshals Serv., No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *4 (D.D.C. Mar. 15, 2002) (stating that agency's declaration should have explained why particular report, which was known to exist, was not located, and requiring agency to "explain its failure to locate this report in a future motion"); 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).

[71] See Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 328 (D.C. Cir. 1999) (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").

[72] White v. DOJ, 840 F. Supp. 2d 83, 90 (D.D.C. 2012) (rejecting argument that Valencia-Lucena required search of other components within same agency because in Valencia-Lucena "court concluded that interviewing the [agency] employee was a necessary step because the [agency] had 'no responsibility under FOIA to make inquiries of other law

Vaughn Index

When an agency faces challenges to its reliance on particular exemptions, a device known as a Vaughn Index is commonly used to make the agency's evidentiary showing, as fashioned by the Court of Appeals for the District of Columbia Circuit in a case entitled Vaughn v. Rosen.[73]

The Vaughn decision requires agencies to specify in detail which portions of a document it has withheld, and to correlate each withheld document (or portion thereof) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification.[74] In Vaughn, the D.C. Circuit explained that this purpose could be achieved through the preparation of an itemized index.[75] This "Vaughn Index" allows the district court "to make a rational decision [about] whether the withheld material must be produced without actually viewing the documents themselves, as well as to produce a

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enforcement agencies . . . for documents no longer within its control or possession'" and, therefore, "Valencia-Lucena supports the conclusion that the USAO was under no obligation to seek additional information from the FBI in order to perform an adequate search in the USAO record system in response to [the] request" (quoting Valencia-Lucena, 180 F.3d at 328)), aff'd, No. 12-5067, 2012 WL 3059571, at *1 (D.C. Cir. July 19, 2012).

[73] 484 F.2d 820 (D.C. Cir. 1973); see, e.g., Canning v. DOJ, 848 F. Supp. 1037, 1042 (D.D.C. 1994) ("[A]gencies 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))).

[74] See Vaughn, 484 F.2d at 827 (determining that agency's burden to demonstrate legality of withholdings with adequate specificity "could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the [agency's] refusal justification with the actual portions of the document"); accord King, 830 F.2d at 217; Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1258 (11th Cir. 2008) (noting that 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'") (quoting Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977))).

[75] Vaughn, 484 F.2d at 827.

record that will render [its] decision capable of meaningful review on appeal."[76] It also helps to "create balance between the parties."[77]

If a court finds that an index is not sufficiently detailed, it will often require one that is more detailed.[78] Alternatively, if a Vaughn Index is inadequate to support withholding, courts have sometimes utilized in camera review of the withheld material.[79]

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[76] Dellums v. Powell, 642 F.2d 1351, 1360 (D.C. Cir. 1980); see, e.g., Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 65 (1st Cir. 2002) (noting that Vaughn Index allows court to determine if use of exemptions are "justified"); Rugiero v. DOJ, 257 F.3d 534, 544 (6th Cir. 2001) (explaining that Vaughn Index enables court to make "independent assessment" of agency's exemption claims); Queen v. Gonzales, No. 96-1387, 2005 WL 3204160, at *2 (D.D.C. Nov. 15, 2005) (explaining that "[a]gency affidavits can satisfy Vaughn's requirements" if they are sufficiently detailed to permit de novo review).

[77] Long v. DOJ, 10 F. Supp. 2d 205, 209 (N.D.N.Y. 1998); see, e.g., Jud. Watch, Inc. v. FDA, 449 F.3d 141, 146 (D.C. Cir. 2006) (noting that agency would have "a nearly impregnable defensive position" but for its burden to justify nondisclosure); Odle v. DOJ, No. 05-2711, 2006 WL 1344813, at *9 (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 the withholding"); Edmonds v. FBI, 272 F. Supp. 2d 35, 44 (D.D.C. 2003) (explaining that affidavits must "'strive to correct . . . the asymmetrical distribution of knowledge that characterizes FOIA litigation'" (quoting King, 830 F.2d at 218)).

[78] See Davin v. DOJ, 60 F.3d 1043, 1065 (3d Cir. 1995) (remanding case for further proceedings and suggesting that another, more detailed Vaughn Index be required); Church of Scientology Int'l v. DOJ, 30 F.3d 224, 230-40 (1st Cir. 1994) (same); Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991) (same); Isiwele v. HHS, 85 F. Supp. 3d 337, 344 (D.D.C. 2015) (noting that when "the record includes deficient declarations, 'the courts generally will request that the agency supplement its supporting declarations'" (quoting Jud. Watch v. DOJ, 185 F. Supp. 2d 54, 65 (D.D.C. 2002))); 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).

[79] See, e.g., Solers, Inc. v. IRS, 827 F.3d 323, 328 (4th Cir. 2016) (agreeing with district court that in camera review of records mooted any potential inadequacies of Vaughn Index); Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1082 (9th Cir. 2004) (acknowledging that "[u]nder certain limited circumstances, we have endorsed the use of in camera review of government affidavits as the basis for FOIA decisions"); Maynard v. CIA, 986 F.2d 547, 557 (1st Cir. 1993) ("When, 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 documents in camera."); Simon v. DOJ, 980 F.2d 782, 784 (D.C. Cir. 1992) (holding that despite

In a broad range of contexts, most courts have refused to require agencies to file public submissions that are so detailed as to reveal sensitive information the withholding of which is the very issue in the litigation.[80] Therefore, in camera submissions are frequently utilized in Exemption 1 cases when public descriptions of responsive documents would compromise national security.[81] This important principle also has been applied to other

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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 All. v. Clarke, No. 04-00749, 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); cf. Hall & Assocs. v. EPA, 846 F. Supp. 2d 231, 246 (D.D.C. 2012) (denying plaintiff's request for in camera review where "Vaughn index and accompanying declaration are sufficiently detailed to permit a meaningful review of the Agency's exemption claims"); Fla. Immigrant Advoc. Ctr. v. NSA, 380 F. Supp. 2d 1332, 1338 (S.D. Fla. 2005) (conducting in camera inspection "to satisfy an 'uneasiness' or 'doubt' that the exemption claim may be overbroad given the nature of the Plaintiff's arguments"). But see 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").

[80] See, e.g., Agrama v. IRS, No. 17-5270, 2019 WL 2064505, at *2 (D.C. Cir. Apr. 19, 2019) (holding that district court acted within its discretion in finding good cause for permitting *ex parte* submissions because "requiring the IRS to produce further 'public justification would threaten to reveal the very information for which a FOIA exemption is claimed'" (quoting *Lykins v. DOJ*, 725 F.2d 1455, 1463 (D.C. Cir. 1984))); 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"); Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1093 (9th Cir. 1997) ("Indeed, we doubt that the agency could have introduced further proof without revealing the actual contents of the withheld materials."); Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996) ("The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document without actually disclosing information that deserves protection."); Maynard, 986 F.2d at 557 (emphasizing that although public declaration "lacked specifics, a more detailed affidavit could have revealed the very intelligence sources or methods that the CIA wished to keep secret"); Curran v. DOJ, 813 F.2d 473, 476 (1st Cir. 1987) (agency should not be forced "to resort to just the sort of precise description which would itself compromise the exemption"); Am. Mgmt. Servs., LLC v. Dept. of Army, 842 F. Supp. 2d 859, 874 (E.D. Va. 2012) (finding that "descriptive information need not be 'so detailed that it would serve to undermine the important deliberative processes protected by Exemption 5'" (quoting Rein v. U.S. Patent & Trademark Off., 553 F.3d 353, 368-69 (4th Cir. 2009))), aff'd, 703 F.3d 724 (4th Cir. 2013).

[81] See, e.g., Open Soc'y Just. Initiative v. CIA, 505 F. Supp. 3d 234, 248 (S.D.N.Y. 2020) (reviewing classified submissions ex parte and affirming that revealing more about classified records, "including their dates, nature, and lengths" could enable adversaries to circumvent U.S. intelligence activities and generally enhance its intelligence or counterintelligence activities at the expense of the U.S. national security'" (quoting agency opposition memorandum)); N.Y. Times Co. v. DOJ, 756 F.3d 100, 122 (2d Cir. 2014)

FOIA exemptions, for example, in cases involving Exemption 5,[82] Exemption 7(A),[83] Exemption 7(C),[84] and Exemption 7(D).[85] However, in cases in which explanations for

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(ordering agency to submit classified Vaughn Indices to lower court, for in camera review, on remand); Doyle v. FBI, 722 F.2d 554, 556 (9th Cir. 1983) (approving use of in camera affidavits in certain cases involving national security exemption); Mobley v. DOJ, 870 F. Supp. 2d 61, 69 (D.D.C. 2012) (holding that after in camera review, agency's (b)(1) withholdings were proper and "considerations of national security appropriately preclude the [agency] from publicly releasing additional information regarding the documents"); Peltier v. FBI, No. 03-905, 2006 WL 462096, at *1 (W.D.N.Y Feb. 24, 2006) (allowing submission of in camera Vaughn Index to justify withholding pursuant to Exemption 1), aff'd, 218 F. App'x 30 (2d Cir. 2007); Edmonds, 272 F. Supp. 2d at 46-47 (approving use of in camera affidavit because "'extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed'" (quoting Lykins, 725 F.2d at 1463)).

[82] 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.").

[83] See, e.g., Lewis v. IRS, 823 F.2d 375, 380 (9th Cir. 1987) ("[A] Vaughn index of the documents here would defeat the purpose of Exemption 7(A). It would aid [the requester] in discovering the exact nature of the documents supporting the government's case against him earlier than he otherwise would or should."); Int'l Union of Elevator Constructors Loc. 2 v. U.S. Dep't of Lab., 747 F. Supp. 2d 976, 982 (N.D. Ill 2010) (denying motion for production of Vaughn Index because it would "compromise the [agency's] pending investigation"); Dickerson v. DOJ, No. 90-60045, 1991 WL 337422, at *3 (E.D. Mich. July 31, 1991) (same), aff'd, 992 F.2d 1426 (6th Cir. 1993); Alyeska Pipeline Serv. v. EPA, No. 86-2176, 1987 WL 17071, at *3 (D.D.C. Sept. 9, 1987) ("[R]equiring a Vaughn index in this matter will result in exactly the kind of harm to defendant's law enforcement proceedings which it is trying to avoid under exemption 7(A)."), aff'd on other grounds, 856 F.2d 309 (D.C. Cir. 1988).

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

[85] See, e.g., DOJ v. Landano, 508 U.S. 165, 180 (1993) (ruling that government can meet its burden with in camera affidavits in order to avoid identification of sources in Exemption 7(D) withholdings); 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 . . . .").

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.[86] (For a further discussion of in camera review, see Litigation Considerations, In Camera Inspection)

There is no set formula for a Vaughn Index; instead, courts have held that it is the function, not the form that is important.[87] Indeed, the Court of Appeals for the Eleventh Circuit has explained that, with respect to putatively "boilerplate" language in agency submissions: it has "never suggested that an agency may not use similar language to justify withholding information in multiple documents. After all, '[t]here are only so many ways' an agency can claim the same exemption for related documents."[88] Notably, the D.C. Circuit has observed that "a Vaughn Index is not a work of literature; agencies

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[86] See Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1083-84 (9th Cir. 2004) (holding that district court erred by relying solely on in camera submission to support agency's assertion of Exemption 7(A) because it reasoned that "the district court must require the government to justify FOIA withholdings in as much detail as possible on the public record before resorting to *in camera* review"); Armstrong v. Exec. Off. of the President, 97 F.3d 575, 580 (D.C. Cir. 1996) ("Case law in this Circuit is clear that when a district court uses an in camera affidavit, it must both make its reasons for doing so clear and make as much as possible of the in camera submission available to the opposing party." (citing Lykins, 725 F.2d at 1465)); Philippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (holding, in case involving assertion of "Glomar" response, that agency must submit public declaration providing as much detail as possible for basis of its claim that it can neither confirm nor deny the existence of requested records).

[87] See Jones v. FBI, 41 F.3d 238, 242 (6th Cir. 1994) (indicating that there is no "precise form . . . dictated for these affidavits"); Fiduccia v. DOJ, 185 F.3d 1035, 1044 (9th Cir. 1999) ("Any form . . . may be adequate or inadequate, depending on the circumstances."); Church of Scientology Int'l v. DOJ, 30 F.3d 224, 231 (1st Cir. 1994) (agreeing that there is no set formula for Vaughn Index); Gallant v. NLRB, 26 F.3d 168, 172-73 (D.C. Cir. 1994) (holding that justification for withholding provided by agency may take any form as long as agency offers "reasonable basis to evaluate [it]s claim of privilege"); Vaughn v. United States, 936 F.2d 862, 867 (6th Cir. 1991) ("A court's primary focus must be on the substance, rather than the form, of the information supplied by the government to justify withholding requested information."); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 294 (D.D.C. 2007) ("The adequacy of a Vaughn Index is not defined by its form, but rather its substance."); 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 Jud. Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 257 (D.D.C. 2004))).

[88] Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1196 (11th Cir. 2019) (quoting Jud. Watch, Inc. v. FDA, 449 F.3d 141, 147 (D.C. Cir. 2006) ("No rule of law precludes [an agency] from treating common documents commonly.")).

are not graded on the richness or evocativeness of their vocabularies."[89] Likewise, the sufficiency of a Vaughn Index is not determined by reference to the length of its document descriptions.[90] 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."[91] As the D.C. Circuit has explained:

> [The Vaughn Index's purpose is] "to permit adequate adversary testing of the agency's claimed right to an exemption," and enable 'the District Court to make a rational decision whether the withheld material must be produced without actually viewing the document themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." Thus, when an agency seeks to withhold information, it must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." Specificity is the defining requirement of the Vaughn index and affidavit[.][92]

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[89] 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.").

[90] See Jud. 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.").

[91] Hinton v. DOJ, 844 F.2d 126, 129 (3d Cir. 1988); see Jones, 41 F.3d at 242 (holding agency's Vaughn Index adequate when it "'enables the court to make a reasoned independent assessment of the claim[s] of exemption'" (quoting Vaughn, 936 F.2d at 866-67)); Pub. Emps. for Env't Resp. v. Off. of Sci. and Tech., 881 F. Supp. 2d 8, 13 (D.D.C. 2012) (finding Vaughn Index adequate when for each document agency provided "details about each document's sender, recipients, date and time, and subject" and "described the redacted portions of the documents, explained how that information is exempted from FOIA, and provided the relevant FOIA exemption for each piece of withheld information"); Smith v. Dep't of Lab., 789 F. Supp. 2d 274, 281 (D.D.C. 2011) (finding agency's Vaughn Index adequate when it "describes the rationale of the exemptions invoked and provides the locations in the disclosed documents where redactions are made under those exemptions").

[92] King v. DOJ, 830 F.2d 210, 218-19 (D.C. Cir. 1987) (quoting NTEU v. U.S. Customs Serv., 802 F.2d 525, 527 (D.C. Cir. 1986), Dellums v. Powell, 642 F.2d 1351, 1360 (D.C. Cir. 1980), & Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 251 (D.C. Cir, 1977))); 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 *5-6 (D.D.C. Sept. 27, 2006) (noting that "detailed and systematic" index satisfies legal requirements in specifying: "(1) the type of document, (2) the exact location of the withheld information in the document, (3) the applicable FOIA

When an agency's submission meets these criteria, it is "'accorded a presumption of good faith.'"[93]

An itemized "Vaughn Index" is not essential in every instance, as long as the nature of the withheld information is adequately described through the agency's submissions, or is confirmed by the court through in camera review.[94]

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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).

[93] Carney v. DOJ, 19 F.3d 807, 812 (2d Cir. 1994) (quoting SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991)); see, e.g., Hall & Assocs. v. EPA, 956 F.3d 621, 634 (D.C. Cir. 2020) (agency declarant's "earnestly held but mistaken view of the law" not a basis to strike declaration); Jones, 41 F.3d at 242 (reiterating that agency declarations are entitled to presumption of good faith); Am. Mgmt. Servs., LLC v. Dept. of Army, 842 F. Supp. 2d 859, 870 (E.D. Va. 2012) (finding that initial errors, which were corrected by agency, were insufficient grounds for striking entire index or questioning good faith); Butler v. DEA, No. 05-1798, 2006 WL 398653, at *2 (D.D.C. Feb. 16, 2006) (noting presumption of good faith is accorded to agency declarations); Caton v. Norton, No. 04-439, 2005 WL 3116613, at *11 (D.N.H. Nov. 21, 2005) (concluding that mistakes in processing FOIA request, which agency "convincingly explained," were not sufficient to overcome "presumption of good faith" given to its declaration); Dean v. FDIC, 389 F. Supp. 2d 780, 790 (D. Ky. 2005) (concluding that agency's Vaughn Index was entitled to presumption of good faith because it contained sufficient detail "to permit the Court to make a fully-informed decision" about propriety of the agency's nondisclosure); cf. Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 962 (C.D. Cal. 2003) (explaining that plaintiff's disagreement with conclusions reached in Vaughn Index is not sufficient basis for challenging it, and observing that "such a challenge is only appropriate when the defendant does not provide sufficient explanation of its position to allow for disagreement"), appeal dismissed voluntarily, No. 03-55833 (9th Cir. 2003).

[94] See, e.g., Burton v. Wolf, 803 F. App'x 120, 122 (9th Cir. 2020) (per curiam) (holding that because the declaration provided plaintiff "a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding," a Vaughn Index is not necessary as declaration is sufficient) (internal quotations omitted); Mo. 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); Jud. Watch, Inc., 449 F.3d at 146 (stating that agency may "submit other measures in combination with or in lieu of the index itself," such as supporting affidavits, or seek in camera review of the documents); 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"); Heartland All. for Hum. Needs & Hum. Rts. v. ICE, 406 F. Supp. 3d 90, 126 (D.D.C. 2019) (ordering agency to provide Vaughn Index when declaration lacks specificity and does not,

When voluminous records are at issue, courts have approved the use of Vaughn Indices based upon representative samplings of the withheld documents.[95] This special

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standing alone, "permit the Court to conduct the de novo review required by the statute"); Argus Leader Media v. USDA, 900 F. Supp. 2d 997, 1003 (D.S.D. 2012) (holding that Vaughn Index is not mandatory, but court may order agency to provide one if adequacy of exemptions cannot be determined without it); Zander v. DOJ, 885 F. Supp. 2d 1, 12 (D.D.C. 2012) (finding because of court's in camera review and plaintiff receiving full explanation of what documents were withheld and why, plaintiff no longer had right to Vaughn Index), appeal dismissed, No. 12-5270, 2013 WL 599184 (D.C. Cir. Feb. 13, 2013); Kozacky & Weitzel, P.C. v. United States, No. 07-2246, 2008 WL 2188457, at *3 (N.D. Ill. Apr. 10, 2008) ("When the government's affidavits provide sufficient information for the court to evaluate the exemption claims, a Vaughn Index is not required."); Tax Analysts v. IRS, 414 F. Supp. 2d 1, 4 (D.D.C. 2006) (concluding that agency need not justify withholdings on document-by-document basis because it invoked only one exemption); Jud. Watch, Inc. v. USPS, 297 F. Supp. 2d 252, 257 (D.D.C. 2004) (noting that agency may submit materials in "'any form'" as long as reviewing court has reasonable basis to evaluate exemption claim (quoting Gallant v. NLRB, 26 F.3d 168, 173 (D.C. Cir. 1994))); Doyharzabal v. Gal, No. 00-2995-24, 2004 WL 35810671, at *3 (D.S.C. Sept. 13, 2001) (finding agency's declaration to be "equivalent" to Vaughn Index); 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."); Ferri v. DOJ, 573 F. Supp. 852, 856-57 (W.D. Pa. 1983) (holding that plaintiff is not entitled to an indexing of 6,000 pages of grand jury testimony described in agency declaration where plaintiff concedes that the records are exempt under FOIA Exemption 3 and "the indexing and affidavit procedure [was developed] as a means of promoting informed [adversarial] argument and testing the government's exemption claim").

[95] See, e.g., Neely v. FBI, 208 F.3d 461, 467 (4th Cir. 2000) (suggesting that, on remand, district court "resort to the well-established practice . . . of randomly sampling the documents in question"); Solar Sources, Inc. v. U.S., 142 F.3d 1033, 1038-39 (7th Cir. 1998) (approving use of sample of 6,000 pages out of five million); Jones, 41 F.3d at 242 (approving sample comprising two percent of total number of documents at issue); Meeropol v. Meese, 790 F.2d 942, 956-57 (D.C. Cir. 1986) (allowing sampling of every 100th document when approximately 20,000 documents were at issue); Weisberg v. DOJ, 745 F.2d 1476, 1490 (D.C. Cir. 1984) (approving index of sampling of withheld documents, with over 60,000 pages at issue, even though no example of certain exemptions was provided); Mullen v. U.S. Army Crim. Investigation Command, No. 10-262, 2011 WL 5870550, at *4 (E.D. Va. Nov. 22, 2011) (approving sample of every 84th page as representative sample for 39,575 pages at issue); Schoenman v. FBI, 604 F. Supp. 2d 174, 196 (D.D.C. 2009) ("As is particularly relevant here, '[r]epresentative sampling is an appropriate procedure to test an agency's FOIA exemption claims when a large number of documents are involved.'" (quoting Bonner v. Dep't of State, 928 F.2d 1148, 1151 (D.C. Cir. 1991))); Hornbeck v. U.S. Coast Guard, No. 04-1724, 2006 WL 696053, at *6 (D.D.C. Mar. 20, 2006) ("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 v. DOD, 388 F. Supp. 2d 1086, 1089 (C.D. Cal. 2005) (ordering parties to agree upon

procedure "allows the court and the parties to reduce a voluminous FOIA exemption case to a manageable number of items" for the Vaughn Index and, "[i]f the sample is well-chosen, a court can, with some confidence, 'extrapolate its conclusions from the representative sample to the larger group of withheld materials.'"[96] 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.[97] 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."[98]

"representative sample" from more than 6,500 documents that will provide basis for Vaughn Index); Piper v. DOJ, 294 F. Supp. 2d 16, 20 (D.D.C. 2003) (noting that parties agreed to sample of 357 pages out of 80,000 to be discussed in Vaughn Index); cf. Martinson v. Violent Drug Traffickers Project, No. 95-2161, 1996 WL 571791, at *8 (D.D.C. Aug. 7, 1996) ("This Court does not believe that 173 pages of located documents is even close to being 'voluminous.'"), aff'd on other grounds, No. 96-5262, 1997 WL 634559 (D.C. Cir. 1997); SafeCard Servs. v. SEC, No. 84-3073, 1988 WL 58910, at *3-5 (D.D.C. May 19, 1988) (concluding that burden of indexing relatively small number of requested documents (approximately 200) was insufficient to justify sampling).

[96] 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 Lab., 326 F.3d 607, 612-13 (5th Cir. 2003) (per curiam) (approving use of representative sample that was offered to district court for in camera inspection because sample was "adequate" to demonstrate that no reasonably segregable information could be extracted from withheld records); Clemente v. FBI, 854 F. Supp. 2d 49, 58 (D.D.C. 2012) ("The Court therefore examines the Vaughn index of the representative sample in order to determine whether it suggests that the entire set of responsive documents was properly processed under the legal standards applicable at the time of processing.").

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

[98] Bonner, 928 F.2d at 1154; accord Davin v. DOJ, 60 F.3d 1043, 1053 (3d Cir. 1995) (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); Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, *14 (D.D.C. July 2, 2020) (holding that disputes over sample documents withheld at the time sample was

Some agencies use "coded" Vaughn Indices - which break certain FOIA exemptions into several categories, explain the particular nondisclosure rationales for each category, and then mark the exemption and category on the particular documents at issue.[99] Courts have generally accepted the use of such "coded" indices when "[e]ach deletion was correlated specifically and unambiguously to the corresponding exemption . . . [which] was adequately explained by functional categories . . . [so as to] place[] each document into its historical and investigative context."[100] Innovative formats for "coded" submissions have been found acceptable, so long as they enhance the ultimate goal of overall "descriptive accuracy" of the agency's submission.[101] However, this approach has

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chosen, but released to plaintiff as briefing was ongoing, are not moot and agency is not relieved of burden to justify original withholdings by subsequent release of documents).

[99] See, e.g., Jones, 41 F.3d at 242-43 (noting that coded indices "have become accepted practice"); Maynard v. CIA, 986 F.2d 547, 559 & n.13 (1st Cir. 1993) (noting use by FBI and explaining format); Queen v. Gonzales, No. 96-1387, 2005 WL 3204160, at *2 (D.D.C. Nov. 15, 2005) (same); Hodge v. FBI, 764 F. Supp. 2d 134, 141 (D.D.C. 2011) ("Indeed, because the function, and not the form, of the index is dispositive, our Circuit has upheld similar agency declarations coupled with coded categories, in lieu of Vaughn indices."); Blackwell v. FBI, 680 F. Supp. 2d 79, 96 (D.D.C. 2010) (holding that FBI met its burden when it "category-coded the documents identified in the Vaughn Index, detailing the nature of the information withheld and which Exemption(s) applied"), aff'd, 646 F.3d 37 (D.C. Cir. 2011).

[100] Keys v. DOJ, 830 F.2d 337, 349-50 (D.C. Cir. 1987); see, e.g., Morley v. CIA, 508 F.3d 1108, 1122 (D.C. Cir. 2007) (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 Jud. Watch, Inc. v. FDA, 449 F.3d 141, 147 (D.C. Cir. 2006))); 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 "[u]se of coded indices has been explicitly approved by several circuit courts"); Baez v. FBI, 443 F. Supp. 2d 717, 723 (E.D. Pa. 2006) (upholding use of coded Vaughn Index where agency "redacted only identifying information and administrative markings"); Garcia v. DOJ, 181 F. Supp. 2d 356, 370 (S.D.N.Y. 2002) (accepting adequacy of agency's coded Vaughn Index); cf. Fiduccia v. DOJ, 185 F.3d 1035, 1043-44 (9th Cir. 1999) (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).

[101] See Nat'l Sec. Archive v. Off. of the Indep. Couns., 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

been found inadequate when the coded categories are too "far-ranging" and more detailed subcategories could be provided.[102] Indeed, when numerous pages of records are withheld in full, a "coded" submission that does not specifically correlate multiple exemption claims to particular portions of the pages withheld has been found to be impermissibly conclusory.[103]

Additionally, courts have upheld categorical Vaughn Indices, where agencies group similar documents and provide descriptions of the withholdings based on categories,[104]

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agencies under various exemptions); see also King v. DOJ, 830 F.2d 210, 225 (D.C. Cir. 1987) ("The measure of a Vaughn index is its descriptive accuracy, and we are willing to accept innovations in its form so long, but only so long, as they contribute to that end."); Canning v. DOJ, 848 F. Supp. 1043 (D.D.C. 1994) ("As a matter of principle, the Court agrees with the Defendant's claim that there is nothing inherently improper about the use of a coding system.").

[102] See King, 830 F.2d at 221-22 ("The declaration's far-ranging category definitions for information classifiable under Executive Order 12065 make clear that the FBI could provide subcategory descriptions of redacted material in far more detail than it has."). But see Canning, 848 F. Supp. at 1044-45 (approving coded Vaughn Index for classified information and differentiating it from that filed in King).

[103] 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).

[104] See Jud. Watch, Inc., 449 F.3d at 148 (concluding that agency's "decision to tie each document to one or more claimed exemptions in its index and then summarize the commonalities of the documents in a supporting affidavit" is acceptable); Landmark Legal Found. v. IRS, 267 F.3d 1132, 1138 (D.C. Cir. 2001) (finding that repetitive nature did not make Vaughn Index deficient because it was "not the agency's fault that thousands of documents belonged in the same category, thus leading to exhaustive repetition"); Citizens Comm'n on Hum. Rts. v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (finding adequate, for responsive records consisting of 1,000 volumes of 300 to 400 pages each, agency's volume-by-volume categorical summary when Vaughn Indices "sufficiently describe the documents' contents and give specific reasons for withholding them"); Vaughn v. United States, 936 F.2d 862, 868 (6th Cir. 1991) (approving category-of-document approach when over 1,000 pages were withheld under Exemptions 3, 5, 7(A), 7(C), 7(D), and 7(E)); Davis v. DOJ, 968 F.2d 1276, 1282 n.4 (D.C. Cir. 1992) (opining that precise matching of exemptions with specific withheld items "may well be unnecessary" when all government's generic categorical claims have merit); Prop. of the People, Inc. v. DOJ, No. 17-1193, 2021 WL 3052033, at *3 (D.D.C. July 20, 2021) (ordering FBI to provide either Vaughn Index or relevant categories for withheld information, including which category each document belongs in and how disclosure of each category would harm law enforcement proceedings, and affirming that "category-of-document by category-of-document" approach is permitted but "file-by-file" approach is not); Nat'l Pub. Radio, Inc. v. FBI, 539 F. Supp. 3d 1, 15 (D.D.C.

but have declined to accept Vaughn Indices which group documents into overly broad categories.[105]

Courts have permitted agency justifications for withholding records on a "generic" basis in cases involving Exemption 7(A).[106] While the outermost contours of what

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2021) (upholding categorical indexing approach to FBI ballistics videos when basis for withholding each video is identical, and declining to require "phony individualization" for records properly withheld pursuant to FOIA exemption as long as justifications are sufficient for purposes of resolving FOIA claim); Mullen v. U.S. Army Crim. Investigation Command, No. 1:10-262, 2011 WL 5870550, *8 (E.D. Va. Nov. 22, 2011) (approving use of categorical Vaughn Index for those "documents that were withheld in full since those documents were all withheld on the same basis"); Carter, Fullerton & Hayes LLC v. FTC, 520 F. Supp. 2d 134, 142 (D.D.C. 2007) (concluding that "[w]hile there is some degree of repetition among entries within defendant's Vaughn Index, repetition is to be expected, especially when 'each redacted passage concerns the same . . . subject'" (quoting Coldiron v. DOJ, 310 F. Supp. 2d 44, 52 (D.D.C. 2004))).

[105] See Prison Legal News v. Samuels, 787 F.3d 1142, 1150-52 (D.C. Cir. 2015) (remanding for creation of new Vaughn Index and declaration because categories "include[d] a wide range of claims covering various degrees of privacy interests," and finding that categories must be "based on the individual's privacy interest or the public interest in disclosure"); Bloomgarden v. DOJ, No. 12-0843, 2016 WL 471251, at *1 (D.D.C. Feb. 5, 2016) (finding Vaughn Index "'useless [and] deficient' because it impermissibly lumped hundreds of pages together in a single entry, making it impossible to understand which claimed exemptions applied to which documents (and why)" (quoting hearing transcript)).

[106] See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 218-24 (1978) (endorsing government's position "that a particularized, case-by-case showing is neither required nor practical" and that language of Exemption 7(A) "appears to contemplate that certain generic determinations may be made"); Gatson v. FBI, 779 F. App'x 112, 115-16 (3d Cir. 2019) (per curiam) (observing that Vaughn Index generally is not required for withholdings under Exemption 7A and holding that, where agency provided public declaration describing categories of information withheld and bases for withholding, there is sufficient "connective tissue" between documents, redactions, exemptions, and explanations); Solar Sources, Inc. v. U.S., 142 F.3d 1033, 1040 (7th Cir. 1998) (explaining that "a detailed Vaughn Index is generally not required in Exemption 7(A) cases"); W. Journalism Ctr. v. Off. of the Indep. Couns., No. 96-5178, 1997 WL 195516, at *1 (D.C. Cir. Mar. 11, 1997) (per curiam) ("[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."); In re DOJ, 999 F.2d 1302, 1309 (8th Cir. 1993) (en banc) (ruling that to satisfy its burden under 7(A), agency is not required to "produce a fact-specific, document-specific, Vaughn index"); Dickerson v. DOJ, 992 F.2d 1426, 1428, 1433-34 (6th Cir. 1993) (approving FBI justification of Exemption 7(A) for documents pertaining to disappearance of Jimmy Hoffa on "category-of-document" basis by supplying "a general description of the contents of the investigatory files, categorizing the records by source or function"); Lewis v.

constitutes acceptable "generic" Exemption 7(A) Vaughn declarations are sometimes unclear,[107] 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.[108] When an agency invokes an exemption to protect a broad category of records, such as investigatory records pertaining to a third party,[109] a generic description of the records withheld under that categorical basis has been found to satisfy an agency's Vaughn obligation.[110]

IRS, 823 F.2d 375, 380 (9th Cir. 1987) ("The IRS need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings.").

[107] 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, 1991 WL 328041, at *2-3 (W.D. Mo. Dec. 9, 1991) (approving categories of "intra-agency memoranda" and "work sheets"), with Bevis v. Dep't of State, 801 F.2d 1386, 1390 (D.C. Cir. 1986) (concluding that FBI failed to carry its burden by identifying categories "only as 'teletypes,' or 'airtels,' or 'letters'").

[108] See Bevis, 801 F.2d at 1389-90 (explaining that if agency "wishes to adopt the generic approach" for Exemption 7(A), it "has a three-fold task[:] [f]irst, it must define its categories functionally[,] [s]econd, it must conduct a document-by-document review in order to assign documents to the proper category[, and] [f]inally, it must explain to the court how the release of each category would interfere with enforcement proceedings"); In re DOJ, 999 F.2d at 1309-10 (same); Manna v. DOJ, 815 F. Supp. 798, 806 (D.N.J. 1993) ("The hallmark of an acceptable category is thus that it is functional; it allows the court to trace a rational link between the nature of the document and the alleged likely inference."), aff'd, 51 F.3d 1158 (3d Cir. 1995); see also Dickerson, 992 F.2d at 1433 (enumerating categories of information withheld); Jud. 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 submission met Bevis test and therefore finding it unnecessary to determine whether Bevis test is too demanding).

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

[110] See Gallant v. NLRB, 26 F.3d 168, 173 (D.C. Cir. 1994) (finding government under no obligation to justify withholding of third party names on an individual-by-individual basis under FOIA Exemption 6); Church of Scientology v. IRS, 792 F.2d 146, 152 (D.C. Cir. 1986) (finding generic showing under IRS Exemption 3 statute appropriate if "affidavit sufficiently detailed to establish that the document or group of documents in question actually falls into the exempted category"); Antonelli v. FBI, 721 F.2d 615, 617-19 (7th Cir. 1983) (holding that no index is required in third-party request for records when agency categorically neither

Notably, the D.C. Circuit has held that the district court judge's evaluation of only the redacted documents - without reviewing a Vaughn Index at all - was sufficient in a situation in which the applicable exemption was obvious from the face of the document.[111]

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.[112] Once in

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confirmed nor denied existence of records on particular individuals absent showing of public interest in disclosure); Brown v. FBI, 658 F.2d 71, 74 (2d Cir. 1981) (concluding that itemized and indexed justification unnecessary with respect to third party request for records); Pully v. IRS, 939 F. Supp. 429, 433-38 (E.D. Va. 1996) (noting that "[t]he detail outlined by the IRS in its supporting affidavits must provide sufficient justification that the claimed exemption applies to the requested document so that the requesting party may challenge the asserted exemption" and accepting categorical descriptions for documents protected under Exemptions 3, 5 (attorney-client privilege), 7(A), 7(C), and 7(E) – 5,624 documents arranged into twenty-six categories); May, 1991 WL 328041, at *3-4 (denying plaintiff's request for index and finding categorical description of records withheld under Exemptions 3 and 7(A) acceptable). But see McNamara v. DOJ, 949 F. Supp. 478, 483 (W.D. Tex. 1996) (rejecting apparent categorical indices for criminal files on third parties that were withheld under Exemptions 6 and 7(C) because "there is no way for the court to tell whether some, a portion of some, or all the documents being withheld fall within any of the exemptions claimed").

[111] Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 128 (D.C. Cir. 1987) (holding that district court's determination that redacted portions of memoranda were appropriately withheld as attorney work-product based solely on review of redacted documents was "a fair inference" and "entirely suitable" because released portions of the memoranda constitute work-product and "it would be startling for the agency to release qualifying parts of a document and withhold less qualifying portions"); accord Fiduccia v. DOJ, 185 F.3d 1035, 1043 (9th Cir. 1999) (recognizing that Vaughn Index is "a superfluity" when plaintiff and court can ascertain the nature of information withheld by reviewing redacted documents and observing that "[t]he redacted document may be less work for the agency and more useful to the requester and the court than a *Vaughn* index or affidavit").

[112] See, e.g., Khine v. DHS, 943 F.3d 959, 967 (D.C. Cir. 2019) (holding, in response to plaintiff's suggestion that he should have received Vaughn Index at administrative stage, that "[the court] do[es] not require the agency at this stage, as [the requester] appears to suggest, to provide a document-by-document Vaughn index, which this court has recognized is a 'judicial rule' that 'governs litigation in court and not proceedings before the agency'" (quoting *NRDC v. NRC*, 216 F.3d 1180, 1190 (D.C. Cir. 2000))); Bangoura v. U.S. Dep't of the Army, 607 F. Supp. 2d 134, 143 n.8 (D.D.C. 2009) (noting that agency not required to provide Vaughn Index prior to filing of lawsuit); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) ("[T]here is no requirement that an agency provide a . . . 'Vaughn' index on an initial request for documents."), summary affirmance granted, No. 00-5453, 2001 WL 674636 (D.C. Cir. May 10, 2001); Edmond v. U.S. Att'y, 959 F. Supp. 1, 5 (D.D.C. 1997) (rejecting, as premature, request for Vaughn Index when agency had not processed plaintiff's request); cf. Kanam v. Off. of Benton Peterson, No. 20-5001,

litigation, efforts to compel the preparation of Vaughn Indices prior to the filing of an agency's dispositive motion are often denied as premature,[113] but have been granted in some instances.[114]

2020 WL 3406469, at *1 (D.C. Cir. June 2, 2020) (per curiam) (holding that where plaintiff did not submit proper FOIA request, there was no requirement for agency to provide Vaughn Index).

[113] See, e.g., Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) ("The plaintiff's early attempt in litigation of this kind to obtain a Vaughn Index . . . is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); Mullen v. U.S. Army Crim. Investigation Command, No. 10-262, 2011 WL 5870550, *4 (E.D. Va. Nov. 22, 2011) (discussing generally timing of Vaughn Index production and ruling agency did not have to produce Vaughn until it filed its dispositive motion); Ioane v. Comm'r, No. 09-00243, 2010 WL 2600689, at *6 (D. Nev. Mar. 11, 2010) ("Generally, agencies should be given the opportunity to file dispositive motions and produce affidavits regarding claimed exemptions before they are ordered to produce Vaughn indices."); Gerstein v. CIA, No. 06-4643, 2006 WL 3462659, at *5 (N.D. Cal. Nov. 29, 2006) (denying plaintiff's request for Vaughn Index because agencies had not yet begun responding to plaintiff's FOIA requests); Bassiouni v. CIA, 248 F. Supp. 2d 795, 797 (N.D. Ill. 2003) (finding plaintiff's request for a Vaughn Index premature because the case was "only in the initial stages"); Pyne v. Comm'r, No. 98-00253, 1999 WL 112532, at *3 (D. Haw. Jan. 6, 1999) (denying motion to compel submission of Vaughn Index as "premature" when agency had not yet refused to release records or provided supporting affidavit for nondisclosure); Stimac v. DOJ, 620 F. Supp. 212, 213 (D.D.C. 1985) (denying as premature motion to compel Vaughn Index on ground that "filing of a dispositive motion, along with detailed affidavits, may obviate the need for indexing the withheld documents"); see also Payne v. DOJ, No. 95-2968, 1995 WL 601112, at *1 (E.D. La. Oct. 11, 1995) (refusing to order Vaughn Index at "nascent" stage of litigation, i.e., when defendants had not even answered plaintiff's complaint); Cohen v. FBI, 831 F. Supp. 850, 855 (S.D. Fla. 1993) (confirming that Vaughn Index is not required when "Open America" stay is granted "because no documents have been withheld on the grounds that they are exempt from disclosure").

[114] 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. 06-00098, 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 (S.D.N.Y. 2004) (ordering production of Vaughn Index prior to filing of defendants' dispositive motion, due to "glacial pace at which defendant agencies have been responding to the plaintiffs' requests," which evinces "an indifference to the commands of FOIA and fails to afford accountability of government"); Providence J. 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

Foreseeable Harm Showing

The FOIA requires that an agency "shall withhold information" under the FOIA "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or if "disclosure is prohibited by law."[115] Commonly known as the "foreseeable harm" standard, this requirement was codified into the FOIA by the FOIA Improvement Act of 2016.[116] As a result, for any information withheld in response to requests made after the passage of the FOIA Improvement Act, agency declarations must not only show that a FOIA exemption applies to the withheld information, but must also articulate, in a "focused and concrete" way, the harm that would result from disclosure.[117]

As with the application of FOIA exemptions, agencies bear the evidentiary burden of establishing that disclosure of exempt information would result in reasonably foreseeable harm.[118] The Court of Appeals for the District of Columbia Circuit has

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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).

[115] 5 U.S.C. § 552(a)(8)(A)(i) (2018).

[116] FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, (codified at 5 U.S.C. § 552(a)(8)(A)(i)).

[117] See Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 369 (D.C. Cir. 2021); see also Machado Amadis v. U.S. Dep't of State, 971 F.3d 364, 370 (D.C. Cir. 2020) (stating that to withhold responsive records, agency must show both that FOIA exemption applies and that agency reasonably foresees that disclosure would harm interest protected by that exemption); Emuwa v. DHS, No. 20-01756, 2022 WL 1451430, at *2 (D.D.C. May 9, 2022) ("After Machado Amadis and Reporters Committee, agencies must make two showings. *First*, the agency must, as always, show that a FOIA exemption applies to withheld information. . . . *Second*, the agency must articulate, in a 'focused and concrete' way, the harm that would result from disclosure, including the basis and likelihood of that harm.") (internal citations omitted) (appeal pending); Reps. Comm. for Freedom of the Press v. U.S. Customs & Border Prot., 567 F. Supp. 3d 97, 110 (D.D.C. 2021) (same); OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023) (explaining that unless disclosure is prohibited by law, "even where an exemption would otherwise apply, agencies may withhold information only when" they can establish reasonably foreseeable harm, and providing guidance on assessing foreseeable harm).

[118] See Reps. Comm., 3 F.4th at 369 (holding that foreseeable harm requirement imposes "independent and meaningful burden on agencies" (quoting *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 106 (D.D.C. 2019))); Machado Amadis, 971 F.3d at 370 (upholding agency's application of foreseeable harm standard based on explanations provided in declaration).

explained that in order to meet this burden, agencies must "articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld."[119] An agency's burden to show foreseeable harm cannot be met with "generalized assertions,"[120] although agency declarations may use a categorical approach to identify harm[121] as long as they do not rely on "nearly identical boilerplate statements" when doing so.[122] The District Court for the District of Columbia has found, however, that "the mere recitation of similar reasoning in showing harm does not by itself render that reasoning 'boilerplate.'"[123]

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[119] Reps. Comm., 3 F.4th at 369.

[120] See Machado Amadis, 971 F.3d at 371 (finding that agency "cannot simply rely on 'generalized' assertions that disclosure 'could' chill deliberations," but explaining how disclosure "'would' chill future internal discussions" is sufficient to meet the "governing legal requirement"); see also Reps. Comm., 3 F.4th at 370 (determining that agencies need to provide "a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward"); Louise Trauma Ctr. LLC v. DHS, No. 20-01128, 2022 WL 1081097, at *5 (D.D.C. Apr. 11, 2022) (rejecting agency's foreseeable harm showing as "too 'boilerplate and generic'" because "[o]nly one paragraph in the agency's declaration discusses foreseeable harm," which "says simply that the agency's FOIA personnel conducted a foreseeable harm analysis," and agency Vaughn Index only "goes slightly further" (quoting Reps. Comm., 3 F.4th at 371)).

[121] See Reps. Comm., 3 F.4th at 369 (explaining that agencies may satisfy foreseeable harm requirement "on a category-by-category basis rather than a document-by-document basis" but "the basis and likelihood of that harm must be independently demonstrated for each category"); Ctr. for Pub. Integrity v. DOD, 486 F. Supp. 3d 317, 337 (D.D.C. 2020) (finding that agencies categorized withholdings under Exemption 5 and explained particular harm that would be caused by release of information in each category and therefore met requirements of FOIA Improvement Act); Rosenberg v. DOD, 442 F. Supp. 3d 240, 259 (D.D.C. 2020) (concluding that agency "may take a categorical approach" and "group together like records" but "must explain the foreseeable harm of disclosure for each category").

[122] Ctr. for Investigative Reporting, 436 F. Supp. 3d at 106; see also Am. Immigr. Council v. U.S. Customs & Border Patrol, No. 19-2965, 2022 WL 741864, at *15-16 (D.D.C. Mar. 11, 2022) (rejecting agency's explanation for repeating same foreseeable harm descriptions as "the records all relate to the same issue," and finding that agency's foreseeable harm showings are "generalized [and] vague" because they "do not 'contain[ ] thoroughgoing . . . explanation as to the importance and deliberative value of the specific information in those records in the particular decisional context in which they arose, as well as the precise damage to the relevant agency operations that would result from their release'" (quoting Reps. Comm., 3 F.4th at 371)).

[123] Leopold v. DOJ, No. 19-2796, 2021 WL 3128866, at *4 (D.D.C. July 23, 2021).

Notably, courts may evaluate an agency's foreseeable harm showing even in the absence of a challenge by a FOIA plaintiff.[124] Additionally, the District Court for the District of Columbia has explained that the assessment of foreseeable harm is based on the potential impact from public disclosure rather than the impact on an individual requester,[125] and that agencies may present different types of harms as long as they are "expressly tied" to a harm envisioned by the applicable exemption.[126]

The showing agencies must make as to foreseeable harm is dependent upon the exemption the agency invokes.[127] No foreseeable harm showing is required for information that is prohibited from disclosure by law.[128] Moreover, for FOIA exemptions

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[124] See Wash. Post Co. v. Special Inspector Gen. for Afg. Reconstr., No. 18-2622, 2021 WL 4502106, at *22 (D.D.C. Sept. 30, 2021) (rejecting argument that plaintiff waived ability to challenge foreseeable harm at summary judgment and concluding that because foreseeable harm is a statutory requirement, court must make its own determination on that harm); Ecological Rts. Found. v. EPA, 541 F. Supp. 3d 34, 64-66 (D.D.C. 2021) (evaluating foreseeable harm showing on reconsideration, even though parties did not specifically address it in their briefing on reconsideration).

[125] Naumes v. Dep't of the Army, 588 F. Supp. 3d 23, 42-43 (D.D.C. 2022) (rejecting argument that plaintiff's intended use of copyrighted material for educational work under the "fair-use" doctrine mitigates risk of competitive and financial harm because "[t]he applicability of the fair-use doctrine specifically to Plaintiff's dissertation research . . . cannot outweigh Defendant's determination of foreseeable harm when the material is to be released to the public overall").

[126] Emuwa v. DHS, No. 20-01756, 2022 WL 1451430, at *4 (D.D.C. May 9, 2022) (rejecting plaintiff's argument that "fraud by bad actors" is an inappropriate basis for foreseeable harm because "the harm envisioned in Exemption 5 . . . is a lack of candor within agencies, not fraud by bad actors" and finding that the agency "expressly tied its fraud concerns to candor inside the agency . . . because the possibility of fraud would dissuade full and fair deliberation," which "is a proper assertion of foreseeable harm under Exemption 5") (appeal pending).

[127] See Ball v. USMS, No. 19-1230, 2021 WL 4860590, at *9 (D.D.C. Oct. 19, 2021) ("'[T]he agency's burden to demonstrate that harm would result from disclosure may shift depending on the nature of the interests protected by the specific exemption with respect to which a claim of foreseeable harm is made.'" (quoting Ecological Rts. Found. v. EPA, No. 19-980, 2021 WL 535725, at *32 (D.D.C. Feb. 13, 2021), vacated in part on reconsideration, 541 F. Supp. 3d 34 (D.D.C. 2021))); Reps. Comm. v. U.S. Customs & Border Protect., 567 F. Supp. 3d at 120 ("[A]n agency's burden under the foreseeable harm requirement may be more easily met when invoking other privileges and exemptions [other than the deliberative process privilege] for which the risk of harm through disclosure is more self-evident and the potential for agency overuse is attenuated.").

[128] See 5 U.S.C. § 552(a)(8)(B) ("Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted

that have a "built-in" harm element, courts have increasingly held that the agency's showing on the exemption's harm element satisfies the foreseeable harm requirement[129]

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from disclosure under subsection (b)(3)"); see also Clemente v. FBI, No. 20-1527, 2022 WL 17092585, at *3 n.2 (D.D.C. Nov. 21, 2022) (stating that no foreseeable harm analysis is required for Exemptions 1 and 3, but even if one is required, FBI easily met its burden by focusing on many harms in focused and concrete way); Ball, 2021 WL 4860590, at *9 (holding that plaintiff cannot challenge agency's foreseeable harm determination under Exemption 3); Wash. Post Co., 2021 WL 4502106, at *22 (finding that 5 U.S.C. § 552(a)(8)(B) does not require agency declarations to specifically address foreseeable harm for Exemption 3 withholdings); Rosenberg v. DOD, 342 F. Supp. 3d 62, 73 n.1 (D.D.C. 2018) (opining that foreseeable harm analysis only applies to exemptions under which discretionary disclosures are possible, which does not include Exemptions 1 or 3, certain Exemption 4 information if prohibited from disclosure by the Trade Secrets Act, or certain Exemptions 6 and 7(C) information if prohibited from disclosure by the Privacy Act of 1974) (internal citations omitted).

[129] See, e.g., Reps. Comm. for Freedom of the Press v. FBI, No. 17-1701, 2022 WL 13840088, at *6 (D.D.C. Oct. 21, 2022) (holding that "an Exemption 7(E) claimant must show a risk of circumvention of the law" and that "the language of this requirement – 'could reasonably be expected to risk circumvention of the law' –supplants the FOIA Improvement Act's general requirement that an agency must disclose records unless it is reasonably foreseeable that disclosure would harm the interest the claimed exemption protects"); Kendrick v. DEA, No. 21-01624, 2022 WL 3681442, at *6 (D.D.C. Aug. 25, 2022) (explaining that "fulfilling the terms of exemptions outside Exemption 5 'goes a long way to meeting the foreseeable harm requirement'" and considering "the lower burden" for Exemption 7(C), "DEA says little but enough" to establish foreseeable harm (quoting Reps. Comm. v. U.S. Customs & Border Prot., 567 F. Supp. 3d at 127)); 100Reporters v. U.S. Dep't of State, 602 F. Supp. 3d 41, 83 (D.D.C. 2022) (explaining that "[a]lthough the D.C. Circuit has yet to opine on what an agency must do to show foreseeable harm under Exemption 7(E), courts have acknowledged on at least two occasions that the foreseeable-harm requirement is similar to (and was not intended to heighten) Exemption 7(E)'s 'circumvention of the law' requirement"); Louise Trauma Ctr., 2022 WL 1081097, at *7 (finding agency's statement that disclosing names of outside experts would subject them to harassment for providing training to asylum officers sufficient to establish foreseeable harm: "'These predicted results of disclosure are exactly what' Exemption 6 seeks to prevent." (quoting Ecological Rts. Found., 541 F. Supp. 3d at 65-66)); Ball, 2021 WL 4860590, at *9 (determining that an agency's justifications for non-disclosure when Exemption 7(C) is invoked "generally are also sufficient evidence of foreseeable harm"); Wash. Post Co., 2021 WL 4502106, at *22 (holding that assurances of confidentiality underlying Exemption 7(D) – at least when expressly made – are sufficient to satisfy the foreseeable harm standard, and that agency "submissions supporting the withholdings under Exemption 1 . . . also satisfy the reasonable foreseeability of harm standard" because they identify "particularized indicia of foreseeable harm" to national security (quoting Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 372 (D.C. Cir. 2021)); Amiri v. Nat'l Sci. Found., No. 20-02006, 2021 WL 4438910, at *13 (D.D.C. Sept. 28, 2021) (finding that although agency did not expressly address foreseeable harm standard, context provided by agency regarding individual privacy harms in establishing that Exemption 6 applied was sufficient to make harm "manifest"); Ecological Rts. Found., 541 F. Supp. 3d at 65 (holding that when invoking Exemption 7(C), "an agency need not

– with the separate showing of foreseeable harm serving as a safeguard against boilerplate or weak exemption-based harm.[130] Courts have differed on the appropriate standard for the foreseeable harm showing required for Exemption 4.[131] (For further discussion of

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establish much more than the fact of disclosure to establish foreseeable harm"); Leopold v. DOJ, No. 19-3192, 2021 WL 124489, at *8 (D.D.C. Jan. 13, 2021) (holding that "underlying purposes of Exemption 8 are served" by withholding independent bank monitoring report and that government sufficiently demonstrated foreseeable harm where "evidence [provided in agency declarations] showing that regulatory effectiveness would be undermined by public release of the Report also speaks to the foreseeable harm") (appeal pending); see also OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023) (explaining that elements for withholding records under some exemptions "should, in the ordinary course, establish that disclosure would result in reasonably foreseeable harm").

[130] See, e.g., Reps. Comm. for Freedom of the Press v. U.S. Customs & Border Prot., 567 F. Supp. 3d at 127-28 (observing that "relatively generalized assertion" that disclosing employee names would invade privacy "would likely be enough" to meet foreseeable harm burden for Exemption 7(C); that Exemption 7(E) by its terms already forces agencies to show risk of harm, but "freestanding foreseeable harm requirement" can nonetheless guard against general and boilerplate language in 7(E) context; and ultimately holding that agency sufficiently established foreseeable harm on both exemptions); Citizens for Resp. & Ethics in Wash. v. DHS, 525 F. Supp. 3d 181, 192, 192 n.4 (D.D.C. 2021) (upholding agency's foreseeable harm showing when it demonstrated that "disclosure of information about the size of the President's Secret Service detail would result in foreseeable risks of harm to agents and those they protect" because not doing so would mean "ignoring the D.C. Circuit's precedents defining the substantive standards under Exemptions 7(E) and 7(F)," and observing that "the statutory text of Exemption 7 . . . already contained an explicit requirement that the agency show a reasonable nexus between the withheld information and a predicted harm," while at the same time noting that foreseeable harm requirement "provides a meaningful safeguard" against boilerplate justifications).

[131] See, e.g., Seife v. FDA, 43 F.4th 231, 239-43 (2d Cir. 2022) (holding "that the interests protected by Exemption 4 are the submitter's commercial or financial interests in information that is of a type held in confidence and not disclosed to any member of the public by the person to whom it belongs;" therefore, an agency can "meet the foreseeable harm requirement of the [FOIA Improvement Act] by showing foreseeable commercial or financial harm to the submitter upon release of the contested information," and finding "that Defendants presented sufficient evidence, in reasonably specific detail, to establish foreseeable harm to [the submitter's] commercial or financial interests" and that "big picture" of "highly competitive" pharmaceutical industry further supports foreseeable harm); First Look, Inst. v. U.S. Marine Corps, No. 21-5087, 2022 WL 2784431, at *2, *4 (C.D. Cal. June 13, 2022) (observing that other courts differ on Exemption 4 foreseeable harm standards, but declining to choose one approach over another, because defendant satisfies either standard by providing declaration from submitter explaining high risk of competitive harm and specific harm to confidential trade secrets that would result from disclosure); Am. Small Bus. League v. DOD, 411 F. Supp. 3d 824, 836 (N.D. Cal 2019) (explicitly rejecting the District Court for the District of Columbia's standard requiring that

foreseeable harm in the context of a specific exemption, see each relevant exemption section.)

In order to meet the foreseeable harm standard in the context of Exemption 5's deliberative process privilege, the D.C. Circuit has explained that "what is needed is a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward," and that "this inquiry is context specific."[132] Courts have generally found that the foreseeable harm showing is easier to establish for other Exemption 5 privileges.[133] (For further discussion of foreseeable harm in the context of Exemption 5, see Exemption 5, Foreseeable Harm and Other Considerations.)

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agencies show disclosure would cause foreseeable competitive harm, and holding instead that "the plain and ordinary meaning of Exemption 4 indicates that the relevant protected interest is that of the information's confidentiality – that is, its private nature"); Ctr. for Investigative Reporting v. U.S. Customs & Border Prot., 436 F. Supp. 3d 90, 113 (D.D.C. 2019) (finding that foreseeable harm requirement "replaces to some extent the 'substantial competitive harm' test that the Supreme Court overruled in [Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2363 (2019)]" and that government must explain how disclosing information withheld under Exemption 4 would harm a protected interest, such as by causing genuine harm to submitter's economic or business interests, thereby dissuading others from submitting similar information to government).

[132] Reps. Comm., 3 F.4th at 370; see also Nat'l Pub. Radio, Inc. v. DHS, No. 20-2468, 2022 WL 4534730, at *8-9 (D.D.C. Sept. 28, 2022) (holding that "[t]he fatal flaw in DHS's [deliberation-chilling] 'reasonably foreseeable' justification is that it is essentially a restatement of 'the generic rationale for the deliberative process privilege itself'" and likewise rejecting "generic, boilerplate justification" that disclosure would result in public confusion (quoting Reps. Comm., 3 F.4th at 370)); Reps. Comm. for Freedom of the Press v. FBI, Nos. 15-1392 & 18-345, 2022 WL 1908841, at *3-4 (D.D.C. June 3, 2022) (concluding that "'focused and concrete'" supplemental declarations are "hardly the 'cookie-cutter formulations' that our Circuit Court rejected previously" because they "articulate[] a 'link between the specified harm and the specific information contained in the material withheld' and "'explain the particular sensitivity of the types of information at issue [and] the role that they play in the relevant agency decisional processes'" (quoting Reps. Comm., 3 F.4th at 370-71)); Emuwa, 2022 WL 1451430, at *3 (upholding agency's "robust explanations" that "asylum officers would 'temper their discussions' of a particular applicant and would focus less on 'the substance of the information' in the asylum file" and that disclosure "would impede agency deliberations" in the specific context of "'the full and proper analysis and fair consideration of [ ] asylum requests on the merits'" when declarations "'specifically focused on the information at issue'" and explained how "'disclosure of that information would chill future internal discussions'" (quoting agency declaration and Machado Amadis, 971 F.3d 364 at 371)).

[133] See Louise Trauma Ctr., 2022 WL 1081097, at *6 (holding that, although agency's declaration provides "little clarity" on foreseeable harm, "the 'context and purpose' of attorney work product makes self-evident the harm from its disclosure" (quoting Reps. Comm., 3 F.4th at 369)); Reps. Comm. for Freedom of the Press v. U.S. Customs & Border

In some cases, the foreseeable harm showing may be met if "the very context and purpose of the withheld material 'make[s] the foreseeability of harm manifest,'" even in the absence of a sufficient showing in the agency's declaration.[134] However, if an agency

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Prot., 567 F. Supp. 3d at 120 (explaining that because "Congress added the foreseeable harm requirement specifically to limit 'agency overuse and abuse of Exemption 5 and the deliberative process privilege,'" foreseeable harm showing may be more easily met for other exemptions and privileges than for the deliberative process privilege and observing that "[r]elease of attorney-client communications would undoubtably undermine our legal culture" and "the law already acknowledges and guards against the risk of harm that would come from disclosing attorney-client communications" in holding that agency's "fairly non-generalized description of that risk" is "good enough" (quoting Reps. Comm., 3 F.4th at 369)); Wash. Post Co., 2021 WL 4502106, at *23 (finding foreseeable harm standard satisfied for presidential communications privilege where declarant explained that disclosure "burdens the ability of the President and his advisors to engage in a confidential and frank decision-making process and chills or inhibits their ability to have candid discussions, thus impacting the efficiency of government policy-making" and that "in the context of the presidential communication privilege, this is sufficient" (citing Leopold v. DOJ, 487 F. Supp. 3d 1, 10 n.4 (D.D.C. 2020) (holding that risk of chilling "full and candid discussions" among Presidents and their advisers, as well as Presidents-elect and their advisers, was sufficient identification of foreseeable harm))); see also OIP Guidance: Applying a Presumption of Openness and the Foreseeable Harm Standard (posted 3/13/2023) (noting that foreseeable harm "may be easier to establish for some Exemption 5 privileges, such as the attorney-client privilege").

[134] Reps. Comm., 3 F.4th at 372; see also Greenspan v. Bd. of Governors of the Fed. Rsrv. Sys., No. 21-01968, 2022 WL 17356879, at *16 (D.D.C. Dec. 1, 2022) (observing that "[a]s [plaintiff] himself acknowledges, '[the Chairman's] words have the power to move markets and alter the world economy,'" and concluding that the context and purpose of some documents support finding of foreseeable harm notwithstanding lack of specificity because "the Court is satisfied that the information within the communications has the power to sow confusion and disrupt financial markets if disclosed"); Reps. Comm. for Freedom of the Press v. U.S. Customs & Border Prot., 567 F. Supp. 3d at 114-17, 124, 128 (considering context and purpose for each category of withheld records to determine if risk of foreseeable harm is "manifest" notwithstanding deficiencies in agency declaration's description of harm); Amiri v. Nat'l Sci. Found., No. 20-02006, 2021 WL 4438910, at *13 (D.D.C. Sept. 28, 2021) (using "context" of information withheld under Exemption 6 to find harm in disclosure "manifest" even though agency declaration did not specifically address foreseeable harm); Selgjekay v. EOUSA, No. 20-2145, 2021 WL 3472437, at *5 (D.D.C. Aug. 6, 2021) (finding that although agency "could have been more explicit" on foreseeable harm, considering context and purpose of attorney work-product privileged document, it is "hardly debatable that the government's ability to prosecute [complex financial fraud] cases would be impeded" if disclosed), summary affirmance granted, No. 21-5264, 2023 WL 2905019 (D.C. Cir. Apr. 10, 2023); Bonner v. CIA, No. 19-9762, 2021 WL 3193090, at *5 (S.D.N.Y. July 28, 2021) (finding foreseeable harm showing satisfied by in camera declaration on classified cable correspondence as "'[t]he degree of detail necessary to substantiate a claim of foreseeable harm is context-specific' and, '[i]n some instances, the

fails to meet its evidentiary burden to show reasonably foreseeable harm, whether through a harm "built-in" to an exemption element or in a separate showing, courts may require supplemental showings on harm,[135] or order the release of otherwise exempt information.[136]

"Reasonably Segregable" Showing

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."[137] The FOIA Improvement Act of 2016 further addressed segregability requirements, directing that agencies shall "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible."[138] Because of these requirements, an agency cannot "justify withholding an entire document simply by showing that it contains some exempt material."[139] Rather, this provision generally requires agencies to apply exemptions to specific portions of information within a record, instead of to the document as a whole.[140]

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withheld information may be so obviously sensitive . . . that a simple statement illustrating why the privilege applies and identifying the harm likely to result from release may be enough'" (quoting Rosenberg, 442 F. Supp. 3d at 259)).

[135] See, e.g., Reps. Comm. for Freedom of the Press v. FBI, 2022 WL 1908841, at *3 (upon remand from the D.C. Circuit, holding that supplemental declarations providing additional detail on foreseeable harm of disclosure of draft Inspector General report cured deficiencies in original agency showing).

[136] See, e.g., Reps. Comm. for Freedom of the Press v. U.S. Customs & Border Protect., 567 F. Supp. 3d at 110 (explaining that "[a]n agency's failure to make both [exemption and foreseeable harm] showings warrants disclosure" and ordering disclosure of some otherwise exempt records on the independent basis of insufficient harm showing); Savage v. Dep't of the Navy, No. 19-2983, 2021 WL 4078669, at *7 (D.D.C. Sept. 8, 2021) (same).

[137] 5 U.S.C. § 552(b) (2018) (sentence immediately following exemptions).

[138] FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (codified at 5 U.S.C. § 552(a)(8)(A)(ii)).

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

[140] See Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1212 (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., 566 F.2d at 260)); see also OIP Guidance: Segregating and Marking Documents for Release in

At the same time, courts, including the Court of Appeals for the District of Columbia Circuit, have held that agencies need not disclose nonexempt information that is "inextricably intertwined with exempt portions" or "commit significant time and resources to the separation of disjointed words, phrases or even sentences which taken separately or together have minimal or no information[al] content" in order to comply with the segregation requirement.[141] Nor do agencies need to create new records in order to comply with the reasonably segregable requirement.[142]

Accordance with the OPEN Government Act (posted 10/23/2008) (providing guidance regarding segregation of documents for release in light of statutory provisions of OPEN Government Act).

[141] Mead Data Cent., 566 F.2d at 260 & 261 n.55; see, e.g., Covington v. McLeod, No. 09-5336, 2010 WL 2930022, at *1 (D.C. Cir. July 18, 2010) (per curiam) (concluding that "because the exempt and non-exempt information in the [requested] grand jury material and proffer statement are 'inextricably intertwined,' any excision of exempt information would impose significant costs on the agency and produce edited documents with little informational value"); Nat'l Pub. Radio, Inc. v. FBI, 539 F. Supp. 3d 1, 16 (D.D.C. 2021) (concluding that any nonexempt material within FBI ballistics videos is inextricably intertwined with information properly withheld under Exemptions 7(E) and 7(F)); Elec. Priv. Info. Ctr. v. DOJ, 490 F. Supp. 3d 246, 275 (D.D.C. 2020) (holding that nonexempt information was inextricably intertwined with exempt portions of document and thus could not be further segregated); Am. Mgmt. Servs., LLC v. Dep't of Army, 842 F. Supp. 2d 859, 885 (E.D. Va. 2012) (noting that agency is under no obligation to segregate "essentially meaningless words and phrases" for release), aff'd, 703 F.3d 724 (4th Cir. 2013); Brown v. DOJ, 734 F. Supp. 2d 99, 110-11 (D.D.C. 2010) (determining that "defendant need not expend substantial time and resources to 'yield a product with little, if any, informational value'" by releasing "plaintiff's name, cities, and file numbers on documents that are otherwise exempt from production" (quoting Assassination Archives & Res. Ctr. v. CIA, 177 F. Supp. 2d 1, 9 (D.D.C. 2001))); Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 529 (S.D.N.Y. 2010) (concluding that "forcing the CIA to re-process all of the records for the sole purpose of releasing various words and phrases would be a waste of time and resources"); Asian L. 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 material and these portions are inextricably intertwined with the exempt information"); Arizechi v. IRS, No. 06-5952, 2008 WL 539058, at *6 (D.N.J. Feb. 25, 2008) (finding that segregation requirement is "futile in the case of summonses issued to witnesses" because "releasing a blank summons would serve no purpose and is not required"); Thomas v. DOJ, No. 04-112, 2006 WL 722141, at *4 (E.D. Tex. Mar. 15, 2006) (noting that redacting telephone recordings for segregable information "would have left nothing meaningful to release"), aff'd, 260 F. App'x 677 (5th Cir. 2007).

[142] See, e.g., Cole v. Copan, No. 19-1182, 2020 WL 7042814, at *7 (D.D.C. Nov. 30, 2020) (rejecting plaintiff's argument that specific nonexempt information within computer code files could be segregated for release via "screen shot" and holding that agency was under no obligation to create entirely new records by searching through coding to remove potentially nonexempt embedded data).

Courts have also held that agencies should not base their segregability determination upon an assessment of the value of the information to the requester.[143] (For a discussion of document segregation at the administrative level, see Procedural Requirements, "Reasonably Segregable" Obligation.)

In the context of FOIA litigation, agency declarations must provide an adequate basis for courts to make a segregability finding;[144] once they have done so, "conjecture is not enough to rebut [the] presumption" that an agency complied with the obligation to disclose reasonably segregable material.[145] Although as a general rule "[t]he

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[143] See, e.g., Stolt-Nielsen Transp. Grp. Ltd. v. United States, 534 F.3d 728, 734 (D.C. Cir. 2008) (rejecting agency's assessment that "redacted documents without the names and dates would provide no meaningful information" because "FOIA mandates disclosure of information, not solely disclosure of helpful information"); Antonelli v. BOP, 623 F. Supp. 2d 55, 60 (D.D.C. 2009) (holding that declarant's statement that "'no meaningful portion[] [of the withheld documents] could reasonably be released without destroying the integrity'" of document "is not significantly probative" as to whether all segregable, non-exempt material was disclosed (quoting agency declaration)); 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 because basis of its determination was that "fragmented" and "isolated" non-exempt information was inextricably intertwined with exempt material, and not whether such information was meaningful).

[144] See Porup v. CIA, 997 F.3d 1224, 1239 (D.C. Cir. 2021) (holding that declarant's sworn statement that agency "conducted a page-by-page and line-by-line review," attesting that all reasonably segregable, nonexempt information was released, and that "no additional information could be released without divulging information that . . . falls within the scope of one or more FOIA exemptions" sufficiently met segregability obligations); Machado Amadis v. U.S. Dep't of State, 971 F.3d 364, 371-72 (D.C. Cir. 2020) (noting that government agency's "line-by-line review" of documents in responding to FOIA request was sufficient as to segregability responsibilities); Ball v. USMS, No. 19-1230, 2021 WL 4860590, at *7-8 (D.D.C. Oct. 19, 2021) (upholding agency's non-segregability decision based on declarations that "[a] line-by-line review was conducted to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied").

[145] Gatson v. FBI, 779 F. App'x 112, 117-18 (3d Cir. 2019) (per curiam); accord Lewis v. U.S. Dep't of the Treasury, 851 F. App'x 214, 217 (D.C. Cir. 2021) (per curiam) (unpublished table decision) (finding obligation met when agency Vaughn Index and declarations describe what was withheld and attest that all reasonably segregable information was released, and plaintiff points to nothing that "calls into question the presumption" that agency reasonably segregated); Garza v. USMS, No. 18-5311, 2020 U.S. App. LEXIS 1917, at *4 (D.C. Cir. Jan. 22, 2020) (per curiam) (finding that agency declarations provided court with adequate basis to determine that it reasonably segregated, and plaintiff did not provide evidence to rebut presumption); Reps. Comm. for Freedom of the Press v. U.S. Customs & Border Protect., 567 F. Supp. 3d 97, 131 (D.D.C. 2021) (rejecting argument that agency's "one-paragraph explanation" does not fulfill segregability obligation when plaintiff offers "no evidence,

'segregability' requirement applies to all documents and all exemptions in the FOIA[,]"[146] courts have held that agencies need not show reasonable segregation of materials which are, by definition, wholly exempt from disclosure.[147] However, when an agency reviews records specifically to determine that they contain no reasonably segregable, nonexempt information, it must demonstrate in its evidentiary showing that the withheld materials are wholly exempt from disclosure, "with reasonable specificity."[148] Similarly, the D.C.

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much less a 'quantum,' that overcomes the presumption that agency released all reasonably segregable information" (citing Loving v. DOD, 550 F.3d 32, 41 (D.C. Cir. 2008))).

[146] Ctr. for Auto Safety v. EPA, 731 F.2d 16, 21 (D.C. Cir. 1984).

[147] See Jud. Watch, Inc. v. DOJ, 806 F. App'x 5, 7 (D.C. Cir. 2020) (per curiam) (concluding that because "entire contents of the records at issue here constitute attorney work product, protected from disclosure by Exemption 5 in their entirety, there is no segregable information" (quoting Jud. Watch, Inc. v. DOJ, 391 F. Supp. 3d 43, 53 (D.D.C. 2019))); Liounis v. Krebs, No. 18-5351, 2019 WL 7176453, at *1 (D.C. Cir. Dec. 19, 2019) (per curiam) (holding that district court need not conduct segregability analysis for document withheld under Exemption 5, attorney work-product privilege); Pickard v. DOJ, 713 F. App'x 609, 610-11 (9th Cir. 2018) (unpublished table decision) (determining that findings on segregability unnecessary "because Plaintiff is not legally entitled to any of the information"); Jud. Watch, Inc. v. DOJ, 432 F.3d 366, 371 (D.C. Cir. 2005) (same); Surgick v. Cirella, No. 09-3807, 2012 WL 1067923, at *9 (D.N.J. Mar. 29, 2012) (determining that "FOIA's segregation requirement is not applicable in this case" because not only are tax returns sought by plaintiffs "entirely exempt from disclosure [under Exemption 3 in conjunction with Section 6103 of the Internal Revenue Code], but also . . . there is no form of non-exempt information in these documents which the IRS could segregate and disclose"); Beltranena v. Dep't of State, 821 F. Supp. 2d 167, 179 (D.D.C. 2011) (noting that segregability with regard to Exemption 3 "differs somewhat from the review conducted in relation to FOIA's other exemptions" because "the disclosure-prohibiting statute" controls what is withheld); Tamayo v. DOJ, No. 07-21299, slip op. at 6 (S.D. Fla. June 18, 2011) (finding that because records withheld by FBI pursuant to Exemption 1 "were properly classified, none of the classified information is segregable and subject to disclosure"); cf. Carter v. NSA, No 13-5322, 2014 WL 2178708, at *2 (D.C. Cir. Apr. 23, 2014) (finding no agency obligation under FOIA to conduct segregability analysis if agency properly asserted Glomar response).

[148] Armstrong v. Exec. Off. of the President, 97 F.3d 575, 580 (D.C. Cir. 1996); see Liounis, 2019 WL 7176453, at *1 (holding that agency declaration and Vaughn Index that provided descriptions of withheld grand jury materials and explained why they could not be segregated for release satisfied "reasonable specificity" requirement); Sorin v. DOJ, 758 F. App'x 28, 33 (2d Cir. 2018) (per curiam) (holding that declaration's assertions that records withheld in full could not be segregated were adequate and "entitled to a presumption of good faith"); Jud. Watch, Inc. v. DHS, 880 F. Supp. 2d 105, 113 (D.D.C. 2012) (holding that agency affidavits are sufficient to fulfill agency's obligation to show with reasonable specificity why records are exempt in full); Barnard v. DHS, 598 F. Supp. 2d 1, 25 (D.D.C. 2009) (finding agency's description of why records were fully exempt adequate after agency described proportion of non-exempt information and how it was dispersed throughout

Circuit has held that if the government maintains that it does not have the technical capability to segregate digital records, specifically video media, it must explain with specificity in its declaration why it is unable to do so.[149] Conclusory assertions that an agency lacks the technological capability to segregate digital records will not suffice to meet its evidentiary burden.[150]

In Trans-Pacific Policing Agreement v. United States Customs Service, the D.C. Circuit treated the segregation obligation as a sua sponte requirement for the district court.[151] Consistent with that holding, courts have denied an agency's motion for summary judgment, or have asked for supplemental showings on segregation, when they found the declarations did not adequately demonstrate that all reasonably segregable, nonexempt information had been disclosed.[152] (For a further discussion of summary

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withheld records); see also Elec. Priv. Info. Ctr. v. TSA, No. 03-1846, 2006 WL 626925, at *8 (D.D.C. Mar. 12, 2006) (explaining that in situations where records are wholly exempt, "line-by-line" review is not required as court considers "a variety of factors to determine if Defendants' segregability justifications [are] sufficiently detailed and reasonable, rather than requiring a specific checklist of form language").

[149] Evans v. BOP, 951 F.3d 578, 587 (D.C. Cir. 2020) (rejecting "vagueness" of government's claimed inability to segregate video media and holding that it is required to explain why it "could not at least isolate some screenshots that would meet the same sort of segregability standards typically applied to printed material").

[150] See, e.g., id.; Wash. Post Co. v. SBA, No. 20-1240, 2021 WL 2982173, at *11 (D.D.C. July 15, 2021) (holding that agency did not carry evidentiary burden on segregation because it failed to adequately show why non-exempt employer identification numbers could not be segregated from social security numbers based on "conclusory" assertion that it lacked technical capability to correct for numbers that were incorrectly labeled, and failed to address plaintiff's "plausible" suggestion that SBA could seek assistance from SSA to do so); Stahl v. DOJ, No. 19-4142, 2021 WL 1163154, at *6-7 (E.D.N.Y. Mar. 26, 2021) (holding that BOP's "conclusory statements" that nonexempt information could not be segregated from videos are insufficient "[b]ecause editing is routine and inexpensive" and agency "cannot credibly claim that it lacks access to this technology").

[151] 177 F.3d 1022, 1027 (D.C. Cir. 1999) (reversing district court and indicating that district court had duty to consider reasonable segregability even though requester never sought segregability finding); see also Elliott v. USDA, 596 F.3d 842, 851 (D.C. Cir. 2010) (noting that although plaintiff did not challenge agency's segregability determination, district court properly considered it sua sponte); Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1212 (8th Cir. 2008) ("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. Policing Agreement, 177 F.3d at 1028)).

[152] See, e.g., Long v. ICE, 464 F. Supp. 3d 409, 424 & 427 (D.D.C. 2020) (ordering supplemental showing on segregability analysis when factors suggest that ICE may have withheld reasonably segregable information; Am. Immigr. Laws. Ass'n v. DHS, 852 F. Supp.

judgment, see Litigation Considerations, Summary Judgment.) In the absence of an adequate showing in an agency's declaration, courts have on occasion conducted their own segregability analysis based on their review of the parties' public submissions,[153] or

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2d 66, 80-81 (D.D.C. 2012) (ordering defendant to provide revised Vaughn submissions to address segregability where agency "fail[ed] to describe the proportion of exempt to non-exempt information and fail[ed] to establish that any non-exempt information is 'inextricably intertwined' with exempt information" (quoting Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977))); Elec. Frontier Found. v. DOJ, 826 F. Supp. 2d 157, 174 (D.D.C. 2011) (finding "DOJ's description of its segregation efforts . . . too categorical for the Court to evaluate whether any factual material in the documents withheld in full is 'inextricably intertwined' with the deliberative material"); McGehee v. DOJ, 800 F. Supp. 2d 220, 238 (D.D.C. 2011) (concluding that FBI's submissions are "deficient and must be supplemented" where "the failure of the Vaughn Index to provide any specific information regarding the missing pages and numerous redactions renders it impossible to evaluate the FBI's conclusions that the pages had no segregable portions"); Gray v. U.S. Army Crim. Investigation Command, 742 F. Supp. 2d 68, 76 (D.D.C. 2010) (holding that agency's assertion that records were properly withheld in full because they "were compiled in the course of an ongoing investigation and disciplinary action [and] [t]herefore none of the materials were segregable" is insufficient "to establish that there were no segregable portions"); Ctr. for Biological Diversity v. OMB, No. 07-4997, 2008 WL 5129417, at *9 (N.D. Cal. Dec. 4, 2008) (requiring agency to provide more particularized affidavits because it used "boilerplate segregability language" to describe records and failed to document any "inability on its part to parse the records, such that incomplete segments of records would be rendered meaningless if disclosed"); United Am. Fin., Inc. v. Potter, 531 F. Supp. 2d 29, 41 (D.D.C. 2008) (determining that agency's conclusory assertions of segregability are not sufficient because they fail to explain "why purely factual information in the public domain . . . is not reasonably segregable"); Pa. Dep't of Pub. Welfare v. HHS, No. 05-1285, 2006 WL 3792628, at *17 (W.D. Pa. Dec. 21, 2006) (concluding that agency's declaration is too broad and fails to provide factual recitation as to segregability); Nat'l Res. Def. Council v. DOD, 388 F. Supp. 2d 1086, 1106 (C.D. Cal. 2005) (finding that segregability analysis is not met based on a "boilerplate statement . . . , which conclusorily asserts [that] 'all reasonably segregable information has been released'" (quoting Wiener v. FBI, 943 F.2d 972, 988 (9th Cir. 1991))); 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).

[153] See, e.g., Ferranti v. ATF, 177 F. Supp. 2d 41, 47 (D.D.C. 2001) (recognizing "substantial defect" in declaration that fails to refer explicitly to segregability, but nevertheless determining independently that segregability requirement is 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 (D.C. Cir. Oct. 2, 2002); Campaign for Fam. 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).

after reviewing material in camera.[154] (For a further discussion of in camera review, see Litigation Considerations, In Camera Inspections.) Notably, if the lower court initially failed to make a segregability finding, the court of appeals has at times remanded the matter to the district court.[155] Nevertheless, an appellate court can elect to make the segregation determinations itself.[156]

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[154] See Bartko v. DOJ, 167 F. Supp. 3d 55, 73 (D.D.C. 2016) ("The Court, in an abundance of caution, . . . undertook its own in camera review," and "[a]fter conducting such review, the Court is satisfied that no additional materials need be released, for '[t]he non-exempt portions of these documents that have been redacted are inextricably intertwined with exempt portions and they need not be further segregated.'" (quoting Am. Immigr. Council v. DHS, 21 F. Supp. 3d 60, 83 (D.D.C. 2014))); ACLU v. DOD, 389 F. Supp. 2d 547, 567-68 (S.D.N.Y. 2005) (granting government's motion for summary judgment with regard to segregability based on in camera review of Vaughn Index and classified declarations); cf. 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).

[155] See Waterman v. IRS, 755 F. App'x 26, 28 (D.C. Cir. 2019) (holding that "[a] district court 'clearly errs when it approves the government's withholding of information under the FOIA without making an *express* finding on segregability'" (quoting *PHE Inc. v. DOJ*, 983 F.2d 248, 252 (D.C. Cir. 1993))); Hamdan v. DOJ, 797 F.3d 759, 779 (9th Cir. 2015) (finding reversible error and remanding where district court "approve[d] the withholding of a document without a segregability finding"); Callaway v. Dep't of Treasury, No. 08-5480, 2009 WL 10184495, at *2 (D.C. Cir. June 2, 2009) (per curiam) (remanding where "[t]here was insubstantial support for the district court's determination that the government has withheld only exempt material . . . [and] [t]he government's affidavits state only legal conclusions regarding segregability"); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1116 (D.C. Cir. 2007) (explaining that if district court approves agency's withholdings without making finding of segregability, then "remand is required even if the requester did not raise the issue of segregability before the court"). But cf. Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1196 (11th Cir. 2019) (declining remand notwithstanding lower court's failure to explicitly use word "segregability" in its "lengthy" redaction analysis and in camera review: "[The court] will not require such a pointless formality.").

[156] See Porup v. CIA, 997 F.3d 1224, 1238-39 (D.C. Cir. 2021) (exercising discretion to make segregability determination rather than remanding to district court solely for that purpose, and finding that agency's declaration demonstrated that it met its segregability obligations); Juarez v. DOJ, 518 F.3d 54, 60 (D.C. Cir. 2008) (determining that district court's failure to address segregability was "reversible error," yet concluding that, based on its review of agency affidavits, "no part of the requested documents was improperly withheld" and accordingly finding that no remand was necessary); Carpenter v. DOJ, 470 F.3d 434, 443 (1st Cir. 2006) (concluding that, although district court failed to find expressly that there were no reasonably segregable portions, district court's in camera inspection afforded it an opportunity to make this determination, and confirming that records were reasonably segregated based on its own review); Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994) (same).

In Camera Inspection

The FOIA specifically authorizes in camera examination of documents;[157] however, district courts have "broad discretion" to decide if this type of review "is necessary to determine whether the government has met its burden."[158] Courts typically exercise their discretionary authority to order in camera inspection in exceptional, rather than routine, cases because such review circumvents the adversarial process and may be burdensome for the court to conduct.[159]

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[157] See 5 U.S.C. § 552(a)(4)(B) (2018); see also S. Conf. Rep. No. 93-1200, at 9 (1974), as reprinted in 1974 U.S.C.C.A.N. 6267, 6287.

[158] Loving v. DOD, 550 F.3d 32, 41 (D.C. Cir. 2008) (citing Armstrong v. Exec. Off. of the President, 97 F.3d 575, 577-78 (D.C. Cir. 1996)); see NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) ("The *in camera* review provision is discretionary by its terms . . . ."); Manivannan v. DOE, 843 F. App'x 481, 483 (4th Cir. 2021) (per curiam) (holding that "the district court did not abuse its discretion in determining that an in camera review was unnecessary to determine whether the agency validly applied the personal privacy exemption"); Garza v. USMS, No. 18-5311, 2020 U.S. App. LEXIS 1917, at *2 (D.C. Cir. Jan. 22, 2020) (holding that lower court "did not abuse its discretion by not conducting an in camera review to determine whether all reasonably segregable information had been released"); Mobley v. CIA, 806 F.3d 568, 588 (D.C. Cir. 2015) (finding that "the district court, after reviewing *in camera* the FBI's classified declaration, acted within its sound discretion when it decided that it did not need to review the classified document *in camera* to conclude that the FBI withheld it as properly classified"); Larson v. Dep't of State, 565 F.3d 857, 869-70 (D.C. Cir. 2009) (noting that "[i]n camera review is available to the district court if the court believes it is needed 'to make a responsible de novo determination on the claims of exception'" (quoting Juarez v. DOJ, 518 F.3d 54, 60 (D.C. Cir. 2008)); Peltier v. FBI, 563 F.3d 754, 759 (8th Cir. 2009) (same); Rein v. U.S. Pat. & Trademark Off., 553 F.3d 353, 377 n.34 (4th Cir. 2009) (same); Halpern v. FBI, 181 F.3d 279, 295 (2d Cir. 1999) (noting that in camera "review would have been appropriate," but leaving this to "the trial court's discretion on remand"), on remand, No. 94-365A, 2002 WL 31012157, at *14 (W.D.N.Y. Aug. 31, 2002) (magistrate's recommendation) (denying plaintiff's motion for in camera inspection), adopted, (W.D.N.Y. Oct. 17, 2002); Jernigan v. Dep't of the Air Force, 163 F.3d 606, 606 n.3 (9th Cir. 1998) (unpublished table decision) ("Section 552(a)(4)(B) empowers, but does not require, a district court to examine the contents of agency records in camera . . . ."); Parsons v. FOIA Officer, 121 F.3d 709, 709 (6th Cir. 1997) (unpublished table decision) (explaining that district court has discretion to conduct in camera inspection but it is neither "favored nor necessary" so long as adequate factual basis for decision exists); 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"); Ball v. USMS, No. 19-1230, 2021 WL 4860590, at *8 (D.D.C. Oct. 19, 2021) (finding in camera review unnecessary to grant summary judgement where affidavits are sufficient, there are no contradictions in the record, and no evidence of agency bad faith (citing ACLU v. DOD, 628 F.3d 612, 626 (D.C. Cir. 2011))).

[159] 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

In camera review is generally not necessary or appropriate when agencies meet their burden of proof by means of sufficiently detailed declarations.[160] However, when

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resolved"); Ctr. for Biological Diversity v. Off. of the U.S. Trade Rep., 450 F. App'x 605, 608 (9th Cir. 2011) (reiterating that "'resort to in camera review is appropriate only after the government has submitted as detailed public affidavits and testimony as possible'" (quoting Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991))); Mo. Coal. for the Env't Found. 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 judicial 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))); 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 of Cal. v. Dep't of Army, 611 F.2d 738, 743 (9th Cir. 1980))); Jones v. FBI, 41 F.3d 238, 243 (6th Cir. 1994) (noting that Sixth Circuit has previously "suggested that in camera review is disfavored because it circumvents the adversarial process . . . ." (citing Vaughn v. United States, 936 F.2d 862, 866 (6th Cir. 1991))); PHE, Inc. 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); Currie v. IRS, 704 F.2d 523, 530 (11th Cir. 1983) ("Thorough in camera inspection of the withheld documents where the information is extensive and the claimed exemptions are many . . . is not the preferred method of determining the appropriateness of the government agency's characterization of the withheld information."); Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978) ("In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt.'").

[160] See, e.g., Rutigliano v. DOJ, 847 F. App'x 86, 87 (2d Cir. 2021) (rejecting requester's claim that lower court abused its discretion declining to conduct in camera review because "'[w]hen the agency meets its burden by means of affidavits, in camera review is neither necessary nor appropriate'" (quoting Larson, 565 F.3d at 870)); Life Extension Found., Inc. v. IRS, 559 F. App'x 3, 4 (D.C. Cir. 2014) (finding that district court did not abuse its discretion in declining to order in camera review where "affidavits sufficiently described the material withheld"); ACLU, 628 F.3d at 626 (stating that in camera inspection is "neither necessary nor appropriate" where "agency meets its burden by means of affidavits" (quoting Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979))); Hull v. IRS, 656 F.3d 1174, 1196 (10th Cir. 2011) (determining that district court did not abuse its discretion in declining to order in camera review where agency demonstrated with "reasonable specificity" why records were exempt, and plaintiffs have not established bad faith); Larson, 565 F.3d at 870 (noting that "[i]f the agency's affidavits 'provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted by the record, and there is no evidence in the record of agency bad faith, then summary judgment is appropriate without in camera review of the documents'" (quoting Hayden, 608 F.2d at 1387)); Mo. Coal. for the Env't Found., 542 F.3d at 1210 (finding in camera review not necessary because agency affidavits and Vaughn Index contained sufficient detail); Nowak v. IRS, 210 F.3d 384, 384 (9th Cir. 2000) (unpublished table decision) (finding in camera review unnecessary where affidavits were sufficiently detailed); Young v. CIA, 972 F.2d 536,

agency declarations are insufficiently detailed to permit meaningful review, in camera review remains an option available to courts to evaluate agency exemption claims.[161]

The District Court for the District of Columbia has noted that in camera review "may be appropriate" when "'the number of records involved is relatively small,'" "'a discrepancy exists between an agency's affidavit and other information that the agency has publicly disclosed,'" and "'when the dispute turns on the contents of the documents, and not the parties' interpretations of the documents.'"[162] Additionally, in cases involving

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538 (4th Cir. 1992) (rejecting in camera inspection when affidavits and Vaughn Indices were sufficiently specific); Silets v. DOJ, 945 F.2d 227, 229-32 (7th Cir. 1991) (en banc) (same); Vaughn, 936 F.2d at 869 (finding in camera review "neither favored nor necessary where other evidence provides adequate detail and justification").

[161] See, e.g., Islamic Shura Council of S. Cal. v. FBI, 635 F.3d 1160, 1166 (9th Cir. 2011) ("If the [agency's] affidavits are too vague, the court 'may examine the disputed documents in camera to make a first hand determination of their exempt status.'" (quoting Lane, 523 F.3d at 1135-36)); 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 Com., 995 F.2d 1247, 1252 n.12 (4th Cir. 1993) ("By conducting in camera review, the district court established an adequate basis for its decision."); 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[.]" (citing Church of Scientology of Cal., 611 F.2d at 743)).

[162] People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 307 (D.D.C. 2007) (quoting Elec. Priv. Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 119 (D.D.C. 2005)); accord Quiñon, 86 F.3d at 1228 (suggesting that number of documents is "another . . . factor to be considered" when determining whether in camera review is appropriate); Maynard v. CIA, 986 F.2d 547, 558 (1st Cir. 1993) ("In camera review is particularly appropriate when the documents withheld are brief and limited in number."); see also Rugiero v. DOJ, 257 F.3d 534, 543 (6th Cir. 2001) (stating that following factors should be considered when determining whether in camera review is appropriate: "'(1) judicial economy; (2) actual agency bad faith, either in the FOIA action or in the underlying activities that generated the records requested; (3) strong public interest; and (4) whether the parties request in camera review'"); Elec. Priv. Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 82-83 (D.D.C. 2008) (stating that in camera review is appropriate where agency affidavits are deficient with respect to segregability analysis and relatively few number of documents are at issue); Cole v. DOJ, No. 05-674, 2006 WL 2792681, at *5 (D.D.C. Sept. 27, 2006) (stating that in camera review is appropriate when "the affidavit is 'insufficiently detailed to permit meaningful review of exemption claims,' where there is evidence of bad faith on the part of the agency, or where

a large number of documents, the court may conduct in camera review of a smaller sample.[163]

In camera review has also been utilized to evaluate whether the government waived its right to claim an exemption,[164] properly invoked a privilege,[165] or withheld information that was publicly available.[166] Further, in camera inspection has been used to verify that

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the judge wishes to resolve an uneasiness about the government's 'inherent tendency to resist disclosure'") (citations omitted).

[163] See, e.g., Carter v. U.S. Dep't of Com., 830 F.2d 388, 393 n.16 (D.C. Cir. 1987) (suggesting that for voluminous documents, "selective inspection of . . . documents [is] often an appropriate compromise"); Dickstein Shapiro LLP v. DOD, 730 F. Supp. 2d 6, 10 (D.D.C. 2010) (ordering in camera review of representative sample of five percent of responsive records to be chosen by both parties that "fairly and equally represent the particular FOIA exemptions at issue"); N.Y. Pub. Int. Res. Grp. 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 1,000 pages withheld in whole or in part, selected equally by parties, for in camera examination).

[164] See, e.g., Tigue v. DOJ, 312 F.3d 70, 82 (2d Cir. 2002) (concluding, following in camera inspection, that "even the limited factual material admittedly in the public domain is too intertwined with evaluative and policy decisions to require disclosure"); ACLU v. DOJ, No. 12-794, 2015 WL 4470192, at *15 (S.D.N.Y. July 16, 2015) (ordering in camera review of documents because "[i]t is not possible to ascertain whether the privileges with respect to some, or all, of [the documents] have been waived").

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

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

an agency has released all reasonably segregable information,[167] and to ascertain whether a district court properly ruled on the merits of a case.[168]

Although mere allegations of bad faith have been found to be insufficient to justify use of in camera inspection,[169] the Court of Appeals for the District of Columbia Circuit has noted that such review may be appropriate if there is evidence of bad faith.[170] In

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

[168] See, e.g., FlightSafety Servs. Corp. v. Dep't of Lab., 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).

[169] See Mobley v. CIA, 806 F.3d 568, 588 (D.C. Cir. 2015) (concluding that district court did not abuse its discretion by failing to conduct in camera review of classified documents where plaintiff did not show agency affidavits were insufficient and did not offer evidence of bad faith); ACLU v. DOD, 628 F.3d 612, 627 (D.C. Cir. 2011) (finding plaintiff's "claim that the government acted in bad faith is meritless" and concluding, on that basis, that "district court did not abuse its discretion by granting the government's motion for summary judgment without conducting in camera review"); Rugiero v. DOJ, 257 F.3d 534, 547 (6th Cir. 2001) (finding that requester failed to demonstrate "strong evidence of bad faith that calls into question the district court's decision not to conduct an in camera review"); Ford v. West, 149 F.3d 1190, 1190 (10th Cir. 1998) (unpublished table decision) ("'[M]ere allegation[s] of bad faith' should not 'undermine the sufficiency of agency submissions.'" (quoting Minier v. CIA, 88 F.3d 796, 803 (9th Cir. 1996))); Silets v. DOJ, 945 F.2d 227, 231 (7th Cir. 1991) (finding mere assertion, as opposed to actual evidence, of bad faith on part of agency insufficient to warrant court's in camera review); Hall v. CIA, 881 F. Supp. 2d 38, 75 (D.D.C. 2012) (declining to conduct in camera review even though plaintiff cited two instances of inadequate segregability because "[w]hen thousands upon thousands of pages of records are involved, it is inevitable that some unnecessary redactions will be made," and finding that because they are "minor" and there is no evidence of bad faith, in camera review is not necessary).

[170] See Quiñon v. FBI, 86 F.3d 1222, 1228 (D.C. Cir. 1996) (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").

camera inspection has also been undertaken in situations where the handling of the records at issue or the underlying activities described in the records give rise to questions of potential bad faith or other improprieties by the government.[171]

Finally, courts have permitted agencies leave to file in camera declarations where they have created as complete a public record as possible but cannot adequately explain the harms from disclosure without causing those harms.[172] However, the D.C. Circuit has

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[171] See Jones v. FBI, 41 F.3d 238, 242-43 (6th Cir. 1994) (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"); Elec. Priv. Info. Ctr. v. DOJ, 442 F. Supp. 3d 37, 52 (D.D.C. 2020) ("[C]onsidering the record in this case, the Court must conclude that the actions of Attorney General Barr and his representations about the Mueller Report preclude the Court's acceptance of the validity of the Department's redactions without its independent verification."); Habeas Corpus Res. Ctr. v. DOJ, No. 08-2649, 2008 WL 5000224, at *1 (N.D. Cal. Nov. 21, 2008) (reviewing documents in camera where plaintiff alleged that "certain interests may have been permitted to exercise undue influence over the development of [a] regulation"); Hiken v. DOD, 521 F. Supp. 2d 1047, 1055-56 (N.D. Cal. 2007) (ordering in camera review to supplement agency declaration because "while the record does not support a finding of bad faith . . . , defendants' underlying activities with respect to Iraq and the accuracy of government disclosures about activities in Iraq is sufficient to raise questions in the mind of the public as to the defendants' good faith or lack thereof").

[172] See, e.g., Agrama v. IRS, No. 17-5270, 2019 WL 2064505, at *2 (D.C. Cir. Apr. 19, 2019) (holding that district court acted within its discretion in finding good cause for permitting *ex parte* submissions because "requiring the IRS to produce further 'public justification would threaten to reveal the very information for which a FOIA exemption is claimed'" (quoting *Lykins v. DOJ*, 725 F.2d 1455, 1463 (D.C. Cir. 1984))); Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1083 (9th Cir. 2004) (holding that "resort to in camera review is appropriate only after the [agency] has submitted as much detail in the form of public affidavits and testimony as possible"); Elec. Priv. Info. Ctr. v. DEA, 401 F. Supp. 3d 37, 44 (D.D.C. 2019) (finding in camera inspection appropriate after "a redacted version of [defendant's] declaration was filed on the public docket, and this redacted version explains the justifications for why the DEA submitted it *in camera");* Jarvik v. CIA, 741 F. Supp. 2d 106, 111-13 (D.D.C. 2010) (permitting agency leave to file in camera Vaughn declaration where court "cannot meaningfully review the defendant's actions based on the current public record and the CIA cannot provide further information on the public record" due to national security concerns); Barnard v. DHS, 598 F. Supp. 2d 1, 16-17 (D.D.C. 2009) (explaining that court granted leave to submit in camera affidavit where agency could not release any additional information about investigation without revealing precise information that it sought to withhold); cf. Pub. Citizen Health Res. Grp. v. Dep't of Lab., 591 F.2d 808, 809 (D.C. Cir. 1978) (ruling that district court should not have refused to examine affidavit proffered in camera in an Exemption 6 case, because affidavit was "the only matter available . . . that would have enabled [the court] to properly decide de novo the propriety of" the agency's exemption claim).

noted that in camera declarations are generally "disfavored."[173] 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.[174]

Waiver of Exemptions in Litigation

Because the FOIA directs district courts to review agency actions de novo,[175] an agency is not barred from invoking a particular exemption in litigation merely because that exemption was not raised at the administrative level.[176] However, waiver may occur

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[173] Armstrong v. Exec. Off. of the President, 97 F.3d 575, 580 (D.C. Cir. 1996); see also Pub. Citizen v. Dep't of State, 100 F. Supp. 2d 10, 27 (D.D.C. 2000) (explaining that "in camera declarations are disfavored as a first line of defense").

[174] 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, 1470 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 where district court refused to allow plaintiff's counsel to view agency's affidavits and withheld documents submitted in camera); Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982) (finding no error "in the decision of the District Court to exclude appellant's counsel from the ex parte proceedings"); Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) (holding District Court "was correct in following our directions and excluding counsel from the in camera viewing").

[175] 5 U.S.C. § 552(a)(4)(B) (2018).

[176] See, e.g., Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992) ("[A]n agency does not waive FOIA exemptions by not raising them during the administrative process." (citing Dubin v. Dep't of Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981)), aff'd, 697 F.2d 1093 (11th Cir. 1983)); Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1318 (D. Utah 2003) (citing Young) (same); Sinito v. DOJ, No. 87-0814, 2000 WL 36691372, at *16 (D.D.C. July 12, 2000) (same); Frito-Lay v. EEOC, 964 F. Supp. 236, 239 (W.D. Ky. 1997) ("[A]n agency's failure to raise an exemption at any level of the administrative process does not constitute a waiver of that defense."); Farmworkers Legal Servs. v. U.S. Dep't of Labor, 639 F. Supp. 1368, 1370-71 (E.D.N.C. 1986) ("The relevant cases universally hold that exemption defenses are not too late if initially raised in the district court."); see also Pohlman, Inc. v. SBA, No. 03-01241, 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

for failing to raise exemption claims at the administrative level of "reverse" FOIA actions as those lawsuits fall under the Administrative Procedure Act and review is limited to the administrative record.[177]

An agency with identical documents at issue in both a FOIA and 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."[178] However, an agency's failure to timely raise an exemption in a FOIA case at the district court level may result in a waiver of the agency's ability to assert the exemption.[179]

Although an agency is not generally required to plead its exemptions in its answer to a complaint,[180] the Court of Appeals for the District of Columbia Circuit has held that

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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).

[177] See, e.g., 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).

[178] Stonehill v. IRS, 558 F.3d 534, 536 (D.C. Cir. 2009); see also Marshall v. FBI, 802 F. Supp. 2d 125, 136 (D.D.C. 2011) (finding court order for production of records in criminal case did not constitute waiver for purposes of FOIA because "disclosure obligations under FOIA and disclosure obligations in criminal proceedings are separate matters, governed by different standards"); Moffat v. DOJ, No. 09-12067, 2011 WL 3475440, at *19 (D. Mass. Aug. 5, 2011) (finding previous production in full during criminal trial irrelevant and concluding that no waiver occurred "as the standards for disclosure of information under FOIA are different from the standards of disclosure of information in a criminal trial").

[179] 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"); cf. Citizens for Resp. & Ethics in Wash. v. DOJ, 854 F.3d 675, 681 (D.C. Cir. 2017) (refusing to allow FBI to belatedly invoke Exemption 5 even when Criminal Division timely did so because "DOJ utilized a decentralized process, in which the Criminal Division and the FBI independently decided whether or not to release responsive records that originated in their respective components").

[180] See, e.g., Sciba v. Bd. of Governors of the Fed. Rsrv. Sys., No. 04-1011, 2005 WL 758260, at *1 n.3 (D.D.C. Apr. 1, 2005) (recognizing 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 "Plaintiff has had ample notice of and opportunity to rebut Defendant's defenses"); Farmworkers Legal Servs, 639 F. Supp. at 1371 (same); Berry v. DOJ, 612 F. Supp. 45, 47 (D. Ariz. 1985) (same). But see Ray v.

"'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.'"[181] 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.[182] Generally, however, in the absence of mitigating factors, discussed below, an agency's failure to adequately preserve its exemption positions or other claims at the district court level has resulted in waiver of those claims – not only during the initial

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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))); 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).

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

[182] See, e.g., Reliant Energy Power Generation v. FERC, 520 F. Supp. 2d 194, 201-02 (D.D.C. 2007) (concluding that agency did not waive right to claim Exemption 4 by raising claim in second motion for summary judgment because court's denial of agency's first motion for summary judgment was not ruling in plaintiff's favor, as plaintiff's own motion for summary judgment was also denied); Jud. 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"); cf. Senate of P.R., 823 F.2d at 581 (holding that "the district judge did not abuse *his* discretion when he evaluated the situation at hand as one inappropriate for application of a rigid 'press it at the threshold, or lose it for all times' approach to the agency's FOIA exemption claims"); Piper v. DOJ, 374 F. Supp. 2d 73, 78 (D.D.C. 2005) (opining that while FOIA exemptions not raised at initial district court proceedings ordinarily may be waived, if disclosure "will impinge on rights of third parties that are expressly protected by FOIA . . . district courts not only have the discretion, but sometimes the obligation to consider newly presented facts and to grant" post-judgment relief).

district court proceedings,[183] but also at the appellate level,[184] and even following a remand.[185] However, where waiver of an agency's claims may cause a "manifest injustice," a court has the discretion to hear such late claims.[186]

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[183] 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 1557 (same); Scheer v. DOJ, No. 98-1613, slip op. at 4-5 (D.D.C. July 24, 1999) (denying motion for reconsideration to present new exemption claims, partly because defendant did not show "why, through the exercise of due diligence, it could not have presented this evidence before judgment was rendered"), remanded per stipulation, No. 99-5317 (D.C. Cir. Nov. 2, 2000); Miller v. Sessions, No. 77-3331, 1988 WL 45519, at *1-2 (N.D. Ill. May 3, 1988) (holding "misunderstanding" on part of government counsel of court's order to submit additional affidavits insufficient to overcome waiver); Powell v. DOJ, No. 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. Jud. Watch, Inc. v. DOE, 319 F. Supp. 2d 32, 34-35 (D.D.C. 2004) (denying motion for reconsideration, explaining that government may not raise for first time presidential communication privilege after summary judgment was granted to plaintiff).

[184] 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).

[185] 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 v. DOJ, 617 F.2d 781, 792 & n.38a (D.C. Cir. 1980) (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 Vaughn indexed). 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 on remand), 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 district court to determine whether sealing order actually prohibits disclosure under FOIA, but noting that "[b]ecause the [agency] claimed that the seal prohibited it from disclosing" agency "did not consider whether the notes fall within any of the FOIA exemptions[]" and therefore, agency can invoke other exemptions "if the court determines that the seal does not prohibit disclosure").

[186] Brennan Ctr. for Just. at NY Univ. Sch. of L. v. DOJ, No. 18-1860, 2021 WL 2711765, at *8-9 (D.D.C. Jul. 1, 2021) (granting Department's motion for reconsideration, in part, after determining that not doing so may cause "manifest injustice" to third parties "who cannot be blamed for the Department's delay" in raising additional privacy arguments and ultimately finding that some additional categories of third-party records may be withheld).

In Maydak v. DOJ,[187] the D.C. Circuit refused to allow the defendant agency to invoke underlying FOIA exemptions when its initial Exemption 7(A) basis for nondisclosure became moot due to the completion of the underlying law enforcement proceedings.[188] 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,"[189] 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.[190] (For further discussion of waiver of Exemption 7(A) in litigation, see Exemption 7(A), Changes in Circumstances in Litigation When Exemption 7(A) No Longer Applies.)

Three years later, when another D.C. Circuit panel was presented with a similar situation, in August v. FBI,[191] the court pointed out that it did not intend to "adopt[] a rigid 'press it at the threshold or lose it for all times' approach to . . . agenc[ies'] FOIA exemption claims."[192] Significantly, that panel emphasized the fact that the full court in Jordan v. DOJ[193] had adopted a "flexible approach to handling belated invocations of FOIA exemptions," which it said actually was "affirmed" in Maydak.[194] The D.C. Circuit in August acknowledged three circumstances that might permit the government to belatedly invoke FOIA exemptions: a substantial change in the factual context of a case; an interim development in an applicable legal doctrine; or pure mistake.[195] Moreover, in

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[187] 218 F.3d 760 (D.C. Cir. 2000).

[188] Id. at 767.

[189] Id. (citing, e.g., Senate of P.R. v. DOJ, 823 F.2d 574, 580-81 (D.C. Cir. 1987)).

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

[191] 328 F.3d 697 (D.C. Cir. 2003).

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

[193] 591 F.2d 753 (D.C. Cir. 1978).

[194] 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 district court proceedings - but not requiring "that all exemptions . . . be raised at the same time").

[195] August, 328 F.3d at 700 (citing Jordan); see, e.g., Citizens for Resp. & Ethics in Wash. v. DOJ, 854 F.3d 675, 680-81 (D.C. Cir. 2017) (discussing reasons for allowing untimely assertion of exemption and finding that defendant has not provided sufficient basis for declining to assert exemption in a timely manner); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1119 (D.C. Cir. 2007) (relying on August and explaining that "where an agency fails 'through pure mistake' to cite a particular exemption, the appellate court has discretion

two rulings issued shortly after August, the D.C. Circuit suggested that an agency's belated raising of FOIA exemptions may also be appropriate in circumstances where the agency did not produce responsive records based on a preliminary, nonexemption-based rationale that is rejected in litigation.[196]

Frivolous Lawsuits

Occasionally, courts have considered whether a FOIA plaintiff is filing frivolous lawsuits. The Court of Appeals for the District of Columbia Circuit has ruled that generally FOIA plaintiffs' "mere litigiousness alone does not support the issuance of an injunction" against filing further lawsuits.[197] Nevertheless, where a plaintiff has a history of initiating frivolous claims, courts have required them to seek leave of court before filing further FOIA actions.[198]

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to remand for consideration of the exemption, at least where the government's case is sufficiently strong"); Hiken v. DOD, 872 F. Supp. 2d 936, 941 (N.D. Cal. 2012) (concluding that "the Supreme Court's decision, in Milner, to overturn the interpretation of Exemption 2 on which Defendants had relied constitutes an 'interim development in applicable legal doctrine' sufficient to warrant the government's assertion of a belated FOIA exemption"); Gerstein v. CIA, No. 06-4643, 2008 WL 4415080, at *13 (N.D. Cal. Sept. 26, 2008) (finding that CIA did not waive right to claim exemption although it failed to raise claim in initial motion because omission was inadvertent and CIA made adequate showing as to excusable neglect); Jud. 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).

[196] See United We Stand Am., Inc. v. IRS, 359 F.3d 595, 597-603 (D.C. Cir. 2004) (finding that agency could belatedly raise exemption claims on remand where agency unsuccessfully argued on appeal that a responsive record was not an agency record and agency "reserve[d] the right" to raise exemptions if court disagreed with agency's position); LaCedra v. EOUSA, 317 F.3d 345, 348 (D.C. Cir. 2003) (finding agency's narrow interpretation of request "implausible" but permitted agency to belatedly raise exemptions on remand on 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").

[197] 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'").

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

Appointment of Counsel

Where a pro se FOIA plaintiff seeks appointment of counsel, a district court has wide discretion to decide whether to grant that request under 28 U.S.C. § 1915(e)(1).[199] The Court of Appeals for the District of Columbia Circuit has held that a court should consider several factors in making this decision: 1) the nature and complexity of the action, 2) the potential merit of the claims, 3) the inability of a pro se party to obtain counsel by other means, and 4) the degree to which the interests of justice will be served by appointment of counsel.[200] (For a discussion of the availability of attorney fees in the

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

[199] (2019); see, e.g., Schwarz v. U.S. Dep't of the Treasury, No. 00-5453, 2001 WL 674636, at *1 (D.C. Cir. May 10, 2001) (declaring that "appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits").

[200] See Willis v. FBI, 274 F.3d 531, 532-33 (D.C. Cir. 2001) (citing local court rules as most appropriate basis upon which to decide appointment of counsel question in FOIA case); see also Rose v. DOJ, No. 19-5191, 2020 WL 283002, at *1 (D.C. Cir. Jan. 16, 2020) (denying motion to appoint counsel because appellants "have not demonstrated sufficient likelihood of success on the merits"); Pinson v. DOJ, 104 F. Supp. 3d 30, 35-36 (D.D.C. 2015) (agreeing with parties that "because the BOP's mail policy prohibits [plaintiff] from accessing some documents responsive to his FOIA requests, . . . [plaintiff] is currently unable to view documents relevant to this litigation, and in light of the fact that a number of his FOIA claims have proven meritorious and survived Defendants' motions for partial summary judgment, appointment of counsel is appropriate and will serve the interests of justice"); Shehadeh v. FBI, No. 10-3306, 2011 WL 2909202, at *1 (C.D. Ill. July 18, 2011) ("In deciding whether to allow a request for pro bono counsel, the Court must consider: (1) whether the indigent plaintiff has made a reasonable attempt to obtain counsel or has been effectively precluded from doing so; and, (2) whether the plaintiff appears competent to litigate the matter for himself."); Jackson v. EOUSA, No. 07-6591, 2008 WL 4444613, at *2-3 (S.D.N.Y. Sept. 25, 2008) (denying appointment of counsel in light of plaintiff's demonstrated abilities to pursue her FOIA claim, and given that factual and legal issues relating to her FOIA claim do not appear overly complex).

event that counsel is appointed, see Attorney Fees.) Additionally, it has been held that the FOIA does not provide a plaintiff, pro se or otherwise, with a right to a jury trial.[201]

Special Counsel Provision

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

> Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States 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.[202]

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.[203] Courts have declined to order a referral to the Office of Special Counsel where these prerequisites have not been met.[204]

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[201] See, e.g., Begay v. NARA, No. 21-782, 2021 WL 4589085, at *3 (D.D.C. Oct. 6, 2021) (finding "FOIA only offers equitable remedies," and "[p]laintiff has no right to a jury trial"); Buckles v. Indian Health Serv./Belcourt Serv. Unit, 268 F. Supp. 2d 1101, 1102 (D.N.D. 2003) (finding "[n]either the Privacy Act nor the [FOIA] provide a plaintiff with a right to a jury trial" because "[t]he Seventh Amendment of the Constitution does not grant a plaintiff a right to a jury trial in actions against the United States" (citing Lehman v. Nakshian, 453 U.S. 156, 160-61 (1981)).

[202] 5 U.S.C. § 552(a)(4)(F)(i) (2018) (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).

[203] See 5 U.S.C. § 552(a)(4)(F)(i).

[204] See, e.g., Light v. DOJ, 968 F. Supp. 2d 11, 31 (D.D.C. 2013) (declining to refer defendant to Office of Special Counsel after rejecting plaintiff's claim of wrongful delay and arbitrary action because plaintiffs made six separate detailed FOIA requests which compelled defendant to take additional time to search); Pub. Emps. for Env't Resp. v. U.S. Sec. Int'l Boundary & Water Comm'n, 839 F. Supp. 2d 304, 329-30 (D.D.C. 2012) (denying plaintiff's request to refer matter to Office of Special Counsel based on its unfounded allegations that

One court 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."[205]

Considerations on Appeal

As noted previously, an exceptionally large percentage of FOIA cases are decided by summary judgment.[206] While a decision fully granting a motion for summary

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agency denied existence of record and exaggerated threat of harm in disclosure); Hernandez v. U.S. Customs & Border Protect. Agency, No. 10-4602, 2012 WL 398328, at *13 (E.D. La. Feb. 7, 2012) (declining to refer matter to Office of Special Counsel where agency's conduct in responding to request did not rise to level of arbitrary and capricious); O'Shea v. NLRB, No. 05-2808, 2006 WL 1977152, at *6 (D.S.C. July 11, 2006) (holding that referral to Office of Special Counsel was unwarranted "because no documents remain improperly withheld by the defendant"); Hull v. Dep't of Lab., No. 04-1264, 2006 WL 8454017, at *6 (D. Colo. May 30, 2006) (concluding that referral to Office of Special Counsel was unwarranted because, despite "bureaucratic mistakes, [plaintiff] did eventually get the documents it requested" and "[defendant] did not lie to this court or disobey or ignore any orders of this court"); Chourre v. IRS, 203 F. Supp. 2d 1196, 1202 (W.D. Wash. 2002) (rejecting plaintiff's request for written finding in accordance with 5 U.S.C. § 552(a)(4)(F)(i) because "[t]here is nothing in the record to suggest that any officer or employee of the [agency] acted arbitrarily or capriciously"); Kempker-Cloyd v. DOJ, No. 97-253, 1999 U.S. Dist. LEXIS 4813, at *1, *23-24 (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); Norwood v. FAA, No. 83-2315, slip op. at 20 (W.D. Tenn. Dec. 11, 1991) (finding that when court denies fees on ground that plaintiff is proceeding pro se, "the issuance of written findings pursuant to 5 U.S.C. § 552(a)(4)(F) would be inappropriate since both prerequisites have not been met"); cf. Consumer Fed'n of Am. v. USDA, 539 F. Supp. 2d 225, 228 (D.D.C. 2008) (directing agency to file supplemental declaration detailing its plans to respond to future FOIA requests and steps it has taken to correct problem which led to destruction of responsive records, and further stating that it will take under advisement whether to sanction defendant by referring matter to Office of Inspector General and/or Office of Special Counsel).

[205] Jefferson v. Reno, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

[206] See, e.g., Evans v. BOP, 951 F.3d 578, 584 (D.C. Cir. 2020) ("[T]he vast majority of FOIA cases can be resolved on summary judgment." (quoting Brayton v. Off. of Trade Representative, 641 F.3d 521, 527 (D.C. Cir. 2011))); World Publ'g Co. v. DOJ, 672 F.3d 825, 832 (10th Cir. 2012) ("In general, FOIA request cases are resolved on summary judgment."); Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1243 (11th Cir. 2008) ("'Generally, FOIA cases should be handled on motions for summary judgment, once the documents at issue are properly identified.'" (quoting Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993))); Wickwire Gavin, P.C. v. USPS, 356 F.3d 588, 591 (4th Cir. 2004) (declaring that "FOIA cases are generally resolved on summary judgment"); Cooper

judgment usually is immediately appealable, that is not generally the case with other orders that are issued during the course of a FOIA lawsuit.[207] For example, courts have held that the grant of an Open America stay of proceedings is not a decision that is immediately appealable.[208] Similarly, it has been held that an "interim" award of attorney fees is generally not appealable until the conclusion of the district court proceedings, except in certain limited circumstances.[209] Likewise, one court has held that a district

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Cameron Corp. v. OHSA, 280 F.3d 539, 543 (5th Cir. 2002) ("Summary judgment resolves most FOIA cases . . . .").

[207] Compare Citizens for Resp. & Ethics in Wash. v. DHS, 532 F.3d 860, 862-68 (D.C. Cir. 2008) (holding that district court's denial of agency's motion for summary judgment, which was premised on argument that requested records did not qualify as "agency records," was not final and appealable order nor was it an injunction subject to interlocutory appeal), Loomis v. DOE, 199 F.3d 1322, 1322 (2d Cir. 1999) (unpublished table decision) (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. DOJ, 844 F.2d 126, 129-33 (3d Cir. 1988) (declining to review district court order that Vaughn Index be filed), and Ctr. for Nat'l Sec. Stud. 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 the merits in the case" and plaintiffs did not establish that denial of relief would cause them irreparable injury), with Jud. 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), and In re Steele, 799 F.2d 461, 465 (9th Cir. 1986) (finding interlocutory order compelling disclosure under FOIA "is injunctive in nature" and appealable pursuant to 28 U.S.C. § 1292(a)(1)).

[208] See Nance v. O'Brien, No. 95-5112, 1996 WL 135313, at *1 (D.C. Cir. Feb. 6, 1996) (per curiam) (dismissing appeal "for lack of a final, appealable order" where district court had "ordered a limited stay under Open America"); Summers v. DOJ, 925 F.2d 450, 453 (D.C. Cir. 1991) ("The district court's stay of proceedings under Open America is not a 'final decision' appealable under 28 U.S.C. § 1291.").

[209] See, e.g., Pigford v. Veneman, 369 F.3d 545, 548 (D.C. Cir. 2004) (dismissing appeal of interim fee award because defendant failed to show it is likely to suffer irreparable harm which can only occur "if the party and counsel awarded fees will 'likely be unable to repay the fees if the award is later reduced or overturned'") (citation omitted); Petties v. Dist. of Columbia, 227 F.3d 469, 473 (D.C. Cir. 2000) (holding that appellate court lacked jurisdiction over appeal of interim fee award where plaintiff failed to show that irreparable harm was likely, only that it was possible plaintiff would no longer have the funds after the

court's determination with respect to a FOIA plaintiff's fee category is not subject to interlocutory appeal.[210]

The Court of Appeals for the District of Columbia Circuit has held that orders requiring the disclosure of documents[211] and orders "denying a *Glomar* response and requiring the agency to reveal whether it holds particular records" are appealable injunctions.[212] Where there is a final order requiring that an agency disclose the relevant records, courts typically grant the government's request for a stay pending appeal because release of the information would disrupt the status quo and cause irreparable harm by mooting the issue on appeal.[213]

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litigation); Nat'l Ass'n of Crim. Def. Laws. v. DOJ, 182 F.3d 981, 984-85 (D.C. Cir. 1999) (finding that award of "interim" attorney fees in this case is not appealable either as final judgment or as collateral order but also recognizing that "an interim award of attorney's fees that does satisfy all three of the [collateral order doctrine] criteria is immediately appealable"); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1025, 1027 (10th Cir. 1998) (holding "award of interim attorneys' fees is not a final order and thus generally not appealable" but also that "under the collateral order doctrine, however, such orders may be appealed if a party is ordered to pay fees immediately and there is a likelihood that party will not be able to recover those fees if the case is reversed on appeal").

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

[211] See, e.g., Jud. Watch, Inc., 412 F.3d at 128 (finding that district court's order requiring disclosure of documents was injunctive in nature and appealable under 28 U.S.C. § 1292(a)(1)).

[212] Leopold v. CIA, 987 F.3d 163, 169 (D.C. Cir. 2021).

[213] See, e.g., HHS v. Alley, 556 U.S. 1149, 1149 (2009) (ordering stay of district court's order which directed agency to disclose records to plaintiff, pending final disposition of appeal, following denial of stay by United States Court of Appeals for the Eleventh Circuit); DOJ v. Rosenfeld, 501 U.S. 1227, 1227 (1991) (granting full stay pending appeal); John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1308 (1989) (granting stay based upon "balance of the equities"); Islamic Shura Council of S. Cal. v. FBI, 635 F.3d 1160, 1164 (9th Cir. 2011) (noting that motions panel of Ninth Circuit granted an administrative stay in order to permit merits panel sufficient time to review district court's decision to unseal a sealed, ex parte order); 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 J. Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979) (finding the "balance of hardship to favor the issuance of a stay"); Nat'l Day Laborer Org. Network v. ICE, 827 F. Supp. 2d 242 (S.D.N.Y. 2011) (granting stay to agency pending appeal); People for Am. Way Found. v. Dep't of Educ., 518 F. Supp. 2d 174, 179 (D.D.C. 2007) (same); Ctr. for Nat'l Sec. Stud. v. DOJ, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (explaining that "stays are routinely granted in

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

FOIA cases," and granting stay because disclosure of detainee names would "effectively moot any appeal"). 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).

Columbia,[214] First,[215] Second,[216] Fourth,[217] Fifth,[218] Sixth,[219] Eighth,[220] Ninth,[221] Tenth,[222] and Eleventh Circuits[223] have applied a de novo standard of review to a district court's

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[214] See, e.g., Campaign Leg. Ctr. v. DOJ, 34 F.4th 14, 22 (D.C. Cir. 2022) (reviewing de novo district court's grant of summary judgment); Elec. Priv. Info. Ctr. v. NSA, 678 F.3d 926, 930 (D.C. Cir. 2012) (same).

[215] See, e.g., N.H. Right to Life v. HHS, 778 F.3d 43, 48 (1st Cir. 2015) (reviewing de novo district court's grant of summary judgment based on Vaughn Index and affidavits); Moffat v. DOJ, 716 F.3d 244, 250 (1st Cir. 2013) ("We exercise de novo review over the district court's determination that withheld materials are exempt from disclosure.").

[216] See, e.g., Nat. Res. Def. Council v. EPA, 19 F.4th 177, 183 (2d Cir. 2021) (reviewing de novo district court's grant of summary judgment); Whitaker v. Dep't of Com., 970 F.3d 200, 204 (2d Cir. 2020) ("We review the grant of both a motion to dismiss and a motion for summary judgment de novo."); Florez v. CIA, 829 F.3d 178, 182 (2d Cir. 2016) (reviewing de novo district court's grant of summary judgment upholding agency's Glomar response pursuant to Exemptions 1 and 3).

[217] See, e.g., Manivannan v. DOE, 843 F. App'x 481, 482 (4th Cir. 2021) (per curiam) (reviewing grant of summary judgment de novo); Am. Mgmt. Serv. v. Dep't of the Army, 703 F.3d 724 (4th Cir. 2013) (same).

[218] See, e.g., Jobe v. NTSB, 1 F.4th 396, 402 (5th Cir. 2021) (reviewing de novo district court's grant of summary judgment); Abrams v. Dep't of Treasury, 243 F. App'x 4, 5 (5th Cir. 2007) (same).

[219] See, e.g., Cincinnati Enquirer v. DOJ, 45 F.4th 929, 932 (6th Cir. 2022) (reviewing de novo district court's grant of summary judgment in FOIA proceeding); Lucaj v. FBI, 852 F.3d 541, 545 (6th Cir. 2017) (same); CareToLive v. FDA, 631 F.3d 336, 340 (6th Cir. 2011) (same).

[220] See, e.g., Madel v. DOJ, 784 F.3d 448, 451 (8th Cir. 2015) (reviewing de novo district court's grant of summary judgment); Hulstein v. DEA, 671 F.3d 690, 694 (8th Cir. 2012) (reviewing "applicability of FOIA exemptions de novo"); Cent. Platte Nat. Res. Dist. v. USDA, 643 F.3d 1142, 1146 (8th Cir. 2011) (reviewing de novo district court's grant of summary judgment, "viewing all facts and making all reasonable inferences in the light most favorable to the nonmoving party").

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

[222] See, e.g., World Publ'g Co. v. DOJ, 672 F.3d 825, 826 (10th Cir. 2012) (reviewing "de novo the district court's legal conclusion that requested records are exempt from disclosure under the FOIA," after noting that it can do so, "[g]iven undisputed facts"); Prison Legal News v. EOUSA, 628 F.3d 1243, 1247 (10th Cir. 2011) ("When the underlying facts of a FOIA case are undisputed and a district court has granted summary judgment . . . , we review the

grant of summary judgment where the facts are not in dispute. By contrast, the Courts of Appeals for the Third Circuit applies a two-tiered analysis, determining first whether the district court had an adequate factual basis for its decision and, if so, whether that decision is clearly erroneous.[224] The Court of Appeals for the Seventh Circuit also takes a unique approach by applying a de novo standard of review to a district court's determination regarding search adequacy while reviewing for clear error a lower court's determination that an exemption applies.[225]

On appeal, in contrast to the de novo standard of review, which is generally applied by appellate courts to the legal conclusions of lower courts, circuit courts of appeals apply an abuse of discretion or "clear error" standard when reviewing a lower court's finding of

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district court's legal conclusion that the requested records are exempt from disclosure de novo.").

[223] See, e.g., Broward Bulldog, Inc. v. DOJ, 939 F.3d 1164, 1175 (11th Cir. 2019) (holding that "'[t]his court reviews a district court's grant of summary judgment . . . de novo, viewing all facts and reasonable inferences in the light most favorable to the non-moving party'" (quoting Miccosukee Tribe of Indians of Fl. v. United States, 516 F.3d 1235, 1243 (11th Cir. 2008))); News-Press v. DHS, 489 F.3d 1173, 1187-89 (11th Cir. 2007) (concluding that de novo standard of review applies where facts are not in dispute and only issue on appeal is whether agency properly applied Exemption 6).

[224] See, e.g., Wadhwa v. VA, 446 F. App'x 516, 518 (3d Cir. 2011) (applying two-tiered test in reviewing grant of summary judgment in FOIA case); 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, 896 n.3 (3d Cir. 1998) (describing "two-tiered test" while recognizing that review standard is not uniform among circuits).

[225] See Stevens v. U.S. Dep't of State, 20 F.4th 337, 342 (7th Cir. 2021) (clarifying that "we take a de novo look at the decision and ask whether there is any genuine issue of material fact about the adequacy of the agency's search," but for withholdings, "we begin by considering de novo whether . . . the district court had an adequate factual basis for its decisions" and "[i]f it did, . . . review[] for clear error its conclusion that the exemption did apply"); Rubman v. USCIS, 800 F.3d 381, 389 (7th Cir. 2015) (distinguishing cases involving search challenges, and concluding that "summary judgment in a FOIA case challenging the adequacy of a search should be reviewed under the traditional de novo standard").

fact[226] and discretionary decisions, such as the decision to award fees,[227] deny discovery[228] or deny in camera inspection.[229]

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,"[230] is de novo.[231] 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.[232] 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

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[226] See, e.g., Grand Canyon Tr. v. Bernhardt, 947 F.3d 94, 96-97 (D.C. Cir. 2020) (holding "[a]ppellate courts review findings of fact only for clear error"); Animal Legal Def. Fund v. FDA, 836 F.3d 987, 990 (9th Cir. 2016) (en banc) ("Our review remains the same as in all civil cases: we review the findings of fact for clear error and the conclusions of law de novo."); Batton v. IRS, 718 F.3d 522, 525 (5th Cir. 2013) (reviewing denial of attorneys' fees by "assessing fact findings for clear error and legal conclusions de novo"); Hunton & Williams v. DOJ, 590 F.3d 272, 276 (4th Cir. 2010) ("Whether a document fits within one of FOIA's prescribed exemptions is also a matter of law, unless the legal conclusion is based upon factual findings, which we review for clear error.").

[227] See, e.g., Kwoka v. IRS, 989 F.3d 1058, 1064 (D.C. Cir. 2021) (reviewing award of fees for abuse of discretion); Morley v. CIA, 894 F.3d 389, 391 (D.C. Cir. 2018) (same); First Amend. Coal. v. DOJ, 878 F.3d 1119, 1126 (9th Cir. 2017) (same); DaSilva v. USCIS, 599 F. App'x 535, 539 (5th Cir. 2014) (same); Anderson v. Sec'y HHS, 80 F.3d 1500, 1504 (10th Cir. 1996) (same); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993) (same).

[228] See, e.g., Eddington v. DOD, 34 F.4th 833, 841 (D.C. Cir. 2022) (reviewing denial of discovery for abuse of discretion); Freedom Watch v. NSA, 783 F.3d 1340, 1345 (D.C. Cir. 2015) (same); Yagman v. BOP, 605 F. App'x 666, 667 (9th Cir. 2015) (same); CareToLive v. FDA, 631 F.3d 336, 344 (6th Cir. 2001) (same); Batton v. Evers, 598 F.3d 169, 175 (5th Cir. 2010) (same); Sharkey v. FDA, 250 F. App'x 284, 287 (11th Cir. 2007) (same); Trentadue v. FBI, 572 F.3d 794, 806 (10th Cir. 2009) (same).

[229] See, e.g., Xanthopoulos v. IRS, 35 F.4th 1135, 1138 (8th Cir. 2022) (reviewing denial of in camera inspection for abuse of discretion); Mobley v. CIA, 806 F.3d 568, 576 (D.C. Cir. 2015) (same); Life Extension Found., Inc. v. IRS, 559 F. App'x 3, 3 (D.C. Cir. 2014) (same).

[230] 5 U.S.C. § 552(a)(6)(E)(i) (2018).

[231] 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, 254 F.3d at 305).

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

other cases determined by the agency,"[233] that rule would be entitled to judicial deference.[234] 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.[235]

In some cases where the merits and law of the case are so clear as to justify summary disposition, summary affirmance at the appellate stage is granted.[236] Additionally, although an otherwise routine case may be remanded solely on the basis

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[233] 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") (emphasis omitted).

[234] See id. ("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 such regulations."). Contra ACLU of N. Cal. v. DOJ, No. 04-4447, 2005 WL 588354, at*8 (N.D. Cal. Mar. 11, 2005) (concluding that "in the absence of any controlling Ninth Circuit authority to the contrary, . . . judicial review of any denial of a request for expedited processing – whether the request is made pursuant to the 'compelling need' provision of subparagraph (E)(i)(I), or is made pursuant to 'other cases determined by the agency' provision of subparagraph (E)(i)(II) – must be conducted de novo").

[235] See 5 U.S.C. § 552(a)(6)(E)(iv) ("A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request."); see also Coven v. OPM, No. 07-1831, 2009 WL 3174423, at *29-30 (D. Ariz. Sept. 29, 2009) (concluding that court does not have jurisdiction to review expedited processing claim where agency has provided complete response to request); Jud. 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.").

[236] See, e.g., Taitz v. Ruemmler, No. 11-5306, 2012 WL 1922284, at *1 (D.C. Cir. May 24, 2012) (per curiam) (granting summary affirmance after finding that district court properly determined that White House Counsel's Office is not an "agency" subject to FOIA because "[t]he merits of the parties' positions are so clear as to warrant summary action"); Cooper v. Stewart, No. 11-5061, 2011 WL 6758484, at *1 (D.C. Cir. Dec. 15, 2011) (per curiam) (granting agency's motion for summary affirmance on grounds that "[t]he merits of the parties' positions are so clear as to warrant summary action" where district court properly dismissed FOIA claims against individual defendants, granted summary judgment to DOJ based on adequacy of search, and concluded that Federal Tort Claims Act does not provide basis for considering plaintiff's FOIA claim); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir. 1980) ("[A] party who seeks summary disposition of an appeal must demonstrate that the merits of his claim are so clear as to justify expedited action.") (non-FOIA case); Groendyke Transp. Inc. v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969) (deeming summary disposition appropriate where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, . . . the appeal is frivolous") (non-FOIA case).

that the district court failed to make a segregability finding,[237] courts of appeals still may opt to make a segregability determination based on the record presented before the lower court.[238] (For a further discussion of this point, see Litigation Considerations, "Reasonably Segregable" Requirements.)

Additionally, appellate courts ordinarily will not consider issues raised for the first time on appeal by either party.[239] Similarly, agencies that do not raise or preserve all exemption claims at the district court level risk waiving these claims at the appellate

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[237] See, e.g., Stolt-Nielsen Transp. Grp. Ltd. v. United States, 534 F.3d 728, 734 (D.C. Cir. 2008) (stating that if district court approves agency's withholdings without issuing finding on segregability, then "'remand is required even if the requestee did not raise the issue of segregability before the court'" (quoting Johnson v. EOUSA, 310 F.3d 771, 776 (D.C. Cir. 2002))); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1116 (D.C. Cir. 2007) (same).

[238] See, e.g., Porup v. CIA, 997 F.3d 1224, 1238-39 (D.C. Cir. 2021) (recognizing that in some cases "panels of this court have made segregability findings in the first instance, instead of 'remanding . . . solely for th[e] purpose' of such findings," and holding that agency "released all segregable portions of the responsive documents" (quoting Juarez v. DOJ, 518 F.3d 54, 60 (D.C. Cir. 2008))); Machado Amadis v. Dep't of State, 971 F.3d 364, 372 (D.C. Cir. 2020) (holding "if a district court has not adequately addressed segregability, we may do so in the first instance"); Juarez, 518 F.3d at 60 (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 remand unnecessary).

[239] See, e.g., Amiri v. Nat'l Sci. Found., No. 21-5241, 2022 WL 1279740, at *1 (D.C. Cir. Apr. 28, 2022) (refusing to hear Privacy Act argument raised for first time on appeal because "appellant has not shown that exceptional circumstances justify its consideration for the first time on appeal"); Kinney v. CIA, 715 F. App'x 799, 800 (9th Cir. 2018) (declining to consider "matters not specifically and distinctly raised and argued in the opening briefs, or arguments and allegations raised for the first time on appeal"); Petrucelli v. DOJ, No. 16-5042, 2016 WL 5349349, at *1 (D.C. Cir. Aug. 22, 2016) (refusing to consider "appellant's arguments, raised for the first time on appeal, that the [defendant's] search was inadequate"); Rogers v. IRS, 822 F.3d 854, 863 (6th Cir. 2016) (recognizing that "[i]n general, '[i]ssues not presented to the district court but raised for the first time on appeal are not properly before the court'" (quoting McFarland v. Henderson, 307 F.3d 420, 407 (6th Cir. 2002))); Roth v. DOJ, 642 F.3d 1161, 1179-80 (D.C. Cir. 2011) (prohibiting government from raising argument on appeal that it did not raise in district court in manner sufficient to put plaintiff "on notice of the need to rebut it"); Adamowicz v. IRS, 402 F. App'x 648, 653 n.8 (2d Cir. 2010) (noting that plaintiff's argument that "district court should have conducted an in camera review" is waived where it is raised for first time on appeal); Jud. 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).

level.[240] (See Litigation Considerations, Waiver of Exemptions in Litigation.)

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.[241]

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[240] See, e.g., Citizens for Resp. & Ethics in Wash. v. DOJ, 854 F.3d 675, 680-81 (D.C. Cir. 2017) (recognizing general rule that agencies must assert all exemptions in original district court proceedings, and holding that defendant's failure to assert Exemption 5 precluded its invocation on appeal); Jordan v. DOJ, 668 F.3d 1188, 1198 n.6 (10th Cir. 2011) (noting that court will not consider defendants' alternate arguments, raised for first time on appeal, that additional exemptions apply to requested information); Senate of P.R. v. DOJ, 823 F.2d 574, 580 (D.C. Cir. 1987) (concluding that agencies may not "'wait until appeal to raise additional claims of exemptions or additional rationales for the same claim'" (quoting Holy Spirit Ass'n v. CIA, 636 F.2d 838, 846 (D.C. Cir. 1980))).

[241] See Fed R. App. Pr. 39(A); Baez v. DOJ, 684 F.2d 999, 1005-07 (D.C. Cir. 1982) (en banc) (awarding government costs at issue in appeal in accordance with Federal of Appellate Procedure Rule 39(a)); 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).