The Freedom of Information Act (FOIA): A Legal Overview

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SUMMARY

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The Freedom of Information Act (FOIA): A Legal Overview

Originally enacted in 1966, the Freedom of Information Act (FOIA) establishes a three-part system that requires federal agencies to disclose a large swath of government information to the public. First, FOIA directs agencies to publish substantive and procedural rules, along with certain other important government materials, in the *Federal Register*. Second, on a proactive basis, agencies must electronically disclose a separate set of information that consists of, among other things, final adjudicative opinions and certain "frequently requested" records. Lastly, FOIA requires agencies to disclose all covered records not made available pursuant to the aforementioned affirmative disclosure provisions to individuals, corporations, and others upon request.

FOIA contains nine enumerated exemptions from disclosure that permit—but do not require—agencies to withhold certain information, including classified national security matters, confidential financial information, law enforcement records, and a variety of materials and types of information exempted by other statutes. FOIA also contains three "exclusions" that authorize agencies to treat certain law enforcement records as if they do not fall within FOIA's coverage. Although FOIA's main purpose is to inform the public of the operations of the federal government, the act's drafters also sought to protect certain private and governmental interests from the law's disclosure obligations through FOIA's exemptions and exclusions.

FOIA authorizes requesters to seek judicial review of an agency's decision to withhold records. Federal district courts may "enjoin [an] agency from withholding agency records" and "order the production of any agency records improperly withheld." Judicial decisions—including Supreme Court decisions—have often informed or provided the impetus for congressional amendments to FOIA.

Congress is not subject to FOIA because it is not a covered "agency" as defined by FOIA. As a result, records that are deemed to be "congressional records," even if held by executive branch agencies, are not subject to FOIA in certain circumstances. Nonetheless, the act addresses communications between the legislative branch and FOIA-covered entities. Under 5 U.S.C. § 552(d), an agency may not "withhold information from Congress" on the basis that such information is covered by a FOIA exemption (although the provision does not dictate whether another source of law, such as executive privilege, may shield information from disclosure). The executive branch has interpreted this provision to apply to each house of Congress and congressional committees but generally not to individual Members. Individual Members' requests for information are generally treated as subject to the same FOIA rules as requests from the public. This interpretation is not uniformly shared, with at least one federal appellate court interpreting Section 552(d) as applying to individual Members acting in their official capacities. In addition, although Congress is under no obligation to disclose its materials pursuant to FOIA, whether a congressional document possessed by an *agency* is subject to FOIA depends on whether Congress clearly expressed its intention to retain control over the specific document.

Contents

Key Terms 3
"Agency" 3
"Agency Records" 6
Distinguishing Agency Records and Personal Records of an Employee 7
"Any Person" 9
Access to Government Information Under FOIA 10
Affirmative Disclosure 10
Publication in the *Federal Register* 11
Electronic Disclosure 12
Request-Driven Disclosure 14
Agency Response Requirements 15
Appeals and Exhaustion of Administrative Remedies 17
Exemptions 18
Exemption 1: National Defense or Foreign Policy 22
Exemption 2: Internal Personnel Rules and Practices 23
Exemption 3: Matters Exempted by Other Statutes 24
Exemption 4: Trade Secrets and Commercial or Financial Information 25
Exemption 5: Inter- or Intra-Agency Memoranda or Letters 28
Deliberative Process Privilege 30
Presidential Communications Privilege 31
Attorney-Client Privilege 32
Attorney Work-Product Privilege 32
Other Privileges 33
Exemption 6: Personnel, Medical, and Similar Files 33
Exemption 7: Law Enforcement Records or Information 36
Exemption 7(A) 38
Exemption 7(B) 38
Exemption 7(C) 39
Exemption 7(D) 40
Exemption 7(E) 40
Exemption 7(F) 41
Exemption 8: Financial Institution Reports 41
Exemption 9: Geological and Geophysical Information and Data Concerning Wells 41
Glomar Responses 42
Glomar: Exemptions v. Exclusions 42
Development of the *Glomar* Response 42
Exclusions 44
FOIA-Related Litigation: Selected Issues 46
Judicial Review of Agency Withholding Decisions 47
Reverse-FOIA Litigation 49
Selected Issues of Potential Interest for Congress 51
Congressional Access to Agency Information: FOIA's "Special Access" Provision 51
Congressional Records 55
Related Open Government and Information Laws: FACA, the Sunshine Act, and the Privacy Act 59

Tables

Table 1. FOIA Exemptions 18

Contacts

Author Information 61

The Freedom of Information Act (FOIA)[1] confers on the public a right to access federal agency information.[2] FOIA's tripartite system of disclosure aims to open up a vast array of federal agency information and records to private individuals, researchers, journalists, corporations, and other parties. In addition, disclosure under FOIA may bring information to Congress's attention that may inform its oversight of FOIA-covered agencies.[3] As one court has remarked, "FOIA is the legislative embodiment of Justice Brandeis's famous adage, 'Sunlight is ... the best of disinfectants.'"[4]

Although FOIA's main purpose is to inform the public of the operations of the federal government,[5] the act's drafters sought to protect certain private and governmental interests from the new law's disclosure obligations.[6] FOIA thus contains nine exemptions from disclosure that authorize, but do not require, agencies to withhold information or records that are otherwise subject to release or availability under the statute.[7] Along with its nine exemptions, FOIA contains three records "exclusions" that cover certain "especially sensitive law enforcement records."[8] If records are protected by an exclusion, an agency may "treat the records as not subject to the requirements of" FOIA.[9]

Before FOIA's enactment, the Administrative Procedure Act (APA)[10] had required agencies to make certain government information available to the public. The exceptions in the APA were broad. As a result, the exceptions to disclosure in the APA's public information section had, in the estimation of FOIA's drafters, "become the major statutory excuse for withholding Government records from public view."[11] For example, agencies could withhold information if doing so was "in the public interest"[12] or—for "matters of official record"—when information was "held confidential for good cause found."[13] In addition, the APA's public information section lacked a

[1] 5 U.S.C. § 552.

[2] *See* Pratt v. Webster, 673 F.2d 408, 413 (D.C. Cir. 1982) ("[FOIA] was enacted by Congress ... in order to provide a statutory right of public access to documents and records held by agencies of the federal government.").

[3] *See, e.g.*, Letter to Donald J. Trump, President, from Representative Don Beyer, et al., at 2 (Apr. 6, 2018), https://beyer.house.gov/uploadedfiles/signed_fire_pruitt_letter_4.6.18.pdf (describing information revealed by a FOIA request about the activities of an Environmental Protection Agency (EPA) task force in letter urging the President to request the EPA Administrator's resignation).

[4] N.H. Right to Life v. HHS, 778 F.3d 43, 48–49 (1st Cir. 2015) (alteration in original) (quoting LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. ed. 1914)).

[5] DOD v. Fed. Labor Relations Auth., 510 U.S. 487, 495 (1994) (explaining that "the 'core purpose of FOIA' ... is 'contributing significantly to public understanding of the operations or activities of the government'" (emphasis omitted) (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 777 (1989)).

[6] S. REP. NO. 813, at 3 (1965); FBI v. Abramson, 456 U.S. 615, 621 (1982).

[7] 5 U.S.C. § 552(b)(1)–(9).

[8] *Id.* § 552(c); Edwin Meese III, Att'y Gen., Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 2 (Dec. 1987) [hereinafter Meese Memorandum], https://www.justice.gov/archive/oip/86agmemo.htm.

[9] 5 U.S.C. § 552(c)(1)–(3).

[10] *Id.* §§ 551–559, 701–706.

[11] H.R. REP. NO. 1497, at 3 (1966); *see also* S. REP. NO. 813, at 5 (1965) (explaining that the APA's public information section allowed agencies to "withhold almost anything from any citizen under [its] vague standards").

[12] 5 U.S.C. § 1002 (amended by Administrative Procedure Act Amendments of 1966, Pub. L. No. 89-487, 80 Stat. 150 (1966)).

[13] *Id.* § 1002(c); *see also, e.g., id.* (limiting the availability of matters of official record "to persons properly and directly concerned"). *See* H.R. REP. NO. 1497, at 5–6 (1966) (discussing agencies' abuse of the APA's public information section).

provision authorizing a person to seek judicial review of an agency's decision to withhold information.[14]

To rectify the APA's perceived failure to provide the public with adequate access to government information, Congress enacted FOIA in 1966 as an amendment to the APA. In FOIA, Congress sought to establish a statutory scheme that embodied "a broad philosophy of 'freedom of information'" and ensured "the availability of Government information necessary to an informed electorate."[15] To effectuate Congress's desire for robust public access to agency information, FOIA establishes a three-part system of disclosure by which agencies must disclose a large swath of records and information.[16] First, FOIA directs agencies to publish "substantive rules of general applicability," procedural rules, and specified other important government materials in the *Federal Register*.[17] Second, on a proactive basis, agencies must electronically disclose a separate set of agency information including, among other things, final adjudicative opinions and certain "frequently requested" records.[18] Third, "[e]xcept with respect to the records made available under" the statute's proactive disclosure provisions, FOIA requires that agencies disclose covered records to individuals, corporations, and others upon request.[19]

Lastly, the statute authorizes requesters to challenge in federal court an agency's decision to withhold requested records.[20] Federal district courts may "enjoin [an] agency from withholding agency records" and "order the production of any agency records improperly withheld."[21]

This report provides an overview of FOIA.[22] First, the report examines key terms that dictate the scope of agencies' disclosure obligations under FOIA.[23] The report then provides an overview of FOIA's three disclosure requirements.[24] Following that discussion, the report reviews each of FOIA's nine exemptions[25] and its three records exclusions.[26] After an overview of selected issues concerning judicial review of agency decisions to withhold information under FOIA,[27] this report discusses two topics of potential interest to Congress: FOIA's "special access" provision—which provides that FOIA does not authorize agencies "to withhold information from Congress"[28]—and the status of congressional records under FOIA.[29] Lastly, this report discusses three other laws

[14] S. REP. NO. 813, at 5 (1965).

[15] *Id.* at 3; H.R. REP. NO. 1497, at 12 (1966).

[16] *See* Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 352 (1979).

[17] 5 U.S.C. § 552(a)(1).

[18] *Id.* § 552(a)(2).

[19] *Id.* § 552(a)(3), (a)(4)(B) (providing that federal district courts have "jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld").

[20] *Id.* § 552(a)(4)(B).

[21] *Id.*

[22] This report is not intended to provide an exhaustive account of all topics related to FOIA. Sources that analyze FOIA in greater detail include JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE (2019 ed.) and DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT (last updated Aug. 4, 2020), https://www.justice.gov/oip/doj-guide-freedom-information-act-0.

[23] *See infra* Key Terms.

[24] *See infra* Access to Government Information Under FOIA.

[25] *See infra* Exemptions.

[26] *See infra* Exclusions.

[27] *See infra* FOIA-Related Litigation: Selected Issues.

[28] 5 U.S.C. § 552(d).

[29] *See infra* Selected Issues of Potential Interest for Congress.

that, like FOIA, govern the availability of specific types of government information and constitute significant elements of the federal government's open government and information legal regimes: the Federal Advisory Committee Act (FACA),[30] the Government in the Sunshine Act (Sunshine Act),[31] and the Privacy Act of 1974.[32]

Key Terms

FOIA generally requires each federal "agency" to make "agency records" available to the public and specifically to "any person" who requests them.[33] FOIA does not, however, require *every* federal entity to disclose government information to the public, nor must a covered entity disclose *every* piece of information it possesses. Not all persons have a right to receive records under the act. Three key statutory terms inform FOIA's general scope: (1) "agency,"[34] (2) "agency records,"[35] and (3) "any person."[36] The meaning of each of these terms determines which entities must comply with FOIA, what materials must be disclosed under the act, and to whom FOIA grants the right to request and receive records.

"Agency"

Only an "agency" as defined by FOIA is subject to FOIA's requirements. FOIA adopts wholesale the APA's general definition of "agency." The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."[37] FOIA further specifies that, for the act's purposes, the term "includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."[38] While this definition includes a large swath of the federal government, it does not encompass the entire federal establishment. For

[30] Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972); 5 U.S.C. §§ 1001–1014.

[31] Government in the Sunshine Act (Sunshine Act), Pub. L. No. 94-409, 90 Stat. 1241 (1976); 5 U.S.C. § 552b.

[32] Privacy Act, Pub. L. No. 93-579, 88 Stat. 1896 (1974); 5 U.S.C. § 552a; *see infra* Related Open Government and Information Laws: FACA, the Sunshine Act, and the Privacy Act.

[33] 5 U.S.C. § 552(a)(3)(A), (4)(B).

[34] *See id.* §§ 551(1), 552(f)(2); *see also id.* § 552(a)(3)(A) (requiring that "each agency ... make [requested] records promptly available" upon receiving a proper request).

[35] *See id.* § 552(a)(4)(B).

[36] *See id.* § 552(a)(3)(A).

[37] *Id.* § 551(1). Several entities, such as Congress and the federal courts, are explicitly excepted from this definition. *Id.* § 551(1)(A), (B).

[38] *Id.* § 552(f)(1).

example, FOIA does not apply to Congress, the federal courts, or territorial governments.[39] FOIA has also been held not to apply to state or local governments.[40]

Although FOIA's definition of "agency" includes the Executive Office of the President (EOP),[41] courts have determined that several entities within the EOP are nevertheless not subject to the act. In *Kissinger v. Reporters Committee for Freedom of the Press*, the Supreme Court held that transcripts of Henry Kissinger's telephone conversations from his time as Assistant to the President for National Security Affairs were not subject to disclosure under FOIA.[42] The Court explained that the term "agency" as used in FOIA does not apply to "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President."[43] Courts have determined that several EOP entities are not FOIA "agencies" by virtue of their solely advisory or operational functions, including the Council of Economic Advisers,[44] Office of Administration,[45] and National Security Council.[46] On the other hand, courts have held

[39] *Id.* § 551(1) (providing that the definition of "agency" in the APA does not apply to, *inter alia*, "(A) the Congress; (B) the courts of the United States; [or] (C) the governments of the territories or possessions of the United States"). Courts have clarified that FOIA does not apply to any part of the legislative and judicial branches, including their subcomponents. *See, e.g.*, Mayo v. GPO, 9 F.3d 1450, 1451 (9th Cir. 1993) (recognizing that the Government Publishing Office, as a legislative branch entity, is not covered by FOIA); Andrade v. U.S. Sentencing Comm'n, 989 F.2d 308, 309–10 (9th Cir. 1993) (ruling that FOIA does not apply to the Sentencing Commission as it is a judicial branch entity); *see also Mayo*, 9 F.3d at 1451 (explaining that "[j]ust as [FOIA] in excluding 'the courts of the United States,' 5 U.S.C. § 551(1)(B), excludes not only the courts themselves but the entire judicial branch, so the entire legislative branch has been exempted from [FOIA]"); Cause of Action v. Nat'l Archives & Records Admin., 753 F.3d 210, 212 (D.C. Cir. 2014) (explaining that "FOIA 'does not cover congressional documents,' or documents of legislative branch agencies") (citations omitted). However, many entities that are not subject to FOIA nonetheless authorize public access to many of their records. *See, e.g.*, 4 C.F.R. pt. 81 (authorizing public access to Government Accountability Office records). Some entities that fall outside FOIA's coverage are nonetheless required to provide access to records under non-FOIA statutes. *See, e.g.*, 2 U.S.C. § 603 (requiring public access to Congressional Budget Office budget data).

[40] *See, e.g.*, Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 484 (2d Cir. 1999); Foley v. Vill. of Weston, No. 06-C-350-C, 2006 WL 3449414, at *5 (W.D. Wis. Nov. 28, 2006). States have enacted their own public records laws. *See* Daniel J. Solove et al., *Modern Studies in Privacy Law: Notice, Autonomy and Enforcement of Data Privacy Legislation: Access and Aggregation: Public Records, Privacy and The Constitution*, 86 MINN. L. REV. 1137, 1161 (2002).

[41] *See* 5 U.S.C. § 552(f)(2).

[42] 445 U.S. 136, 156 (1980).

[43] *Id.* (quoting H.R. REP. NO. 1380, at 15 (1974) (Conf. Rep.)). The standard set forth by the Court in *Kissinger*, 445 U.S. at 136, was quoted from the conference report accompanying the 1974 amendments to FOIA. *Id.* That report states that "[t]he term ["Executive Office of the President"] is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. REP. NO. 1380, at 15 (1974) (Conf. Rep.). Immediately before announcing this standard, the report provided that "[w]ith respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in *Soucie* v. *David*, 448 F.2d 1067 (C.A.D.C. 1971)." In *Soucie*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that the Office of Science and Technology (OST) was an agency under FOIA. *Id.* at 1075. The court arrived at that result after concluding that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." *Id.* at 1073. Although the court observed that OST exercised substantial independent authority, it acknowledged that if the office's "sole function were to advise and assist the President, that might be taken as an indication that [it] is part of the President's staff and not a separate agency." *Id.* at 1075. The *Soucie* decision and the conference report's adoption thereof suggest that the D.C Circuit and Congress "wished to avoid the serious separation-of-powers questions that too expansive a reading of FOIA would engender." Judicial Watch, Inc. v. U.S. Secret Service, 726 F.3d 208, 227 (D.C. Cir. 2013).

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

[45] Citizens for Responsibility & Ethics in Wash. (CREW) v. Office of Admin., 566 F.3d 219, 226 (D.C. Cir. 2009).

[46] Main St. Legal Servs. v. Nat'l Sec. Council, 811 F.3d 542, 566 (2d Cir. 2016); Armstrong v. Exec. Office of the President, 90 F.3d 553, 565 (D.C. Cir. 1996). *Cf.* Sweetland v. Walters, 60 F.3d 852, 855 (D.C. Cir. 1995) (per curiam) (continued...)

that entities within the EOP that "wield[] substantial authority independently of the President,"[47] such as the Office of Management and Budget,[48] are agencies under FOIA. FOIA also does not apply to private recipients of federal grants that are not subject to "extensive, detailed, and virtually day-to-day supervision" by a covered agency.[49] Data produced as a result of a federal grant or award, however, is subject to FOIA.[50]

(holding "that the staff of the Executive Residence is not an agency as defined in FOIA"). The 1974 House committee report, which preceded the conference report relied on by the Supreme Court in *Kissinger*, stated that the "Executive Office of the President" term included the National Security Council (NSC). H.R. REP. NO. 876 (1974), *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974), SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, at 121, 128 (Joint Comm. Print 1975). The Court in *Kissinger*, in response to the argument that some of the requested notes from Kissinger's time as presidential adviser may have been NSC records, referred to the committee report's conclusion that NSC records were subject to FOIA. *See Kissinger*, 445 U.S. at 156 (writing that the committee report "indicat[es] that the [NSC] is an executive agency to which the FOIA applies"). The U.S. Court of Appeals for the Second Circuit in *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542 (2d Cir. 2016), explained that the *Kissinger* Court's "assumption that the NSC was an agency was made only *arguendo* in concluding ... that the plaintiffs in that case had failed properly to make a FOIA request for any NSC records" and that "[s]uch an assumption is not even *dictum*." *See Rushforth*, 762 F.2d at 1040–41 ("Where ... the specific mention of the [Council of Economic Advisers] in the House Report was dropped and a specific, judicially formulated test was adopted by the Conference Committee for determining the FOIA status of such entities, the House Report is entitled to little weight in this respect. Manifestly, the Conference elected to embrace a test to be substituted for a listing of the entities to be included; the outcome of the case before us should, accordingly, turn on an examination of *Soucie* and the sole-function test enunciated in that case.").

[47] *CREW*, 566 F.3d at 222–23 (quoting *Sweetland*, 60 F.3d at 854); *see Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971), discussed *supra* note 43. In *CREW v. Office of Administration*, the D.C. Circuit explained that it has articulated several tests for analyzing whether FOIA applies to an entity within the EOP, and that "[t]hese tests have asked, variously, 'whether the entity exercises substantial independent authority,' 'whether ... the entity's sole function is to advise and assist the President,' and in an effort to harmonize these tests, 'how close operationally the group is to the President,' 'whether it has a self-contained structure,' and 'the nature of its delegat[ed]' authority." 566 F.3d at 222 (citations omitted) (ellipses and second alteration in original). The court explained that "common to every case in which we have held that an EOP unit is subject to FOIA has been a finding that the entity in question 'wielded substantial authority independently of the President.'" *Id.* at 222–23 (quoting *Sweetland*, 60 F.3d at 854).

[48] *CREW*, 566 F.3d at 223 (citing Sierra Club v. Andrus, 581 F.2d 895, 901–02 (D.C. Cir. 1978), and explaining that the *Andrus* decision stands for the proposition that OMB "exercises substantial independent authority because it has a statutory duty to prepare the annual federal budget, which aids both Congress and the President").

[49] Forsham v. Harris, 445 U.S. 169, 178–80 (1980); *see also* Ky. Emples. Ret. Sys. v. Seven Counties Servs., 901 F.3d 718, 728–29 (6th Cir. 2018) (explaining that *Forsham* held that federal grants do not "serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision—even if ... some measure of federal agency supervision is a condition of the grant renewals") (internal citations omitted); *accord* Mo. *ex rel.* Garstang v. DOI, 297 F.3d 745, 750 (8th Cir 2002) ("To convert a private organization ... into a federal government agency, the government must engage in 'extensive, detailed, and virtually day-to-day supervision.'" (quoting *Forsham*, 445 U.S. at 180)).

[50] In 1999, Congress included a rider in an appropriations bill that directed the Office of Management and Budget (OMB) to amend OMB Circular A–110, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, to mandate that "Federal awarding agencies ... ensure that all data produced under an award will be made available to the public through the procedures established under [FOIA]." The circular now provides that a recipient of a federal award must provide to its awarding agency, upon request, "research data relating to published research findings produced under a Federal award that were used by the Federal Government in developing an agency action that has the force and effect of law," if such data has been requested under FOIA, "so that [such data] can be made available to the public through the procedures established under the FOIA." 2 C.F.R. § 200.315(e)(1). The awarding agency is required to request the data from the funding recipient upon receiving a request therefor. *Id.* "Research data" does not include, among other things, "preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues." *Id.* § 200.315(e)(3). Research findings are "published" when they appear "in a peer-reviewed scientific or technical journal" or when an "agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law." *Id.* § 200.315(e)(2).

"Agency Records"

Just as only "agencies" are subject to FOIA's disclosure requirements, only "agency records" are subject to FOIA.[51] FOIA defines "records" to include "any information" in "any format, including an electronic format."[52] Although FOIA does not define "agency records,"[53] the Supreme Court, in *United States Department of Justice (DOJ) v. Tax Analysts*,[54] held that materials qualify as agency records if an agency (1) created or obtained the materials and (2) was "in control of the requested materials at the time the FOIA request [was] made."[55] An agency comes in control of materials if "the materials have come into the agency's possession in the legitimate conduct of its official duties."[56]

As the two-part test makes clear, a record may be subject to disclosure even when an agency did not create the record, as long as the agency obtained and controlled the record when it was requested.[57] To determine whether an agency exercises "control" of a record, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) developed the "*Burka* test," which considers

(1) the intent of the document's creator to retain or relinquish control over the records;
(2) the ability of the agency to use and dispose of the record as it sees fit;
(3) the extent to which agency personnel have read or relied upon the document; and
(4) the degree to which the document was integrated into the agency's record system or files.[58]

[51] 5 U.S.C. § 552(a)(4)(B) (providing that federal district courts have "jurisdiction to enjoin [an] agency from improperly withholding *agency records* and to order the production of any *agency records* improperly withheld") (emphasis added).

[52] *Id.* § 552(f)(2)(A).

[53] *Forsham*, 445 U.S. at 178. FOIA does define "record" (unmodified by "agency"). 5 U.S.C. § 552(f)(2). However, that definition does not provide insight into the meaning of "agency record." *See id.* (providing that "record" refers to "(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management").

[54] 492 U.S. 136 (1989).

[55] *Id.* at 144–45 (citations omitted).

[56] *Id.* at 145.

[57] *See id.* at 144 (writing that, "[i]n performing their official duties, agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies both by private and governmental organizations" and that "[t]o restrict the term 'agency records' to materials generated internally would frustrate Congress' desire to put within public reach the information available to an agency in its decision-making processes").

[58] Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (citation omitted) (numerical formatting altered). Despite its name, the court originally set forth the *Burka* test in *Tax Analysts v. DOJ*, 845 F.2d 1060 (D.C. Cir. 1988), *aff'd on other grounds*, 492 U.S. 136.

That said, an agency's mere *ability* to obtain materials, if not exercised, does not establish that such materials are agency records.[59] Further, FOIA does not require an agency to create agency records in response to a FOIA request.[60]

Distinguishing Agency Records and Personal Records of an Employee

Because FOIA applies only to "agency records," agencies are not required to disclose the "personal records" of agency employees.[61] As the Supreme Court in *Tax Analysts* explained, "the term 'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency."[62] The D.C. Circuit has employed "a totality of the circumstances test" to assess whether material constitutes an "agency record" subject to FOIA or a "personal record" excluded from the statute's coverage.[63] This "test focuses on a variety of factors surrounding the creation, possession, control, and use of the document by an agency."[64] In applying the totality of the circumstances test in *Consumer*

[59] *See* Forsham v. Harris, 445 U.S. 169, 186 (1980) (holding, in the context of information generated by a private grantee of federal funds as to which agency had a right to access and obtain custody over, that "FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained"); *cf. Burka*, 87 F.3d at 515 (holding that data possessed by third-party were agency records where agency had "constructive control" of the data). *But see* Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262, 275 (S.D.N.Y. 2009) (holding that "[t]he Supreme Court's teachings in *Tax Analysts*, *Forsham*, and *Kissinger* certainly do not compel adoption of the constructive obtainment and control theory, and thus this Court declines to do so under the facts presented here"). Further, the Supreme Court explained in *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980), that the fact that materials are *physically located* in an agency is not sufficient, alone, to render such materials agency records. *See id.* at 157 ("We simply decline to hold that the physical location of the notes of telephone conversations renders them 'agency records.' The papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department's files, and they were not used by the Department for any purpose. If mere physical location of papers and materials could confer status as an 'agency record' *Kissinger*'s personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA.").

[60] *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975) (writing that FOIA "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create"); *Kissinger*, 445 U.S. at 152 (stating that FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained"). Statutes such as the Federal Records Act (44 U.S.C. Chapters 21, 29, 31, and 33) and the Presidential Records Act (44 U.S.C. §§ 2201–2207) contain requirements for the retention of certain records held by the Executive Branch.

[61] *See* Ethyl Corp. v. EPA, 25 F.3d 1241, 1247 (4th Cir. 1994) ("[P]ersonal records of an agency employee are not agency records and are not subject to the FOIA."); DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, PROCEDURAL REQUIREMENTS, at 16 (Aug. 20, 2021) [hereinafter DOJ GUIDE, PROCEDURAL REQUIREMENTS], https://www.justice.gov/oip/page/file/1199421/dl?inline.

[62] *Tax Analysts*, 492 U.S. at 145 (citing *Kissinger*, 445 U.S. at 157).

[63] CREW v. DHS, 527 F. Supp. 2d. 76, 88 n.15 (D.D.C. 2007); *see* DOJ GUIDE, PROCEDURAL REQUIREMENTS, *supra* note 61, at 16.

[64] Consumer Fed'n of Am. (CFA) v. USDA, 455 F.3d 283, 287 (D.C. Cir. 2006) (alterations, and citation omitted). The *CFA* court cited *Burka* and *Tax Analysts* in a footnote when it explained the focus of the "totality of the circumstances" test. *See id.* at 287 n.7 (citing *Tax Analysts*, 492 U.S. at 144–45; *Burka*, 87 F.3d at 515). However, the court explicitly based its analysis of whether the documents at issue in the case were "agency records" on a prior D.C. Circuit decision with similar facts, *Bureau of National Affairs, Inc. (BNA) v. DOJ*, 742 F.2d 1484 (D.C. Cir. 1984). *See CFA*, 455 F.3d at 288 (explaining that *BNA* "provides the template necessary to decide this case"). *BNA* preceded the Supreme Court's *Tax Analysts* decision and the D.C. Circuit's use of the four-factor control test. The concurring opinion in *CFA* argued that the *Burka* test, not *BNA*, "provide[d] a better guide to decide th[e] case." *Id.* at 295 (Henderson, J., concurring).

The D.C. Circuit later wrote that the court *did* apply the *Burka* test in *CFA*. *See* Judicial Watch, Inc. v. Fed. Hous. Fin. Agency, 646 F.3d 924, 927 (D.C. Cir. 2011) (writing that the *CFA* court "used the *Burka* factors to decide whether FOIA applied" to the materials at issue in that case); *cf.* Judicial Watch, Inc. v. Secret Service, 726 F.3d 208, 220 (D.C. Cir. 2013) (writing that the D.C. Circuit has at different times suggested that all of the *Burka* factors must be satisfied (continued...)

Federation of America v. Department of Agriculture (USDA), the D.C. Circuit held that electronic calendars of several USDA officials qualified as "agency records" under FOIA.[65] The calendars "were created by agency employees and were located within the [officials'] agency," updated and accessed daily, and maintained on the agency's computer system.[66] The court held that the officials' use of the calendars was the "decisive factor."[67] Specifically, the court found it significant that the calendars were used to schedule agency operations and were distributed to other agency staff and top officials.[68] The court further determined that the electronic calendar of a separate USDA official was *not* an agency record subject to disclosure under FOIA because the official only shared the calendar with his secretaries and, therefore, no one else within the agency depended on his calendar to conduct agency business.[69]

Although FOIA does not require the disclosure of personal records, issues may arise when agency personnel use nonofficial electronic accounts to communicate.[70] In *Competitive Enterprise Institute v. Office of Science & Technology Policy (OSTP)*,[71] the requester sought "all policy/OSTP-related email[s]" contained within the private email account of the director of OSTP.[72] A private entity maintained an account that the director used for work-related purposes.[73] OSTP denied the request, asserting that the private entity (the director's former employer) controlled the account and that the agency therefore could not search it.[74] The D.C. Circuit, however, disagreed and held that "records do not lose their agency character just because the official who possesses them takes them out the door."[75] Instead, the court wrote, "[i]f the agency head controls what would otherwise be an agency record, then it is still an agency record and still must be searched or produced."[76] Thus, records that would otherwise be "agency records" under

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to establish control and, in contrast, "described the test as a 'totality of the circumstances test.'" (quoting *CFA*, 455 F.3d at 287)). *But see, e.g.*, Edelman v. SEC, 172 F. Supp. 3d 133, 150 (D.D.C. 2016) (explaining that the "'totality of the circumstances' test applied in *CFA* and *BNA*—rather than the [*Burka*] four-factor framework []—best fits this case").

[65] *CFA*, 455 F.3d at 293.

[66] *Id.* at 288–90.

[67] *Id.* at 288.

[68] *Id.* at 291. *See Edelman*, 172 F. Supp. 3d at 153 (explaining that the court found the "distribution" aspect of the "use" factor in *CFA* and *BNA*, important because "distribution served as evidence that [the records] 'were created for the purpose of conducting agency business.'" (emphasis omitted) (quoting *BNA*, 742 F.2d at 1496)).

[69] *CFA*, 455 F.3d at 293.

[70] Congress was aware of the practice of federal employees conducting government business on private electronic accounts when it passed the Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2003 (2014). That act, in part, prohibits employees of "executive agencies" from "creat[ing] or send[ing] a record using a non-official electronic messaging account unless" they copy their official account when creating or sending the record or "forward[] a complete copy of the record to [their] official electronic messaging account" within twenty days. *Id.* § 10(a), 128 Stat. at 2014 (codified at 44 U.S.C. § 2911(a)(1)-(2)). An individual's intentional violation of this requirement, "as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of title 5, as the case may be." *Id.* (codified at 44 U.S.C. § 2911(b)).

[71] 827 F.3d 145 (D.C. Cir. 2016).

[72] *Id.* at 146 (citation omitted).

[73] Competitive Enter. Inst. (CEI) v. OSTP, 241 F. Supp. 3d 14, 18 (D.D.C. 2017).

[74] *See* CEI v. OSTP, 82 F. Supp. 3d 228, 232–34 (D.D.C. 2015), *rev'd and remanded*, 827 F.3d 145; *CEI*, 827 F.3d at 146–47.

[75] *CEI*, 827 F.3d at 507.

[76] *Id.* On remand, the district court held that OSTP was not required to disclose the work-related emails in the director's private email account. *CEI*, 241 F. Supp. 3d at 21, 24. The court determined that the government had successfully shown that the director had complied with OSTP's policy that employees must forward work-related emails on private accounts to their official OSTP accounts and that, therefore, "any work-related emails in [his private account] are (continued...)

FOIA do not lose their character because they are stored in nongovernmental electronic accounts.[77]

"Any Person"

Lastly, FOIA directs agencies to disclose nonexempt agency records to "any person" upon request.[78] A "person" is defined as "an individual, partnership, corporation, association, or public or private organization other than an agency."[79] Courts have held that, along with individuals, organizational entities such as corporations and state and foreign governments have access rights under FOIA.[80] Federal agencies have no right to records under FOIA.[81]

Access to records under FOIA does not hinge on whether an individual is an American citizen; noncitizens are also entitled to records under the act.[82] Further, the Supreme Court has explained

duplicates of emails located in his OSTP account." *Id.* at 21, 22. "FOIA," the court explained, "does not require agencies to produce duplicate records"; therefore, the government needed only to disclose responsive records contained in the director's official OSTP email account. *Id.* at 22–23. Further, the court determined that OSTP conducted an adequate search of the director's official email account. *Id.* at 23, 24 (citation omitted).

[77] *See CEI*, 827 F.3d at 146 ("[A]n agency cannot shield its records from search or disclosure under FOIA by the expedient of storing them in a private email account controlled by the agency head.... "); Claudia Polsky, *Open Records, Shuttered Labs: Ending Political Harassment of Public University Researchers*, 66 UCLA L. REV. 208, 271 (2019) (explaining that the *Competitive Enterprise Institute* court "held ... that the federal FOIA can reach private email accounts where those accounts contain agency records") (citing *CEI*, 827 F.3d at 146).

[78] 5 U.S.C. § 552(a)(3)(A). *See infra* Request-Driven Disclosure.

[79] 5 U.S.C. § 551(2). *Cf.* Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262, 277 n.12 (S.D.N.Y. 2009) (stating that "the only way the FRBNY [Federal Reserve Bank of New York] could qualify as a person is if this Court determined that the FRBNY does not qualify as an agency because FOIA defines 'person' as an 'individual, partnership, corporation, association, or public or private organization other than an agency'" (emphasis omitted) (quoting 5 U.S.C. § 551(2))), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

[80] *See, e.g.*, Judicial Watch of Fla., Inc. v. DOJ, 102 F. Supp. 2d 6, 10 (D.D.C. 2000) (noting 5 U.S.C. § 551(1)'s definition of "person" and explaining that "[a] corporation is a person entitled to make FOIA requests"); Texas v. Interstate Commerce Comm., 935 F.2d 728, 729, 734 (5th Cir. 1991) (denying attorney's fees in action brought by state-requester); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776 (D.D.C. 1974) ("A foreign government or an instrumentality thereof would appear to be a 'public or private organization' within the terms of [FOIA]."). *Cf.* Tembec, Inc. v. United States, 441 F. Supp. 2d 1302, 1322 (Ct. Int'l Trade 2006) (writing that "[i]n cases litigating [FOIA] requests filed by foreign agencies and sovereigns, courts have generally assumed that such entities are 'persons' within the meaning of 5 U.S.C. § 551"). However, as to foreign governments, FOIA prohibits "element[s] of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947)" from disclosing agency records to foreign governmental entities or representatives thereof. 5 U.S.C. § 552(a)(3)(E) (citation omitted); *see* All Party Parliamentary Grp. on Extraordinary Rendition v. U.S. DOD, 754 F.3d 1047, 1053 (D.C. Cir. 2014) (holding that "FOIA requesters who have authority to file requests on behalf of foreign government entities are 'representatives' of such entities [under 5 U.S.C. § 552(a)(3)(E)] when they file requests of the sort they have authority to file").

[81] *See* 5 U.S.C. § 551(2) (defining "person" under the APA as "an individual, partnership, corporation, association, or public or private organization *other than an agency*") (emphasis added); *cf.* Ebling v. DOJ, 796 F. Supp. 2d 52, 62 (D.D.C. 2011) ("Congress deliberately conferred the right to make a FOIA request upon 'any person,' a term that is defined broadly to include any individual or organization other than a federal agency" (internal citations omitted) (quoting 5 U.S.C. §§ 551(2), 552(a)(3)(A))).

[82] *See, e.g.*, Doherty v. DOJ, 596 F. Supp. 423, 428 (S.D.N.Y. 1984) (holding that resident alien who entered country under a fraudulent passport was able to request records under FOIA); *see also* De Laurentiis v. Haig, 528 F. Supp. 601 (E.D. Penn. 1981) (plaintiff in FOIA lawsuit was a foreign citizen residing in country of citizenship). However, under the "fugitive disentitlement doctrine," some courts have rejected FOIA claims asserted by fugitives where there was a sufficient relationship between the individual's status as a fugitive and his FOIA lawsuit. *See* Maydack v. DOE, 150 F. App'x 137 (3d Cir. 2005) (affirming district court's dismissal of fugitive's FOIA lawsuit under the fugitive disentitlement doctrine); *see also* Lazaridis v. DOJ, 713 F. Supp. 2d 64, 69, 70 (D.D.C. 2010) (explaining that "[u]nder the fugitive disentitlement doctrine, a court, in its discretion, may dismiss a civil action if the plaintiff is a fugitive, his (continued...)

that the requester's identity generally does not factor into whether records are subject to disclosure, nor is a requester generally required to supply a reason to an agency for his or her request.[83]

Access to Government Information Under FOIA

FOIA sets forth a three-part system for disclosing government information.[84] FOIA's two affirmative disclosure requirements require agencies to disclose specific categories of information to the public either through publication in the *Federal Register* or electronic disclosure by, for instance, posting the information on the agency's website.[85] The third request-based disclosure provision requires that, "[e]xcept with respect to the records made available" pursuant to FOIA's affirmative disclosure requirements, agencies disclose covered records after receiving a request from "any person."[86]

Affirmative Disclosure

While FOIA may be known predominately for its request-driven system of disclosure,[87] the statute also contains affirmative disclosure provisions that require federal agencies to proactively disseminate to the public certain agency records. FOIA imposes two affirmative (also known as mandatory or proactive)[88] disclosure obligations. Under the first requirement—codified in subsection (a)(1) of § 552—agencies must publish certain important government materials—including "substantive rules of general applicability" and "rules of procedure"—in the *Federal Register*.[89] The second affirmative disclosure requirement—codified in subsection (a)(2) of

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fugitive status has a connection to the present proceedings, and dismissal 'is necessary to effectuate the concerns underlying the ... doctrine,'" but denying DOJ's motion to dismiss fugitive's FOIA lawsuit "[i]n the absence of a demonstrable connection between [the requester's] fugitive status and these FOIA proceedings" (ellipses in original) (citations omitted) (quoting Magluta v. Samples, 162 F.3d 662, 664 (11th Cir. 1998)). *See* DOJ GUIDE, PROCEDURAL REQUIREMENTS, *supra* note 61, at 19 & n.90.

[83] *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004) ("As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester."); *id.* at 172 ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, as we have noted, the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all."); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 144 n.10 (1975) (explaining that a requester's "rights under [FOIA] are neither increased nor decreased by reason of the fact that it claims an interest in [records] greater than that shared by the average member of the public"). *See* DOJ GUIDE, PROCEDURAL REQUIREMENTS, *supra* note 61, at 21–22.

The identity of a requester does factor, however, in the assessment of fees under FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(ii). For information on FOIA fees, see CRS In Focus IF11272, *Freedom of Information Act Fees for Government Information*, by Meghan M. Stuessy (2022).

[84] Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 352 (1979) (noting that FOIA "makes available to any person all agency records, which it divides into three categories: [1] some must be currently published in the *Federal Register*; [2] others must be promptly [published] or made publicly available and indexed; and [3] all others must be promptly furnished on request") (internal citations omitted) (third alteration in original).

[85] 5 U.S.C. § 552(a)(1)–(2).

[86] *Id.* § 552(a)(3)(A), 4(B). *See supra* "Agency Records" & "Any Person"

[87] *See* CREW v. DOJ, 846 F.3d 1235, 1240 (D.C. Cir. 2017) (stating that provision governing agencies' response-driven obligation under FOIA is FOIA's "most familiar provision").

[88] *See* DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, PROACTIVE DISCLOSURES 1 (Aug. 4, 2020) [hereinafter DOJ GUIDE, PROACTIVE DISCLOSURES], https://www.justice.gov/oip/foia-guide/proactive_disclosures/dl?inline.

[89] 5 U.S.C. § 552(a)(1), (a)(1)(C), (D).

§ 552—requires agencies to provide electronic access to a separate set of agency materials that consists of, among other things, final agency adjudicative opinions and certain "frequently requested" records.[90]

Publication in the *Federal Register*

Under § 552(a)(1), agencies must publish certain information "in the Federal Register for the guidance of the public."[91] The provision seeks "to enable the public 'readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies.'"[92] It instructs agencies to publish the following:

(1) descriptions of agency organization and information regarding how, where, and from whom "the public may obtain information, make submittals or requests, or obtain decisions";[93]

(2) information on how agency "functions are channeled and determined, including the nature and requirements of all formal and informal procedures available";[94]

(3) procedural rules, descriptions of available agency forms "or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations";[95]

(4) "substantive rules of general applicability adopted as authorized by law," as well as agency "statements of general policy or interpretations of general applicability";[96] and

(5) every "amendment, revision, or repeal of the foregoing."[97]

FOIA imposes a penalty for an agency's failure to publish the above information. It provides that no person shall "in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published" unless the affected party received "actual and timely notice of the terms thereof."[98] In other words, an agency may not enforce any material against an affected party that the agency did not publish in the *Federal Register* as required under subsection (a)(1) if the affected party did not otherwise receive actual and timely notice.[99]

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[90] *Id.* § 552(a)(2), (a)(2)(A), (D).

[91] *Id.* § 552(a)(1).

[92] Ramsey Clark, Att'y Gen., *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 3 (1967) (quoting S. REP. NO. 1219 (1964)).

[93] 5 U.S.C. § 552(a)(1)(A).

[94] *Id.* § 552(a)(1)(B).

[95] *Id.* § 552(a)(1)(C).

[96] *Id.* § 552(a)(1)(D).

[97] *Id.* § 552(a)(1)(E). *See generally* DOJ GUIDE, PROACTIVE DISCLOSURES, *supra* note 88, at 2.

[98] *Id.* § 552(a)(1). *See* S. REP. NO. 813, at 6 (1965) (stating that "[t]he new sanction imposed for failure to publish the matters enumerated in" the *Federal Register* publication provision "gives added incentive to the agencies to publish the required material"); H.R. REP. NO. 1497, at 7 (1966) (writing that the sanction is "[a]n added incentive for agencies to publish necessary details about their official activities in the Federal Register").

[99] 5 U.S.C. § 552(a)(1); Emily S. Bremer, *American and European Perspectives on Private Standards in Public Law*, 91 TUL. L. REV. 325, 346 (2016) (explaining that, "[i]f an agency does not fulfill the [*Federal Register*] publication requirement, it will be prevented from enforcing the nonpublished material against any person or entity that did not have actual notice of the material in question"); *see* Appalachian Power Co. v. Train, 566 F.2d 451, 455–56 (4th Cir. 1977); *see also* United States v. San Juan Lumber Co., 313 F. Supp. 703, 706–08 (D. Col. 1969) (holding that failure to (continued...)

Courts have held that FOIA authorizes judicial review of an agency's withholding of materials subject to subsection (a)(1).[100] However, available remedies in such cases may be limited. In *Kennecott Utah Copper Corporation v. Department of the Interior (DOI)*, the D.C. Circuit held that FOIA does not authorize reviewing courts to order an agency to publish materials in the *Federal Register*.[101] The court explained that FOIA's judicial review provision "allows district courts to order 'the production of any agency records improperly withheld *from the complainant*,' not agency records withheld from the *public*."[102] Whereas, as explained by the court, "[p]roviding documents to the individual fully relieves whatever informational injury may have been suffered by that particular complainant," requiring "publication goes well beyond that need."[103] The court explained that the penalty in subsection (a)(1), which provides that materials required to be published in the *Federal Register* that an agency has not so published are generally unenforceable,[104] is "an alternative means for encouraging agencies to fulfill their obligation to publish materials in the Federal Register" and "gives agencies a powerful incentive to publish any [(a)(1) materials] they expect to enforce."[105]

Electronic Disclosure

FOIA's second affirmative disclosure provision, subsection (a)(2) of § 552 (often referred to as the "reading-room provision"),[106] directs agencies to "make available for public inspection in an

publish in the *Federal Register* was not a defense where the defendant had received actual notice of the Federal Trade Commission's resolution authorizing an investigation).

5 U.S.C. § 552(a)(1) also states that "matter reasonably available to the class of persons affected thereby is *deemed published* in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register." (emphasis added). This provision allows agencies to integrate external publications into agency regulations simply by referring to—as opposed to reprinting—the outside material in the *Federal Register*, as long as the Office of the Federal Register approves of the incorporation and the matter incorporated is "reasonably available." *Id.* This authorization is intended to effectuate Congress's intent to ensure the *Federal Register* is "kept down to a manageable size." S. REP. NO. 1219, at 4 (1964); *see also* S. REP. NO. 813, at 6 (1965) (writing that "there have been few complaints about omission from the *Federal Register* of necessary official material" and that, "[i]n fact, what complaints there have been have been more on the side of too much publication rather than too little."). For more on incorporation by reference, see Daniel J. Sheffner, *Integrating Technical Standards into Federal Regulations: Incorporation by Reference*, *in* THE CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW: FURTHER INTERSECTIONS OF PUBLIC AND PRIVATE LAW 108–23 (Jorge Contreras, ed., 2019).

[100] *See* CREW v. DOJ, 846 F.3d 1235, 1240 (D.C. Cir. 2017) ("Our precedent makes clear that FOIA's remedial provision ... governs judicial review of ... requests for information under section[] 552(a)(1).... ") (first ellipses in original) (quoting Kennecott Utah Copper Corp. v. DOI, 88 F.3d 1191, 1202 (D.C. Cir. 1996)); Campaign for Accountability v. DOJ, 278 F. Supp. 3d 303, 306 (D.D.C. 2017) (explaining that "[a] FOIA complaint that seeks judicial review of an agency's withholding of records can allege that the government's withholding violates any one of the statute's ... disclosure requirements," including the requirement contained in "section[] 552(a)(1)"); *cf.* CREW v. DOJ, 922 F.3d 480, 486 (D.C. Cir. 2019) ("An agency withholds its records 'improperly' if it fails to comply with one of FOIA's 'mandatory disclosure requirements.'" (quoting DOJ v. Tax Analysts, 492 U.S. 136, 150 (1989), and 5 U.S.C. § 552(a)(4)(B)).

[101] *Kennecott*, 88 F.3d at 1202–03.

[102] *Id.* at 1203 (quoting 5 U.S.C. § 552(A)(4)(B)) (emphasis in original).

[103] *Id.*

[104] *See supra* text accompanying notes 98–99.

[105] *Kennecott*, 88 F.3d at 1203.

[106] *See, e.g.*, CREW v. DOJ, 922 F.3d 480, 483 (D.C. Cir. 2019). Agencies used to make materials covered by subsection (a)(2) available in physical "reading rooms." Upon enactment of the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA Amendments), Pub. L. No. 104-231, 110 Stat. 3048 (1996), which required agencies to make subsection (a)(2) materials available "by electronic means," the locations within agency websites housing (a)(2) materials became known as "electronic reading rooms." *See* Daniel J. Sheffner, *Access to Adjudication Materials on*
(continued...)

electronic format" certain information, unless the information is "promptly published and copies [are] offered for sale."[107] The following information must be electronically disclosed under FOIA's second affirmative disclosure provision:

(1) "final opinions ... , as well as orders, made in the adjudication of cases";[108]
(2) policy statements and interpretations not appearing in the Federal Register;[109]
(3) "administrative staff manuals and instructions to staff that affect a member of the public";[110]
(4) copies of records that had been released in response to a FOIA request and that (a) "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records" due to the nature of the records' subject or (b) "have been requested 3 or more times";[111] and
(5) indexes of such previously released records.[112]

The 1966 House report accompanying FOIA explained that this provision was intended to open up to the public the "thousands of orders, opinions, statements, and instructions issued by hundreds of agencies," information that the report described as constituting "the bureaucracy['s] ... own form of case law."[113] In that vein, the Supreme Court has explained that FOIA's second affirmative disclosure provision "represents a strong congressional aversion to 'secret [agency] law.'"[114] Materials subject to subsection (a)(2) are now generally made accessible on agency

Federal Agency Websites, 51 AKRON L. REV. 447, 454–55 (2017); *see also* OIP, *OIP Guidance: Agency FOIA Websites 2.0*, DOJ (last updated Dec. 2, 2022), https://www.justice.gov/oip/oip-guidance/OIP%20Guidance%3A%20%20Agency%20FOIA%20Websites%202.0 (explaining that the 1996 E-FOIA Amendments "required agencies to use electronic information technology to enhance the public availability of their FOIA 'reading room' records"). DOJ now refers to such website locations as "FOIA Libraries." *See* DOJ GUIDE, PROACTIVE DISCLOSURES, *supra* note 88, at 6 (explaining that what it now refers to as a "FOIA Library" was "previously referred to as an 'electronic Reading Room'").

[107] 5 U.S.C. § 552(a)(2). The provision requires that agencies make covered information available "in accordance with published rules." *Id.* § 552(a)(2).

[108] *Id.* § 552(a)(2)(A). This provision provides that "[f]inal opinions" include "concurring and dissenting opinions." *Id.*

[109] *Id.* § 552(a)(2)(B).

[110] *Id.* § 552(a)(2)(C).

[111] *Id.* § 552(a)(2)(D).

[112] *Id.* § 552(a)(2)(E). *See generally* DOJ GUIDE, PROACTIVE DISCLOSURES, *supra* note 88, at 2–4. Subsection (a)(2) authorizes agencies to "delete identifying details" from (a)(2) materials in order "to prevent a clearly unwarranted invasion of personal privacy." *Id.* An agency must generally explain its reason for doing so and indicate "the extent of such deletion ... on the portion of the record which is made available or published." *See id.* ("[I]n each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made.").

[113] H.R. REP. NO. 1497, at 7 (1966). In the 1966 act, this provision only governed the disclosure of adjudicative opinions and orders, policy statements and interpretations, and staff manuals and instructions (the first three types of materials listed above). *See* An Act to amend section 3 of the Administrative Procedure Act, Pub. L. No. 89-487, 80 Stat. 250, 250–51 (1966). The previously-requested-records requirement and the related index requirement pertaining to such records, *see* 5 U.S.C. § 552(a)(2)(D)–(E), were added to FOIA in 1996. *See* E-FOIA Amendments, Pub. L. No. 104-231, § 4, 110 Stat. at 3049 (1996). The "requested 3 or more times" prong of § 552(a)(2)(D) was added in 2016. *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 538 (2016).

[114] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (alteration in original) (quoting Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967)).

websites.[115] In addition to public dissemination of the above materials, subsection (a)(2) requires that agencies "maintain and make available for public inspection in an electronic format" indexes of (a)(2) material.[116]

Like Section (a)(1), Section (a)(2) bars an agency from using or citing as precedent a "final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public" unless the agency has (1) indexed the material and published or made it available, or (2) given the affected party "actual and timely notice of the terms" of such material.[117]

As with (a)(1) materials,[118] FOIA authorizes judicial review of challenges to the availability of materials subject to disclosure under subsection (a)(2).[119] Courts do not appear to agree, however, whether they have authority under FOIA to order agencies to make (a)(2) records available in agency reading rooms, or whether their authority under the statute is limited to ordering the production of records to individual complainants.[120]

Request-Driven Disclosure

Under FOIA's third system of disclosure, agencies must disclose covered records not "made available under" the affirmative disclosure provisions, discussed above, on a case-by-case basis after receiving a request.[121] As discussed below, FOIA imposes certain procedural requirements on requesters and agencies in making and responding to requests for records.[122] As also discussed

[115] *See* DOJ GUIDE, PROACTIVE DISCLOSURES, *supra* note 88, at 6 ("Agencies often accomplish this electronic availability requirement by posting records on their FOIA websites in a designated area known as a 'FOIA Library'.... "); *see, e.g.*, 40 C.F.R. § 2.101(c) ("All records created by [the Environmental Protection Agency (EPA)] on or after November 1, 1996, which the FOIA requires an agency to make regularly available for public inspection and copying, will be made available electronically through EPA's website, located at http://www.epa.gov, or, upon request, through other electronic means.").

[116] 5 U.S.C. § 552(a)(2) ("Each agency shall ... maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published."); *see also id.* (stating that agencies must "promptly publish ... and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication").

[117] *Id.*

[118] *Id.* § 552(a)(1); *see supra* Publication in the *Federal Register*.

[119] *See* CREW v. DOJ, 846 F.3d 1235, 1240 (D.C. Cir. 2017) ("Our precedent makes clear that FOIA's remedial provision ... governs judicial review of ... requests for information under section[] 552(a) ... (2).... ") (first ellipses in original)(quoting Kennecott Utah Copper Corp. v. DOI, 88 F.3d 1191, 1202 (D.C. Cir. 1996)).

[120] *Compare id.* at 1243 (holding that "a court has no authority under FOIA to issue an injunction mandating that an agency 'make available for public inspection' documents subject to" § 552(a)(2), but that "nothing in [its precedent] prevents a district court from, consistent with [FOIA's judicial review provision], ordering an agency to provide *to the plaintiff* documents covered by" § 552(a)(2)) *with* Animal Legal Def. Fund v. USDA, 935 F.3d 858, 869 (9th Cir. 2019) (holding that FOIA's judicial review "provision cloaks district courts with the authority to order an agency to post records in an online reading room" under § 552(a)(2)).

[121] 5 U.S.C. § 552(a)(3)(A), (a)(4)(B); *see* CREW v. DOJ, 922 F.3d 480, 484 (D.C. Cir. 2019) ("Unlike its more commonly invoked neighbor—which imposes a 'reactive' duty on agencies[]—the reading-room provision affirmatively obligates agencies to 'make available for public inspection' several categories of documents even absent a specific request." (citation omitted) (quoting CREW v. DOJ, 846 F.3d 1235, 1240 (D.C. Cir. 2017), and 5 U.S.C. § 552(a)(2)). The meaning of "agency records" under FOIA is discussed above. *See supra* "Agency Records".

[122] *See generally* DOJ GUIDE, PROCEDURAL REQUIREMENTS, *supra* note 61.

below, FOIA allows requesters to appeal agency decisions to withhold records within the agency, a process requesters generally must take advantage of prior to seeking judicial review.[123]

Agency Response Requirements

Section 552(a)(3)(A) governs the production of records subject to a FOIA request. Under that section, "each agency ... shall make ... records promptly available to any person" after receiving a FOIA request.[124] A request must satisfy two requirements to trigger a response from the relevant agency. First, a request must "reasonably describe[]" the records sought.[125] The House committee report accompanying the 1974 amendments to FOIA states that "a description [of a requested document would be sufficient if it enabled] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort."[126] Second, a FOIA request must comply with the agency's "published rules stating the time, place, fees (if any), and procedures to be followed."[127]

If a requester submits a valid request, an agency must execute an "adequate" or "reasonable" search.[128] This standard requires that an agency conduct a search that is "reasonably calculated to uncover all relevant documents."[129] The D.C. Circuit has explained that "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate."[130] FOIA also states that agencies must "make reasonable efforts to search for ... records in electronic form or format," unless doing so "would significantly interfere with the operation of the agency's automated information system."[131] DOJ

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[123] *See generally* DOJ GUIDE, PROCEDURAL REQUIREMENTS, *supra* note 61.

[124] 5 U.S.C. § 552(a)(3)(A). However, agencies are not required to disclose records covered by one of FOIA's nine exemptions or three exclusions upon receiving a request. 5 U.S.C. § 552(b), (c); *see infra* Exemptions (discussing FOIA's exemptions contained in 5 U.S.C. § 552(b)); *see infra* Exclusions (discussing FOIA's exclusions contained in 5 U.S.C. § 552(c)). As indicated above, § 552(a)(3)'s request-based disclosure obligation does not apply to "records made available under" FOIA's affirmative disclosure provisions. 5 U.S.C. § 552(a)(3)(A). FOIA's affirmative disclosure provisions are discussed above. *See supra* Affirmative Disclosure.

[125] 5 U.S.C. § 552(a)(3)(A)(i).

[126] H.R. REP. NO. 876, at 6 (1974); *see* Yagman v. Pompeo, 868 F.3d 1075, 1081 (9th Cir. 2017) (quoting Marks v. United States, 587 F.2d 261, 263 (9th Cir. 1978) (quoting H.R. REP. NO. 876, at 6 (1974)) (same). Relatedly, courts have determined that agencies are not compelled to perform "unreasonably burdensome search[es]." Am. Fed'n of Gov't Emp.'s, Local 2782 v. U.S. Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (quoting Goland v. CIA 607 F.2d 339, 353 (D.C. Cir. 1978)); *see* DOJ GUIDE, PROCEDURAL REQUIREMENTS, *supra* note 61, at 52 (stating that "courts have held that the FOIA does not require agencies to conduct 'unreasonably burdensome' searches for records").

[127] 5 U.S.C. § 552(a)(3)(A)(ii). Many agencies apply special scrutiny to certain sensitive requests that involve review by agency officials or political appointees. *See, e.g.*, Memorandum, Stephen W. Warren, Executive in Charge and Chief Information Officer for Information and Technology, Dep't of Veterans Affairs, to Under Secretaries, Assistant Secretaries, and Other Key Officials (Oct. 31, 2013) (declaring that, on a temporary basis, "all responses to FOIA requests by [the Department of Veterans Affairs' central] offices and field components will be reviewed by the designated officials prior to release to the public" for the purpose of making "sensitivity determination[s]").

[128] *See* Hamdan v. DOJ, 797 F.3d 759, 770 (9th Cir. 2015); Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004); *see also* Edelman v. SEC, 172 F. Supp. 3d 133, 144 (D.D.C. 2016) ("An agency has an obligation under FOIA to conduct an adequate search for responsive records.").

[129] *Hamdan*, 797 F.3d at 770; *see Edleman*, 172 F. Supp. 3d at 144.

[130] Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (per curiam); *cf. In re* Clinton, 970 F.3d 357, 367 (D.C. Cir. 2020) ("It is well established that the reasonableness of a FOIA search does not turn on whether it actually uncovered every document extant, and that the failure of an agency to turn up a specific document does not alone render a search inadequate.") (citations omitted).

[131] 5 U.S.C. § 552(a)(3)(C); *cf. id.* § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an (continued...)

guidance provides that this latter requirement "promotes electronic database searches and encourages agencies to expend new efforts in order to comply with the electronic search requirements of particular FOIA requests."[132]

To facilitate its disclosure mandate, FOIA requires agencies to respond within certain timeframes and authorizes administrative review of unfavorable agency decisions.[133] Once it receives a valid FOIA request, an agency has twenty business days to "determine ... whether to comply with [the] request" and "shall immediately notify the" requester of its "determination and the reasons therefor," as well as of the requester's right to appeal an "adverse determination" within the agency.[134] In "unusual circumstances"—as defined by the statute—an agency may extend the twenty-day period by ten additional days.[135]

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agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.").

[132] DOJ, Office of Info. Pol'y, *FOIA Update: Congress Enacts FOIA Amendments* (Jan. 1, 1996), https://www.justice.gov/oip/blog/foia-update-congress-enacts-foia-amendments.

[133] *See* Judicial Watch, Inc. v. DHS, 895 F.3d 770, 774 (D.C. Cir. 2018) (explaining that "[t]o ensure [FOIA's disclosure] mandate did not become a dead letter, Congress," *inter alia*, "established timetables for agencies to respond to requests" and "provided members of the public whose records requests were denied a right to an administrative appeal"). In addition to the timeframes discussed herein, FOIA also imposes other related requirements on agencies. For example, agencies are required to create a program for assigning and providing to requesters tracking numbers for requests "that will take longer than ten days to process," 5 U.S.C. § 552(a)(7), and to develop rules "providing for expedited processing of requests," *id.* § 552(a)(6)(c). Agencies must also develop regulations governing fees for processing requests, including in regard to "when such fees should be waived or reduced." *Id.* § 552(a)(4)(A).

[134] 5 U.S.C. § 552(a)(6)(A)(i)(I), (III)(aa). An agency must also notify the requester of his or her "right ... to seek assistance from the FOIA Public Liaison of the agency," as well as "to seek dispute resolution services from the [agency's] FOIA Public Liaison ... or the Office of Government Information Services." *Id.* § 552(a)(6)(A)(i)(II)-(III). The twenty-day period does not include Saturdays, Sundays, or public holidays. *Id.* § 552(a)(6)(A)(i). An agency is authorized to toll this period in certain circumstances. *See id.* § 552(a)(6)(A)(ii)(I) (authorizing agencies to "make one request to the requester for information and toll the 20-day period while it ... await[s] such information that it has reasonably requested from the requester"); *id.* § 552(a)(6)(A)(ii)(II) (providing that the twenty-day period may be tolled "if necessary to clarify with the requester issues regarding fee assessment").

[135] 5 U.S.C. § 552(a)(6)(B)(i). FOIA defines "unusual circumstances" to mean the following—"but only to the extent reasonably necessary to the proper processing of the particular requests":

> (I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
>
> (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
>
> (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

Id. § 552(a)(6)(B)(iii).

Relatedly, during litigation challenging an agency's decision to withhold information under FOIA, *see infra* FOIA-Related Litigation: Selected Issues, FOIA allows courts to "retain jurisdiction and allow [an] agency additional time to complete its review of [its] records" if "*exceptional circumstances* exist and ... the agency is exercising due diligence in responding to the request." 5 U.S.C. § 552(a)(6)(C)(i) (emphasis added). "Exceptional circumstances" is not a limitless term. FOIA states that the term "does not include a delay that results from a predictable agency workload of requests ... , unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." *Id.* § 552(a)(6)(C)(ii). A refusal to reasonably modify a request's scope or processing time frame is "a factor in determining whether exceptional circumstances exist." *Id.* § 552(a)(6)(C)(iii). Stays granted under § 552(a)(6)(C) are often called "*Open America* stays," from the D.C. Circuit's decision in *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). In *Open America*, the court held that "'exceptional circumstances exist,'" and therefore a stay is warranted under subsection (a)(6)(C), "when an agency ... is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it 'is (continued...)

In *Citizens for Responsibility & Ethics in Washington v. Federal Election Commission*,[136] the D.C. Circuit held that to make a proper "determination," an "agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents."[137] The court explained that an agency need not produce requested records when it makes its initial determination, determining that it may fulfill its responsibility under § 552(a)(3)(A) to "make ... records promptly available" *after* it indicates the scope of the records it will disclose and the exemptions it will invoke.[138]

Appeals and Exhaustion of Administrative Remedies

A requester who receives an adverse determination may appeal the determination within the agency.[139] Upon receiving an administrative appeal, an agency has twenty business days to make a determination, although, as in the context of initial determinations, it may extend this timeline by ten days for unusual circumstances.[140] If the agency—in whole or in part—upholds its adverse determination, it must inform the requester of FOIA's provisions governing judicial review of agency withholding decisions.[141] Judicial review can proceed if the requester remains dissatisfied.[142]

Before challenging an agency's nondisclosure decision in federal court, a requester must typically exhaust the agency's internal appeals process.[143] If, however, the agency does not adhere to the response time frames FOIA imposes on agencies, a requester "shall be deemed to have exhausted his administrative remedies."[144] If this occurs, the requester is viewed as having constructively

exercising due diligence' in processing the requests." *Id.* at 616. *Open America* was decided before subsections (a)(6)(C)(ii) and (ii) were added to FOIA in 1996. *See* E-FOIA Amendments, Pub. L. No. 104-231, § 7(c), 110 Stat. at 3051 (1996). The legislative history of the E-FOIA Amendments provides that subsection (a)(6)(C)(ii) clarifies "that routine, predictable agency backlogs for FOIA requests do not constitute exceptional circumstances for purposes of" FOIA, and that the provision is "consistent with the holding in *Open America*." H.R. REP. NO. 795, at 24 (1996); *see* Democracy Forward Found. v. DOJ, 354 F. Supp. 3d 55, 59 (D.D.C. 2018). Courts have held that "[o]ther circumstances warranting an *Open America* stay may include an agency's efforts to reduce the number of pending requests, the amount of classified material, [and] the size and complexity of other requests processed by the agency." Clemente v. FBI, 71 F. Supp. 3d 262, 266 (D.D.C. 2014) (citation omitted) (alteration in original).

[136] 711 F.3d 180 (D.C. Cir. 2013) (Kavanaugh, J.).

[137] *Id.* at 182–83.

[138] *Id.* at 188. *Cf. Judicial Watch*, 895 F.3d at 785 (Pillard, J., concurring) (writing that "FOIA ... sets a default 20-day deadline for the underlying *determination*, and simply requires that the ensuing *production* of records be made to the requester 'promptly' thereafter").

[139] 5 U.S.C. § 552(a)(6)(A). Within twenty (or, in the event of unusual circumstances, thirty) days of receiving a proper request, an agency must inform the requester of his or her ability to appeal an adverse determination "within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination," *id.* § 552(a)(6)(A)(i), (B)(i), (a)(6)(A)(i)(III)(aa).

[140] *Id.* § 552(a)(6)(A)(ii), (B)(i). The same unusual circumstances listed above in relation to initial determinations, *see* discussion and sources *supra* note 135, apply in the case of administrative appellate determinations, *see id.* § 552(a)(6)(B)(i), (iii).

[141] *Id.* § 552(a)(6)(A)(ii).

[142] *See infra* FOIA-Related Litigation: Selected Issues.

[143] Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 61 (D.C. Cir. 1990).

[144] 5 U.S.C. § 552(a)(6)(C)(i) ("Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph."); *see* DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, LITIGATION CONSIDERATIONS PART 1 46–47 (Feb. 27, 2024) https://www.justice.gov/oip/media/1341076/dl?inline#page=1 [hereinafter DOJ GUIDE, LITIGATION CONSIDERATIONS].

exhausted administrative remedies and may seek review in federal court.[145] Conversely, if an agency belatedly responds to a request before the requester files suit in federal court, the requester must still internally appeal the agency's adverse determination before seeking recourse in the federal courts.[146]

Exemptions

As explained above, FOIA establishes a statutory right of public access to a wide array of government information. FOIA's drafters, however, also desired to protect certain private and governmental interests from the law's broad disclosure mandate.[147] FOIA reflects this desire by exempting a variety of records and information from mandatory disclosure pursuant to nine enumerated exemptions.[148] Information protected by FOIA's exemptions ranges from certain classified national security information to geological information pertaining to wells.[149] Together, the statute's policy of otherwise maximum disclosure and its exemptions seek to strike a "balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy."[150]

FOIA's exemptions are codified at 5 U.S.C. § 552(b). **Table 1** lists each exemption. All nine exemptions are explained more fully below.

Table 1. FOIA Exemptions

5 U.S.C. § 552(b)(1)-(9)

Exemptions	Text of Exemptions
Exemption 1: National Security (5 U.S.C. § 552(b)(1)).	*Matters that are ... (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.*
Exemption 2: Personnel Rules and Practices (5 U.S.C. § 552(b)(2)).	*Matters that are ... related solely to the internal personnel rules and practices of an agency.*

[145] *See Oglesby*, 920 F.2d at 62 ("If the agency has not responded within the statutory time limits, then, under 5 U.S.C. § 552(a)(6)(C), the requester may bring suit.").

[146] *See id.* at 63–64 ("The ten-day [now twenty-day] constructive exhaustion under 5 U.S.C. § 552(a)(6)(C) allows immediate recourse to the courts to compel the agency's response to a FOIA request. But once the agency responds to the FOIA request, the requester must exhaust his administrative remedies before seeking judicial review.")

[147] S. REP. NO. 813, at 3 (1965); FBI v. Abramson, 456 U.S. 615, 621 (1982). FOIA's exemptions apply to materials subject to both FOIA's request-driven and affirmative disclosure provisions. *See* 3 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 21.2, at 2185 (6th ed. 2019) [hereinafter 3 HICKMAN & PIERCE, JR.].

[148] 5 U.S.C. § 552(b)(1), (9). In certain circumstances, agencies "may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a[ ] FOIA" exemption. Wilner v. NSA, 592 F.3d 60, 68 (2d Cir. 2009) (alteration in original) (quoting Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982)). This is known as a "*Glomar* response." For more information, see *infra Glomar* Responses.

[149] *See* 5 U.S.C. § 552(b)(1)–(9); *Abramson*, 456 U.S. at 621 (remarking that "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused").

[150] John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (quoting H.R. REP. NO. 1497, at 6 (1966)); *cf.* RICHARD J. PIERCE, JR., ET AL., ADMINISTRATIVE LAW AND PROCESS 374 (6th ed. 2014) ("The exemptions are an attempt to balance the benefits of disclosure against the particular disadvantages to the government or the economy if the information were released.").

Exemptions	Text of Exemptions
Exemption 3: Matter Exempted by Other Statutes (5 U.S.C. § 552(b)(3)).	*Matters that are ... specifically exempted from disclosure by statute (other than section 552b of this title), if that statute-* *(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or* *(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and* *(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.*
Exemption 4: Trade Secrets and Commercial or Financial Information (5 U.S.C. § 552(b)(4)).	*Matters that are ... trade secrets and commercial or financial information obtained from a person and privileged or confidential.*
Exemption 5: Inter- or Intra-Agency Materials (5 U.S.C. § 552(b)(5)).	*Matters that are ... inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.*
Exemption 6: Personal Privacy (5 U.S.C. § 552(b)(6)).	*Matters that are ... personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.*
Exemption 7: Law Enforcement (5 U.S.C. § 552(b)(7)).	*Matters that are ... records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.*
Exemption 8: Financial Institution Reports (5 U.S.C. § 552(b)(8)).	*Matters that are ... contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.*
Exemption 9: Wells (5 U.S.C. § 552(b)(9)).	*Matters that are ... geological and geophysical information and data, including maps, concerning wells.*

Source: 5 U.S.C. § 552(b)(1)–(9).

Despite the scope afforded to agencies to withhold certain records by FOIA's exemptions, FOIA is fundamentally a transparency statute.[151] FOIA explicitly requires that agencies "take reasonable steps necessary to segregate and release nonexempt information"[152] and disclose "[a]ny reasonably segregable portion of a record" that has been requested "after deletion of the portions which are exempt."[153] In that vein, the Supreme Court has directed that FOIA's exemptions should "be narrowly construed."[154] More fundamentally, FOIA's exemptions do not impose mandatory withholding obligations on agencies, and pursuant to the 2016 amendments to FOIA,[155] an agency may not withhold government information protected by an exemption unless it "reasonably foresees that disclosure would harm an interest protected by an exemption" or if disclosing the information is legally prohibited.[156] Interpreting the 2016 amendments, the D.C. Circuit held that 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."[157] Such limitations on the potential breadth of FOIA's exemptions may aid in the implementation of the statute's prodisclosure mandate.

The Supreme Court has instructed that, due to the "exclusivity" of FOIA's exemptions, the act does not authorize an agency to withhold a covered record or information that is not protected by an applicable exemption.[158] In *American Immigration Lawyers Association v. Executive Office for Immigration Review*,[159] the D.C. Circuit held that, when disclosing a record under FOIA, an agency may not redact information from that record on the basis that the information is "non-responsive," but instead is limited by FOIA's nine exemptions in the types of information it may redact.[160] The court explained that, although an agency may apply a FOIA exemption to withhold matter from a record, "once an agency identifies a record it deems responsive to a FOIA request, the statute compels disclosure of the responsive record ... as a unit."[161] Thus, per the court, although "the focus of the FOIA is information, not documents" when the agency is deciding whether to exempt matter from a record, "outside of that context, FOIA calls for disclosure of a responsive record, not disclosure of responsive information within a record."[162]

[151] *See* Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976) (declaring that "the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny").

[152] 5 U.S.C. § 552(a)(8)(A)(ii)(II).

[153] *Id.* § 552(b); *see also id.* ("The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption ... under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.").

[154] *See id.* at 361 (stating that FOIA's "exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA]" and that they "must be narrowly construed").

[155] *See* FOIA Improvement Act, Pub. L. No. 114-185, 130 Stat. 538 (2016).

[156] *Id.* § 2(1), 130 Stat. at 539 (codified at 5 U.S.C. § 552(a)(8)(A)(i)(I)–(II)).

[157] Reps. Comm. For Freedom of the Press v. FBI, 3 F.4th 350, 369 (D.C. Cir. 2021); *see also* U.S. DOJ, OFFICE OF INFO. POL'Y, GUIDANCE: APPLYING A PRESUMPTION OF OPENNESS AND THE FORESEEABLE HARM STANDARD, (Apr. 12, 2023) https://www.justice.gov/oip/oip-guidance-applying-presumption-openness-and-foreseeable-harm-standard.

[158] DOJ v. Tax Analysts, 492 U.S. 136, 151 (1989).

[159] 830 F.3d 667 (D.C. Cir. 2016).

[160] *Id.* at 677–78, 679.

[161] *Id.* at 677.

[162] *Id.* (internal citation omitted).

An agency may be prohibited by another source of law from disclosing material that is exempt under FOIA.[163] For example, under FOIA's Exemption 3, certain statutes that prohibit or place limits on agencies' disclosure of information may serve as bases under FOIA for withholding covered information.[164] An agency's disclosure of information protected by an Exemption 3 withholding statute, therefore, could, depending on the statute's terms, violate that particular statute. As another example, although FOIA's Exemption 4 authorizes an agency to withhold certain confidential "commercial or financial information" and trade secrets,[165] the Trade Secrets Act (TSA)[166] imposes criminal penalties for disclosing certain confidential materials if disclosure is not "authorized by law."[167] Thus, while Exemption 4 grants agencies *discretion* to withhold information covered by both the exemption and the TSA, the TSA *prohibits* the unauthorized disclosure of the information.[168] Ultimately, however, if records within FOIA's coverage are not exempt under FOIA or prohibited from being disclosed by another law, an agency must disclose such records upon request.[169]

Under certain circumstances, an agency may be held to have waived its ability to apply an exemption to a requested record due to its prior disclosure of information. For example, the D.C. Circuit has "held ... that the government cannot rely on an otherwise valid exemption claim to justify withholding information that has been 'officially acknowledged' or is in the 'public domain.'"[170] Courts have often held that an agency's prior disclosure of information to Congress has not foreclosed application of an exemption in response to a subsequent FOIA request.[171]

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[163] *See* DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, WAIVER AND DISCRETIONARY DISCLOSURE 15–16 (Aug. 31, 2022) [hereinafter DOJ GUIDE, WAIVER AND DISCRETIONARY DISCLOSURE], https://www.justice.gov/d9/pages/attachments/2019/08/27/waiver_and_discretionary_disclosure_final.pdf. *See* 5 U.S.C. § 552(b)(3)(A)(i).

[164] *See* 5 U.S.C. § 552(b)(3). Exemption 3 is discussed below. *See infra* Exemption 3: Matters Exempted by Other Statutes.

[165] 5 U.S.C. § 552(b)(4). Exemption 4 is discussed below. *See infra* Exemption 4: Trade Secrets and Commercial or Financial Information.

[166] 18 U.S.C. § 1905.

[167] *Id.*

[168] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 291–94, 318–19 (1979). Courts have recognized that "the scope of the [TSA] is at least co-extensive with that of Exemption 4." CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1144 (D.C. Cir. 1987). Some commentators, however, have expressed skepticism over whether this view remains true given the Supreme Court's recent interpretation of Exemption 4's scope in *Food Marketing Institute (FMI) v. Argus Leader Media*, 139 S. Ct. 2356 (2019). *See, e.g.*, Bernard Bell, *Food Marketing Institute: A Preliminary Assessment (Part II)*, NOTICE & COMMENT: YALE J. ON REG. (July 8, 2019), https://www.yalejreg.com/nc/food-marketing-institute-a-preliminary-assessment-part-ii/.

[169] *Cf.* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 221 (1978) ("Unless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public.").

[170] Davis v. DOJ, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (citations omitted); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975) ("W]e hold that if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5."); Shell Oil Co. v. IRS, 772 F. Supp. 202, 209 (D. Del. 1991) ("Where an authorized disclosure is voluntarily made to a non-federal party ... the government waives any claim that the information is exempt from disclosure under the deliberative process privilege [of FOIA's Exemption 5].").

[171] *See, e.g.*, Fla. House of Representatives v. U.S. Dep't of Commerce, 961 F.2d 941, 946 (11th Cir. 1992) (holding that the agency's disclosure of information to Congress did not constitute a waiver because the agency did so "only under the threat of Congress's power of subpoena" and, therefore, the "disclosure was involuntary"); Murphy v. Dep't of Army, 613 F.2d 1151, 1156 (D.C. Cir. 1979) ("[W]e conclude that, to the extent that Congress has reserved to itself in [5 U.S.C. § 552(d)] the right to receive information not available to the general public, and actually does receive (continued...)

Whether an agency has waived an exemption is necessarily dependent on "the specific nature and circumstances of the prior disclosure."[172]

Exemption 1: National Defense or Foreign Policy

The first FOIA exemption authorizes agencies to withhold certain matters that pertain to "national defense or foreign policy."[173] Exemption 1 allows an agency to withhold information that is "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) [which is] in fact properly classified pursuant to such Executive order."[174] This exemption reflects Congress's interest in maintaining the confidentiality of information implicating national defense and security.[175] As the text makes clear, however, not all national-security-related information may be withheld under Exemption 1. Instead, only those national defense or foreign policy matters that have been properly classified through an applicable executive order are covered.[176]

At present, Executive Order 13,526 primarily governs the classification of national security information by the executive branch.[177] The executive order prescribes the procedures for classifying national security information and lists the categories of information to which the order applies, which include "military plans, weapons systems, or operations"; "scientific, technological, or economic matters relating to ... national security"; and "United States Government programs for safeguarding nuclear materials or facilities."[178] Information that an agency seeks to withhold from disclosure under Exemption 1 must satisfy the substantive and procedural requirements contained in Executive Order 13,526.[179]

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such information pursuant to that section (whether in the form of documents or otherwise), no waiver occurs of the privileges and exemptions which are available to the executive branch under the FOIA with respect to the public at large."); *see also* Rockwell Int'l Corp. v. DOJ, 235 F.3d 598, 604 (D.C. Cir. 2001) (acknowledging "that communications between an agency and Congress would receive protection as intra-agency memoranda [under Exemption 5] if they were 'part and parcel of the agency's deliberative process'" (quoting Dow Jones & Co. v. DOJ, 917 F.2d 571, 575 (D.C. Cir. 1990)); DOJ GUIDE, WAIVER AND DISCRETIONARY DISCLOSURE, *supra* note 163, at 10 ("When an agency shares information with Congress, without making an official disclosure of the information to the public, courts have ruled that this exchange of information does not result in waiver."); *but see, e.g., Dow Jones*, 917 F.2d at 575 (explaining that, "[i]n the case at bar, [DOJ] had unquestionably ended its consideration as to whether to prosecute, or in any other way proceed against, [a Member of Congress] before it sent the letter to Congress" and, "[f]or that reason, we do not think that [DOJ's] letter to the House Ethics Committee can be withheld under Exemption 5.").

[172] DOJ GUIDE, WAIVER AND DISCRETIONARY DISCLOSURE, *supra* note 163, at 1.

[173] 5 U.S.C. § 552(b)(1).

[174] *Id.*

[175] *See* Clark, *supra* note 92, at 298; Lyndon B. Johnson, Statement by the President Upon Signing S. 1160 (July 4, 1966).

[176] 5 U.S.C. § 552(b)(1).

[177] DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 1, at 3 (Mar. 4, 2021) [hereinafter DOJ GUIDE, EXEMPTION 1], https://www.justice.gov/media/1128106/dl?inline.

[178] *See, e.g.*, Exec. Order No. 13,526 §§ 1.4, 1.6, 3 C.F.R. 298 (2010); *id.* § 1.4(a), (e), (f). Although Exemption 1 only applies to information that has been classified pursuant to an applicable executive order, Executive Order No. 13526 specifically authorizes agencies to classify or reclassify, as the case may be, previously undisclosed information upon receipt of a FOIA request. *Id.* § 1.7(d). Such classifications and reclassifications must be made "on a document-by-document basis with the personal participation or under the direction of the agency head" or other senior executive branch official specified in the executive order and comply with the executive order's requirements. *Id.*

[179] *See* Shoenman v. FBI, 575 F. Supp. 2d 136, 151–52 (D.D.C. 2008) ("To show that it has properly withheld information under FOIA Exemption 1, the [agency] must show both that the information was classified pursuant to the (continued...)

Exemption 2: Internal Personnel Rules and Practices

Exemption 2 authorizes agencies to withhold from disclosure information that is "related solely to the internal personnel rules and practices of an agency."[180] The Supreme Court has held that "personnel rules and practices" under Exemption 2 are those that address "employee relations or human resources."[181] This exemption covers rules and practices pertaining to "hiring and firing, work rules and discipline, [and] compensation and benefits."[182] To fall under Exemption 2, information must pertain "exclusively or only" to personnel rules and practices,[183] and, as the Supreme Court has explained, an "agency must typically keep [such] records to itself for its own use."[184]

For years, many courts interpreted this provision to cover not only the employee relations and humans resources information described above but also records that were predominantly internal and the release of which would "significantly risk[] circumvention of agency regulations or statutes."[185] In *Milner v. Department of the Navy*, however, the Supreme Court held that this broad view of Exemption 2 contravened the plain meaning of "personnel rules and practices"—which the Court read as applying only to employee relations and human resources records[186]—and impermissibly incorporated an extrastatutory "circumvention requirement" into the exemption.[187] After *Milner*, agencies wishing to withhold information that would have previously been covered by this expansive reading of Exemption 2 must base decisions to withhold information on other FOIA exemptions.[188]

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proper procedures, and that the withheld information substantively falls within the scope of [the governing executive order]."); H.R. REP. NO. 1380, at 11–12 (1974) (Conf. Rep.); S. REP. NO. 1200, at 11–12 (1974) (Conf. Rep.); *see also* DOJ GUIDE, EXEMPTION 1, *supra* note 177, at 1–2.

[180] 5 U.S.C. § 552(b)(2).

[181] Milner v. Dep't of Navy, 562 U.S. 562, 570 (2011); *see also id.* at 581 (holding that "Exemption 2, consistent with the plain meaning of the term 'personnel rules and practices,' encompasses only records relating to issues of employee relations and human resources").

[182] *Id.* at 570.

[183] *Id.* at 570 n.4 (defining the "related solely" element of Exemption 2).

[184] *Id*. (defining the "internal" element of Exemption 2).

[185] *Milner*, 562 U.S. at 588 (explaining that many courts embraced a bifurcated reading of Exemption 2 that protected both "materials concerning human resources and employee relations, and ... records whose disclosure would risk circumvention of the law"); Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981), (holding "that if a document for which disclosure is sought meets the test of 'predominant internality,' and if disclosure significantly risks circumvention of agency regulations or statutes, then Exemption 2 exempts the material from mandatory disclosure"), *abrogated by Milner*, 562 U.S. 562. The first category of information was protected by what courts referred to as the "Low 2" component of Exemption 2. *See Milner*, 562 U.S. at 567 (explaining that "the 'Low 2' exemption" referred to "materials concerning human resources and employee relations"); *see also* Schiller v. N.L.R.B., 964 F.2d 1205 (D.C. Cir. 1992), (explaining that "[p]redominantly internal documents that deal with trivial administrative matters fall under the 'low 2' exemption"), *abrogated by Milner*, 562 U.S. 562. The second was protected by the exemption's so-called High 2 component. *See Milner*, 562 U.S. at 567; *see also Schiller*, 964 F.2d at 1207 ("Predominantly internal documents the disclosure of which would risk circumvention of agency statutes and regulations are protected by the so-called 'high 2' exemption."), *abrogated by Milner*, 562 U.S. 562. *See* DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 2, at 4–5 (June 12, 2023) https://www.justice.gov/d9/2023-06/06.12.23._-_exemption_2.pdf.

[186] *Milner*, 562 U.S. at 581 (holding that "Exemption 2, consistent with the plain meaning of the term 'personnel rules and practices,' encompasses only records relating to issues of employee relations and human resources").

[187] *Id.* at 573 (declaring that the application of Exemption 2 to records not pertaining to employee relations and human resources "ignores the plain meaning of the adjective 'personnel,' and adopts a circumvention requirement with no basis or referent in Exemption 2's language").

[188] *See id.*

Exemption 3: Matters Exempted by Other Statutes

Exemption 3 generally allows agencies to withhold information if it is "specifically exempted from disclosure by" a non-FOIA statute.[189] In other words, if a separate statute declares that certain materials or information is not subject to disclosure, FOIA authorizes an agency to withhold those records under Exemption 3.[190] Congress has enacted a variety of statutes that prohibit or place limitations on the disclosure of information by the government. These statutory confidentiality requirements cover a wide range of information, such as visa determinations,[191] drug pricing data,[192] patent applications,[193] and tax returns.[194]

Congress, however, did not intend for Exemption 3 to apply to *every* statute that authorizes or requires the withholding of information.[195] Congress limited the exemption's coverage to two particular categories of statutes "to assure," as the D.C. Circuit has concluded, "that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive branch."[196] The first category of laws that qualify under Exemption 3 are statutes that direct agencies to withhold information "from the public in such a manner as to leave no discretion on the issue."[197] The second category embraces statutes that "establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld."[198] In *American Jewish Congress v. Kreps*, the D.C. Circuit explained that the first category "embraces only those statutes incorporating a congressional mandate of confidentiality that, however general, is absolute and

[189] 5 U.S.C. § 552(b)(3); *cf.* H.R. REP. NO. 1497, at 10 (1966) (writing in regard to the first iteration of Exemption 3 that "[t]here are nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by [FOIA]."). The exemption explicitly states that the Sunshine Act is not an Exemption 3 statute. 5 U.S.C. § 552(b)(3).

[190] *Cf.* Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir. 1978) ("[T]he sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage.").

[191] *See* 8 U.S.C. § 1202(f); *see also* Medina-Hincapie v. Dep't of State, 700 F.2d 737, 741 (D.C. Cir. 1983) (holding that § 1202(f) is an Exemption 3 withholding statute).

[192] *See* 42 U.S.C. § 1396r-8(b)(3)(D).

[193] *See* 35 U.S.C. § 122(a); *see also* Irons & Sears v. Dann, 606 F.2d 1215, 1220–21 (D.C. Cir. 1979) (holding that § 122 is an Exemption 3 withholding statute).

[194] *See* 26 U.S.C. § 6103(a); *see also* Adamowicz v. IRS, 402 F. App'x 648, 652 (2d Cir. 2010) (holding information exempt under Exemption 3 and § 6103(a)).

[195] H.R. REP. NO. 1441, at 14 (1976) (Conf. Rep.).

[196] Am. Jewish Cong. v. Kreps, 574 F.2d 624, 628 (D.C. Cir. 1978). The conference report accompanying the 1976 amendments to FOIA, which imposed the limitations to Exemption 3 discussed in this paragraph, *see infra* text accompanying notes 197–202, explained that the limitations were a response to the Supreme Court's decision in *Administrator, Federal Aviation Administration (FAA) v. Robertson*, 422 U.S. 255 (1975). *See* H.R. REP. NO. 1441, at 14 (1976) (Conf. Rep.). Section 1104 of the Federal Aviation Act of 1958 provided that the FAA Administrator shall withhold certain information where, in the Administrator's opinion, disclosure "would adversely affect the interests of" a person objecting to its disclosure and would not be "required *in the interest of the public*." 49 U.S.C. § 1504 (1976) (quoted in *Robertson*, 422 U.S. at 258 n.4 (emphasis added)). The *Robertson* Court held that Section 1104, with its broad grant of authority to the FAA Administrator to determine whether disclosure was in the public interest, was a withholding statute under Exemption 3. *See* 422 U.S. at 266–67. The subsequent 1976 amendment to Exemption 3 was "intend[ed] ... to overrule the decision of the Supreme Court in ... *Robertson*," H.R. REP. NO. 1441, at 14 (1976) (Conf. Rep.), and "exclude from its compass laws ... which Congress perceived as giving the agency *carte blanche* to withhold any information [it] pleases," *Kreps*, 574 F.2d at 627 (alteration in original) (quoting H.R. REP. NO. 880, pt. I, at 23 (1976)).

[197] 5 U.S.C. § 552(b)(3)(A)(i).

[198] *Id.* § 552(b)(3)(A)(ii). For examples of statutes courts have found qualify under this category, see DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 3, at 15–26 (June 2, 2021) [hereinafter DOJ GUIDE, EXEMPTION 3], https://www.justice.gov/media/1144226/dl?inline .

without exception."[199] The second category "leave[s] room for administrative discretion."[200] Statutes included in that category cabin or direct an agency's discretion by specific standards or criteria.[201] A record must fall within the terms of a statute covered by either category of Exemption 3 for it to be withheld by an agency pursuant to Exemption 3.[202]

Exemption 3 limits the universe of statutes subject to its coverage in one additional way. Any statute enacted after the date of the OPEN FOIA Act of 2009[203] must "specifically cite[] to" the exemption to qualify as an Exemption 3 withholding statute.[204] Accordingly, courts have held that statutes enacted after October 28, 2009, that fail to cite Exemption 3 do not qualify as exemption statutes under FOIA, even if they would otherwise fall within the first two categories described above.[205]

Exemption 4: Trade Secrets and Commercial or Financial Information

FOIA's Exemption 4 authorizes agencies to exempt from disclosure many types of sensitive information that individuals and entities from outside the federal government transmit to the government. Third parties regularly submit an enormous amount of sensitive proprietary information to the federal government, including in such varied situations as military and other government contracts,[206] settlement negotiations with agencies,[207] and applications for drug

[199] *Kreps*, 574 F.2d at 628 (internal citation omitted); *see* Baldrige v. Shapiro, 455 U.S. 345, 352 (1982) (explaining that the first disjunctive prong requires that a "statute afford[] the agency no discretion on disclosure").

[200] *Kreps*, 574 F.2d at 628; *cf.* Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979) (writing that "the mere presence of some residual administrative discretion does not take [the statute under review] out of Exemption 3").

[201] Legal & Safety Emp. Rsch., Inc. v. U.S. Dep't of the Army, No. CIV.S001748WBS/JFM, 2001 WL 34098652 (E.D. Cal. May 4, 2001) (explaining that "[t]o satisfy subsection [(A)(ii)], a statute must limit agency discretion to a particular item or class of items, or it must limit agency discretion by prescribing guidelines for the exercise of that discretion") (citing Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984)); *see also* O'REILLY, *supra* note 22, § 13:1, at 350-51 (writing that Exemption 3 "applies to information which is required by statute to be held in confidence; is permitted to be held in confidence by particular statutory criteria; or is permitted to be withheld by the agency upon a statutory reference to one particularly type of information") (emphasis omitted). One court has explained that Exemption 3's second category applies to statutes that "provide a measurable yardstick for [agencies] to use in determining whether disclosure is permissible." Nat'l Western Life Ins. Co. v. United States, 512 F. Supp. 454, 459 (N.D. Tex. 1980). For examples of statutes courts have found qualify under the second category of Exemption 3 statutes, see DOJ GUIDE, EXEMPTION 3, *supra* note 198, at 26–44.

[202] *Cf.* CIA v. Sims, 471 U.S. 159, 167 (1985). Therefore, a court's inquiry under Exemption 3 requires that it determine both that a given statute qualifies as an Exemption 3 withholding statute *and* that the records that have been requested are protected by the statute. *See id.*; *see also* A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 143 (D.C. Cir. 1994) ("The two threshold criteria needed to obtain exemption 3 exclusion from public disclosure are that (1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute's scope.").

[203] Pub. L. No. 111-83, 123 Stat. 2184 (2009).

[204] 5 U.S.C. § 552(b)(3)(B) (providing that Exemption 3 only applies to a statute "enacted after the date of enactment of the OPEN FOIA Act of 2009" if it "specifically cites to this paragraph").

[205] *See, e.g.*, Long v. ICE, 149 F. Supp. 3d 39, 54 (D.D.C. 2015) (holding that the Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283, 128 Stat. 3073 was not a withholding statute under Exemption 3 because, *inter alia*, it failed to cite to Exemption 3 despite the fact that it "was enacted after the OPEN FOIA Act of 2009"). *But see* Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 984 F.3d 39 (2d Cir. 2020) (quoting Dorsey v. United States, 567 U.S. 260, 275 (2012)) (holding that the OPEN FOIA Act provides a "background principle of interpretation" that Congress can depart from in a later statute without complying with Exemption 3's citations requirement).

[206] *See, e.g.*, McDonnell Douglas Corp. v. U.S. Dep't of Air Force, 375 F.3d 1182, 1185 (D.C. Cir. 2004).

[207] *See, e.g.*, M/A-Com Inf. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986).

approvals by the Food and Drug Administration.[208] Therefore, Exemption 4 protects (1) "trade secrets" and (2) "commercial or financial information obtained from a person ... [that is] privileged or confidential."[209]

The D.C. Circuit defines a "trade secret" for purposes of Exemption 4 as any "secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[210]

Courts have interpreted the exemption to cover a broad range of information, allowing, for example, agencies to exempt as trade secrets "documents contain[ing] information consisting of drug product manufacturing information, including manufacturing processes or drug chemical composition and specifications,"[211] as well as "information regarding the quantities of menthol contained in cigarettes by brand and by quantity in each brand and subbrand."[212]

Most Exemption 4 litigation, however, does not concern trade secrets but rather information potentially exempt under the "commercial or financial information" prong of Exemption 4.[213] Under that prong, materials may be withheld under FOIA if they (1) constitute "commercial or financial information,"[214] (2) have been supplied to an agency by a "person,"[215] and (3) are "privileged or confidential."[216] While each element of the prong must be satisfied for information

[208] *See* 21 U.S.C. § 355.

[209] 5 U.S.C. § 552(b)(4).

[210] Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1289 (D.C. Cir. 1983); *accord* Anderson v. HHS, 907 F.2d 936, 943–44 (10th Cir. 1990). In *Public Citizen Health Research Group*, 704 F.2d at 1288, the D.C. Circuit rejected the argument that FOIA adopted the *Restatement (First) of Torts*' definition of "trade secret." That definition provides that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939). The court held that "the broad *Restatement* approach ... [is] inconsistent with the language of the FOIA and its underlying policies" because (1) FOIA's legislative history offers no evidence in support of such an expansive definition, (2) the definition contained in the *Restatement* "renders meaningless the second prong of Exemption 4," and (3) the *Restatement*'s definition "is ill-suited for the public law context in which FOIA determinations must be made." *Pub. Citizen Health Research Grp.*, 704 F.2d at 1288–89. Accordingly, the court's basis for finding that the *Restatement*'s definition of "trade secret" would leave the "commercial or financial information" prong of Exemption 4 meaningless was at least partially based on the fact that the term "confidential" under Exemption 4 included, under the test then in use by the D.C. Circuit, information whose disclosure was "likely ... to cause substantial harm to the competitive position of the person from whom [] information was obtained." Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), *abrogated by* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 204 L. Ed. 2d 742 (2019). It is worth noting that, as discussed below, the Supreme Court subsequently rejected that definition of "confidential" for Exemption 4 in *FMI v. Argus Leader Media*, 139 S. Ct. 2356 (2019). *See infra* text accompanying notes 219–221.

[211] Appleton v. FDA, 451 F. Supp. 2d 129, 141 (D.D.C. 2006).

[212] Rozema v. HHS, 167 F. Supp. 3d 324, 328, 340–41 (N.D.N.Y. 2016) (citation omitted).

[213] DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 4, at 4 (Dec. 16, 2021) [hereinafter DOJ GUIDE, EXEMPTION 4], https://www.justice.gov/media/1181316/dl?inline ("The overwhelming majority of Exemption 4 cases focus on this standard.").

[214] Courts have accorded "the terms 'commercial' and 'financial' in the exemption ... their ordinary meanings." *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290; *see, e.g.*, Judicial Watch, Inc. v. U.S. Dep't of Treasury, 802 F. Supp. 2d 185, 204 (D.D.C. 2011) ("'Commercial' is defined broadly to include 'records that reveal basic commercial operations or relate to income-producing aspects of a business' as well as situations where the 'provider of the information has a commercial interest in the information submitted to the agency.'" (quoting Baker & Hostetler, LLP v. United States Dep't of Commerce, 473 F.3d 312, 319, 374 (D.C. Cir. 2006))).

[215] *See* 5 U.S.C. § 551(2) (defining the word "person" to "include[] an individual, partnership, corporation, association, or public or private organization other than an agency").

[216] *Id.* § 552(b)(4); *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290 ("Information other than trade secrets falls (continued...)

other than a trade secret to qualify as exempt, a particularly significant question courts face in Exemption 4 litigation is whether commercial or financial information is "confidential" within the meaning of Exemption 4.[217]

Prior to 2019, the leading test for determining the meaning of "confidential" under the exemption was developed by the D.C. Circuit in *National Parks & Conservation Association v. Morton*.[218] Under the *National Parks* test, commercial or financial information was deemed confidential "if disclosure of the information [was] likely ... (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[219] Under *National Parks*, therefore, the courts looked to the effect of disclosing commercial or financial information on the federal government or submitter of information.[220]

In *Food Marketing Institute (FMI) v. Argus Leader Media*, however, the Supreme Court rejected the D.C. Circuit's test and instead held that "[a]t least where commercial or financial information is both [1] customarily and actually treated as private by its owner and [2] provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."[221] This definition is broader than the *National Parks* test and permits agencies to

within the second prong of the exemption if it is shown to be (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.").

Though the term "confidential" has been subject to considerable litigation, considerably less litigation has focused on the meaning of "privileged" in Exemption 4. *Cf.* Jordan v. U.S. Dep't of Labor, 273 F. Supp. 3d 214, 231 (D.D.C. 2017) (noting that "case law examining privilege under Exemption 4 is sparse") (citation omitted). The district court in *Jordan* explained that "'[p]rivileged' information" for purposes of Exemption 4 "is generally understood to be information that falls within recognized constitutional, statutory, or common law privileges." *Id.* (citation omitted). Courts, for example, have held that commercial or financial records were exempt under Exemption 4 on account of their protection under the attorney-client privilege. *See e.g.*, *id.* at 231–32; McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 242 (E.D. Mo. 1996). FOIA's legislative history explicitly mentions the attorney-client privilege and other privileges in relation to Exemption 4. *See, e.g.*, H.R. REP. NO. 1497, at 31 (1966) (stating that Exemption 4 embraces "information customarily subject to the doctor-patient, lawyer-client, or lender borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency"); *accord* S. REP. NO. 813, at 44 (1965). Claims that a record is protected by the attorney-client privilege in the context of communications with a federal government attorney may implicate Exemption 5. *See infra* Exemption 5: Inter- or Intra-Agency Memoranda or Letters.

[217] *See* DOJ GUIDE, EXEMPTION 4, *supra* note 213, at 13.

[218] 498 F.2d 765 (D.C. Cir. 1974), *abrogated by* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 204 L. Ed. 2d 742 (2019).

[219] *Id.* at 770 (footnote omitted). In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), the D.C. Circuit limited the *National Parks* test to situations in which entities were *obligated* to provide commercial or financial information to an agency, *id.* at 879. If a submitter had voluntarily provided the government with financial or commercial information, the *Critical Mass* court held that such information "is 'confidential' ... if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.* at 879. *Critical Mass* was not widely accepted outside of the D.C. Circuit. *See* Petition for a Writ of Certiorari at 28, FMI v. Argus Media Leader, No. 18-481 (S. Ct. Oct. 11, 2018) (asserting that, "[t]o date, the voluntary/involuntary *Critical Mass* test has been adopted by the D.C. and Tenth Circuits").

[220] *See, e.g.*, Charles River Park "A," Inc. v. Dep't of Housing & Urban Dev., 519 F.2d 935, 941 n.4 (D.C. Cir. 1975) (writing that "the *National Parks* test for confidentiality looks in one instance to the effect of disclosure on the provider of the information").

[221] 139 S. Ct. 2356, 2363–66 (2019); *see id.* at 2367 (Breyer, J., dissenting). As discussed below, *see infra* Reverse-FOIA Litigation, the definition of "confidential commercial information" in Executive Order 12,600, which governs agencies' general requirement to notify submitters of information before disclosing certain commercial or confidential information in response to a FOIA response, conflicts with the Supreme Court's definition of "confidential" in *FMI*. The executive order defines "confidential commercial information" as "records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 ... because disclosure could reasonably be expected to cause substantial competitive harm." Exec. Order No. 12,600, § 2(a) (Jan. 1, 1987).

withhold a larger category of information from FOIA's disclosure mandate.[222] The Supreme Court, however, did not define the precise boundaries of its new test in *FMI*; although the Court determined that "[a]t least the first condition" must be present for information to qualify as confidential, it did not decide whether the government must always provide assurances that information will be kept private in order for information to retain its confidential character and thus fall within Exemption 4's coverage.[223] The Court in *FMI* explained that it need not reach the issue because the government had provided such assurances of privacy through regulation limiting the public disclosure of the information at issue.[224] Although the government had provided assurances of privacy by regulation in *FMI*, satisfying the second prong of the Court's test, the Court did not elaborate on the form the assurance of privacy must take in order to satisfy Exemption 4.[225]

Exemption 5: Inter- or Intra-Agency Memoranda or Letters

Exemption 5 applies to "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency."[226] The 1966 House report accompanying the FOIA legislation indicates that the exemption was drafted with the intention of ensuring the "full and frank exchange of opinions" within the executive branch and based on the proposition that requiring an agency to release information prior to finalizing an action or decision would hinder its ability to effectively function.[227] To fall within Exemption 5's coverage, a document must both (1) qualify as an "inter-agency or intra-agency" document and (2) "fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it."[228]

Material is "inter-agency or intra agency" if it originates from an "agency," as that term is defined by FOIA.[229] Some courts have also recognized what is known as the "consultant corollary" to Exemption 5, under which the exemption protects certain materials that have been supplied to an agency by external consultants.[230] Nonetheless, Exemption 5 does not protect all communications from third-party consultants. In *DOI v. Klamath Water Users Protective Association*, for example,

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[222] See CRS Legal Sidebar LSB10294, *When Does the Government Have to Disclose Private Business Information in its Possession?*, by Daniel J. Sheffner, at 1 (2019).

[223] *FMI*, 139 S. Ct. at 2363.

[224] *Id.*

[225] *Id.*

[226] 5 U.S.C. § 552(b)(5). As discussed below, *infra* text accompanying note 254. Exemption 5 also provides that the deliberative process privilege—a discovery privilege incorporated by Exemption 5—does "not apply to records created 25 years or more before the date on which the records were requested." 5 U.S.C. § 552(b)(5).

[227] H.R. REP. NO. 1497, at 10 (1966) ("Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation."); *accord* S. REP. NO. 813, at 9 (1965).

[228] DOI v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8–9 (2001). In this context, a privilege is a protection from required disclosure that is afforded to information or materials under certain circumstances. *See, e.g.*, *Privileged*, BLACK'S LAW DICTIONARY 598 (4th pkt. ed. 2011) (defining "privileged" as, *inter alia*, "[n]ot subject to the usual rules or liabilities; esp., not subject to disclosure during the course of a lawsuit").

[229] *See Klamath*, 532 U.S. at 9; 5 U.S.C. §§ 551(1), 552(f)(1). *See also supra* "Agency".

[230] *Klamath*, 532 U.S. at 9–10. *See, e.g.*, McKinley v. Bd. of Governors of Fed. Reserve Sys., 647 F.3d 331, 336 (D.C. Cir. 2011) (explaining that "[u]nder the 'consultant corollary' to Exemption 5 ... we interpret 'intra-agency' 'to include agency records containing comments solicited from nongovernmental parties'" (quoting Nat'l Inst. of Military Justice v. DOD, 512 F.3d 677, 680, 682 (D.C. Cir. 2008)).

the Supreme Court held that information submitted to DOI by certain Indian tribes concerning the allocation of water rights did not constitute "intra-agency" records because the tribes had "communicate[d] with the [agency] with their own, albeit entirely legitimate, interests in mind" and sought "a Government benefit at the expense of other applicants."[231]

Although the Court assumed, but did not determine, the existence of the consultant corollary in *Klamath*, lower courts have recognized the existence of such a corollary.[232] In *Judicial Watch, Inc. v. Department of Energy*, the D.C. Circuit held that despite the Supreme Court's admonition in *Klamath* that Exemption 5 be limited to records that are truly inter-agency or intra-agency, a record prepared by a non-agency but held by an agency can still fall within the scope of Exemption 5 if it is also pre-decisional and deliberative.[233] In light of the *Klamath* decision, however, the D.C. Circuit has recognized two elements that must be met in order for the corollary to apply. First, the consultant must not be acting in its self-interest when providing advice to the agency.[234] Second, the agency must have actually solicited the advice from the consultant.[235] In May 2024, the D.C. Circuit clarified that, to satisfy the first prong of this test, an outside consultant must be "the functional equivalent of an agency employee working on the same matter."[236] In other words, the consultant cannot "have a stake in the outcome of the agency's process" or "represent an interest of its own" that would "render its advice on the subject anything other than disinterested."[237]

An inter- or -intra-agency document will only qualify as exempt if, in the context of pretrial discovery, it would not "be 'routinely' or 'normally' disclosed upon a showing of relevance" in litigation against the agency.[238] Accordingly, agency materials that *would* be routinely or normally disclosed in such contexts are not covered by the exemption.[239] That a record must be disclosed in discovery upon a sufficient showing of need does not remove the record from Exemption 5's

[231] *Klamath*, 532 U.S. at 12 & n.4. The *Klamath* Court considered whether the exemption applied to the communications at issue "on analogy to consultants' reports." *Id.* at 12.

[232] *Id.* at 12 & n.4; *see, e.g.*, Rojas v. FAA, 989 F.3d 666, 670 (9th Cir. 2021) (en banc); Jobe v. NTSB, 1 F.4th 396, 399–400 (5th Cir. 2021); ("Nat'l Inst. of Mil. Justice v. Dep't of Defense, 512 F.3d 677, 680, 684 (D.C. Cir. 2008) (holding that the consultant corollary survived the Supreme Court's decision in *Klamath*, 532 U.S. at 12, and reasoning that "[w]hen an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5"); McKinley v. Bd. of Governors of the Fed. Reserve Sys., 647 F.3d 331, 336 (D.C. Cir. 2011) (quoting *Nat'l Inst. of Mil. Justice*, 512 F.3d at 680).

[233] 412 F.3d 125, 129 (D.C. Cir. 2005) (quoting Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980)).

[234] *McKinley*, 647 F.3d at 336–37 (citing *Klamath*, 532 U.S. at 12).

[235] *McKinley*, 647 F.3d at 336–37; *Nat'l Inst. of Mil. Justice*, 512 F.3d at 680.

[236] Am. Oversight v. HHS, 101 F.4th 909, 917 (D.C. Cir. 2024).

[237] *Id.*

[238] FTC v. Grolier, Inc., 462 U.S. 19, 26 (1983); *accord Klamath*, 532 U.S. at 8; EPA v. Mink, 410 U.S. 73, 86 (1973) (Exemption 5 "clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency.").

[239] *Cf.* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975) ("[I]t is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context."). In *DOJ v. Julian*, 486 U.S. 1 (1988), the Supreme Court held that Exemption 5 did not authorize the withholding of presentence investigation reports in response to requests made by the subjects of such reports, for while "the courts have typically required some showing of special need before they will allow a third party to obtain a copy of a presentence report," the Court explained that "there is simply *no* privilege preventing disclosure" of such reports to the subjects thereof, *id.* at 12–15.

protection, as records subject to disclosure in such circumstances are "not 'routinely' or 'normally' available to parties in litigation."[240]

The Supreme Court has explained that Exemption 5 "incorporates the privileges which the Government enjoys under relevant statut[es] and case law in the pretrial discovery context."[241] The exemption has been construed to embrace privileges mentioned in FOIA's legislative history, but privileges not mentioned may also be incorporated.[242] A privilege not expressly listed in the legislative history and considered "novel" or having "less than universal acceptance" would be less likely to fall within Exemption 5's scope.[243]

Both the Supreme Court and lower federal courts have identified several privileges that Exemption 5 embraces and that may, therefore, serve as bases for withholding agency documents, including the privileges discussed below.

Deliberative Process Privilege

The deliberative process privilege is recognized as a component of the more general "executive privilege."[244] The Supreme Court has explained that the deliberative process privilege applies to agency "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[245] The privilege protects agency records that are "predecisional"[246] (i.e., they predate an agency decision)[247] and "deliberative" (i.e., they reflect "the give-and-take of the consultative process").[248] In 2021, the Supreme Court underscored these principles in *United States Fish and Wildlife Service v. Sierra Club*.[249] The Court held that the deliberative process privilege protected documents that might be final in the sense that nothing else follows them but that did not "communicate[] a policy on which the agency has settled."[250] The Court explained that determining whether a document represents the

[240] *Grolier*, 462 U.S. at 27; DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 5, at 2 (Mar. 13, 2023), https://www.justice.gov/d9/pages/attachments/2023/03/13/exemption_5_final.pdf

[241] Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); *cf.* Martin v. Office of Special Counsel, Merit Sys. Prot. Bd., 819 F.2d 1181, 1185 (D.C. Cir. 1987) ("[Exemption 5 incorporates] all civil discovery rules into FOIA Exemption (b) (5). Nothing on the face of the provision indicates it incorporates the deliberative process privilege in a vacuum.").

[242] United States v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984) (explaining that the Court in *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340 (1979), held "that a privilege that was mentioned in the legislative history of Exemption 5 is incorporated by the Exemption—not that all privileges not mentioned are excluded").

[243] *Id. at* 801; *see* 3 HICKMAN & PIERCE, JR., *supra* note 147, § 21.11, at 2219 (explaining that the *Weber* "Court noted that exemption five is more likely to be held to incorporate 'well-settled' privileges than to incorporate privileges that are 'novel' or that have 'found less than universal acceptance'"). Thus, for example, in *Burka v. Department of Health & Human Services*, 87 F.3d 508 (D.C. Cir. 1996), the D.C. Circuit held that Exemption 5 did not incorporate a privilege for "research data ... on the grounds that disclosure would harm a researcher's publication prospect" because such a practice was not "established or well-settled" in civil discovery. *Id.* at 521.

[244] *Sears*, 421 U.S. at 149 (citing *Mink*, 410 U.S. at 86–87). For a discussion of executive privilege in the context of congressional oversight, see CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey, at 20–25 (2019).

[245] *Klamath*, 532 U.S. at 8 (quoting *Sears*, 421 U.S. at 150).

[246] *See Sears*, 421 U.S. at 151.

[247] *See* Pub. Citizen v. OMB, 598 F.3d 865, 874 (D.C. Cir. 2009).

[248] *Id.* (internal citation omitted).

[249] 592 U.S. 261 (2021).

[250] *Id.* at 268.

agency's chosen course is a matter of the legal consequences that flow from the adoption of the document.[251]

The privilege, however, has limits. It does not protect materials that an "agency chooses expressly to adopt or incorporate by reference," nor does it generally cover factual material.[252] Notably, the FOIA Improvement Act of 2016[253] amended Exemption 5 to exclude application of the privilege to documents that were "created 25 years or more before the date on which [they] were requested."[254]

Presidential Communications Privilege

Exemption 5 also applies to materials that are subject to the presidential communications privilege.[255] The Supreme Court has held that the privilege protects from mandatory disclosure "communications in performance of [a President's] responsibilities, of his office, and made in the process of shaping policies and making decisions."[256] The D.C. Circuit has held that the privilege also protects "communications authored or received in response to ... solicitation[s] by" senior White House advisers "in the course of gathering information and preparing recommendations on official matters for presentation to the President,"[257] as well as records "authored or solicited and received by ... members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on a particular matter."[258] Unlike the deliberative process privilege, the presidential communications privilege "applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones."[259]

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[251] *Id.* at 271.

[252] *Sears*, 421 U.S. at 161 ("[I]f an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5."); *see* Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977) (acknowledging that "[m]any exemption five disputes may be able to be decided by application of the simple test that factual material must be disclosed but advisory material, containing opinions and recommendations, may be withheld"). *But see, e.g.*, Wolfe v. HHS, 839 F.2d 768, 774 (D.C. Cir. 1988) (writing that, "[i]n some circumstances, even material that could be characterized as 'factual' would so expose the deliberative process that it must be covered by the privilege"); City of Va. Beach v. U.S. Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993) (internal citation omitted) ("[P]urely factual material does not fall within the exemption unless it is inextricably intertwined with policymaking processes such that revelation of the factual material would simultaneously expose protected deliberation.").

[253] Pub. L. No. 114-185, 130 Stat. 538 (2016).

[254] *Id.* § 2(2), 130 Stat. at 540 (codified at 5 U.S.C. § 552(b)(5)).

[255] *See* Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1113 (D.C. Cir. 2004).

[256] Nixon v. Adm'r of Gen. Servs. 433 U.S. 425, 449 (1977) (alteration in original) (internal citations omitted).

[257] *In re* Sealed Case (*Espy*), 121 F.3d 729, 757 (D.C. Cir. 1997).

[258] *Id.*

[259] *Judicial Watch*, 365 F.3d at 1113–14 (quoting *Espy*, 121 F.3d at 745). At least one court has explicitly stated that the presidential communications privilege can be waived in regard to information an agency expressly adopted or incorporated by reference into a final opinion. *See* Samahon v. DOJ, No. 13-6462, 2015 WL 857358, at *13 (E.D. Pa. Feb. 27, 2015) ("[T]he deliberative process, attorney-client, and presidential communications privileges can be waived 'if the agency has chosen "expressly to adopt or incorporate by reference [a] ... memorandum previously covered by Exemption 5 in what would otherwise be a final opinion."'" (quoting Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 356 (2d Cir. 2005) (ellipses and second alteration in original)); *but see* Advocates for the West ... [B]ecause the ... the presidential communications privilege applies, there ... is no need to go any further.").

Attorney-Client Privilege

Exemption 5 also incorporates the attorney-client privilege,[260] which generally protects "communication[s] made between privileged persons[] in confidence[] for the purpose of obtaining or providing legal assistance for the client."[261] Exemption 5 incorporates the privilege as it exists for government attorneys, where, as explained by the D.C. Circuit, "the 'client' may be the agency and the attorney may be an agency lawyer."[262] The privilege does not cover information "adopted as, or incorporated by reference into, an agency's policy."[263]

Attorney Work-Product Privilege

In the context of Exemption 5, the attorney work-product privilege embraces "materials 'prepared in anticipation of litigation ... '" by an agency.[264] The privilege serves to protect and maintain an effective adversarial litigation system.[265] While records must have been prepared in anticipation of litigation to be protected by the exemption, in *Federal Trade Commission v. Grolier*, the Supreme Court held that materials may be withheld under Exemption 5 even if the litigation for which the materials were prepared has since ended.[266] The Court's decision was based on its interpretation of Rule 26 of the Federal Rules of Civil Procedure, which is the source of the work-product doctrine for pretrial discovery in federal civil litigation.[267] It was also based on the fact that, generally, federal judicial decisions regarding Rule 26 "had determined that work-product materials retained their immunity from discovery after termination of the litigation for which the documents were prepared, without regard to whether other related litigation is pending or is contemplated."[268] The court explained that, because "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutes and *case law* in the pretrial discovery

[260] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975) (writing that "[t]he Senate Report [accompanying FOIA] states that Exemption 5 'would include ... documents which would come within the attorney-client privilege if applied to private parties'" (quoting S. REP. NO. 813, at 2 (1965)).

[261] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (numerical formatting omitted). The *Restatement (Third) of the Law Governing Lawyers* defines "privileged persons" as the client or prospective client; the client's attorney; "agents of [the client or attorney] who facilitate communications between them"; and "agents of the lawyer who facilitate the representation." *Id.* § 70.

[262] Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997); *see also* Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481, 495 (1982) ("Although the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector.").

[263] *La Raza*, 411 F.3d at 360.

[264] *Tax Analysts*, 117 F.3d at 620 (quoting FED. R. CIV. P. 26(b)(3)); PIERCE, JR., *supra* note 150, at 389. Courts have held that records produced in anticipation of administrative litigation are embraced by the privilege. *See* Schoenman v. FBI, 573 F. Supp. 2d 119, 143 (D.D.C. 2008) ("[C]ourts have found that the attorney work-product privilege extends to documents prepared in anticipation of administrative litigation, partially because 'administrative litigation certainly can beget court litigation and may in many circumstances be expected to do so.'" (quoting Exxon Corp. v. Dep't of Energy, 585 F. Supp. 690, 700 (D.D.C. 1983)).

[265] *See* Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980) ("The purpose of the privilege ... is ... to protect the adversary trial process itself. It is believed that the integrity of our system would suffer if adversaries were entitled to probe each other's thoughts and plans concerning the case."); Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 787 (1983) (stating that "the doctrine's central purpose" is the preservation of an "effective adversary behavior for the good of the system").

[266] 462 U.S. 19, 26–28 (1983).

[267] *See* FED. R. CIV. P. 26(b)(3).

[268] *Grolier*, 462 U.S. at 25–26.

context," materials protected by the work-product privilege were not "'routinely' available in subsequent litigation."[269]

Other Privileges

The Supreme Court and lower courts have determined that other privileges are embraced by Exemption 5. For example, in *United States v. Weber Aircraft Corp.*, the Supreme Court held that the privilege protecting "[c]onfidential statements made to air crash safety inspectors," known as the *Machin* privilege,[270] was incorporated by the exemption.[271] The Court has also held that Exemption 5 applies to "confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract."[272]

Exemption 6: Personnel, Medical, and Similar Files

Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[273] Federal agencies maintain a large amount of information about individuals, such as health and medical records,[274] criminal records,[275] home addresses,[276] Social Security numbers,[277] and a variety of other types of personal information.[278] Exemption 6 helps shield "individuals from the injury and embarrassment" that may stem from the disclosure of personal information maintained

[269] *Id.* at 26–27 (quoting Renegotiation Bd. v. Grunman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975)).

[270] The privilege is named after the D.C. Circuit's decision in *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963).

[271] United States v. Weber Aircraft Corp., 465 U.S. 792, 796, 799 (1984).

[272] Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 360 (1979). Confidential commercial information submitted to the federal government by individuals or entities from *outside* the federal government, however, is the subject of Exemption 4. *See supra* Exemption 4: Trade Secrets and Commercial or Financial Information.

[273] 5 U.S.C. § 552(b)(6). Exemption 7(C) also exempts certain information in order to protect individuals from unwarranted intrusions into their privacy. *See id.* § 552(b)(7)(C). As explained *infra*, Exemption 7: Law Enforcement Records or Information, Exemption 7's privacy protections are broader than Exemption 6's, although it is limited to "records or information compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7).

Some records covered by Exemptions 6 or 7(C) may also fall under the ambit of the Privacy Act, 5 U.S.C. § 552a. The interplay between FOIA and the Privacy Act is discussed below. *See infra* Related Open Government and Information Laws: FACA, the Sunshine Act, and the Privacy Act.

[274] *See, e.g.*, Joseph W. Diemert, Jr. & Assoc. Co. v. FAA, 218 F. App'x 479 (6th Cir. 2007) (workers compensation records possessed by the Federal Aviation Administration).

[275] *See, e.g.*, DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (FBI "rap sheet" on private individual).

[276] *See, e.g.*, DOD v. Fed. Labor Relations Auth., 510 U.S. 487 (1994) (home addresses of certain federal employees).

[277] *See, e.g.*, Coleman v. Lappin, 680 F. Supp. 2d 192 (D.D.C. 2010) (social security numbers of Bureau of Prisons employees).

[278] *See* S. REP. NO. 813, at 9 (1965) (stating that "[s]uch agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great quantifies of files" and that "[t]here is a consensus that these files should not be opened to the public"); *accord* H.R. REP. NO. 1497, at 11 (1966).

by the government.[279] The exemption applies to citizens and noncitizens alike,[280] but courts have not extended its protections to corporations.[281]

As an initial matter, an agency may withhold information for impermissibly invading an individual's privacy only if it is a personnel, medical, or "similar" file.[282] FOIA does not include definitions of these terms, but as some courts have explained, personnel and medical files "generally contain a variety of information about a person, such as place of birth, date of birth, date of marriage, employment history, and comparable data."[283] The Supreme Court has held that the term "similar files" broadly embraces any "information which applies to a particular individual."[284] Courts have identified a variety of information types that qualify as "files" under Exemption 6, including, for example, the names and addresses of federal annuitants;[285] individuals' citizenship information;[286] information associated with asylum requests;[287] and "information regarding marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, [and] reputation."[288]

Information is not exempt from disclosure under FOIA, however, merely because it qualifies as a personnel, medical, or similar file. Such files must still be disclosed upon request unless release "would constitute a clearly unwarranted invasion of personal privacy."[289] To determine whether

[279] U.S. Dep't of State v. Wash. Post. Co., 456 U.S. 595, 599 (1982).

[280] *See, e.g.*, U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991) (holding that disclosure of unredacted documents containing identifying information of Haitian citizens would violate Exemption 6).

[281] Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976) (noting that "[t]he sixth exemption has not been extended to protect the privacy interests of businesses or corporations"). In *FCC v. AT&T*, 562 U.S. 397 (2011), the Supreme Court held that Exemption 7(C)'s protection of "personal privacy" did not apply to corporations. *Id.* at 409–10. In support of this conclusion, the Court discussed the inclusion of that term in Exemption 6 and explained that while "the question whether Exemption 6 is limited to individuals has not come to us directly, we have regularly referred to that exemption as involving an 'individual's right of privacy.'" *Id.* at 407–08 (quoting *Ray*, 502 U.S. at 175). That said, the D.C. Circuit has held that "Exemption 6 applies to financial information in business records when the business is individually owned or closely held, and 'the records would necessarily reveal at least a portion of the owner's personal finances.'" Multi AG Media LLC v. USDA, 515 F.3d 1224, 1228–29 (D.C. Cir. 2008) (quoting *Kleppe*, 547 F.2d at 685).

[282] 5 U.S.C. § 552(b)(6); *see* DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 6, at 4 (Aug. 19, 2022) [hereinafter DOJ GUIDE, EXEMPTION 6] https://www.justice.gov/media/1027586/dl?inline.

[283] Wood v. FBI, 432 F.3d 78, 86 (2d Cir. 2005) (quoting *Wash. Post. Co.*, 456 U.S. at 600); *see also* Dep't of Air Force v. Rose, 425 U.S. 352, 377 (1976) (explaining that the requested case summaries of Air Force Academy honor and ethics code hearings did "not contain the vast amounts of personal data which constitute the kind of profile of an individual ordinarily to be found in his personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance," and that "access to these files is not drastically limited, as is customarily true of personnel files, only to supervisory personnel directly involved with the individual (apart from the personnel department itself), frequently thus excluding even the individual himself") (internal citation omitted).

[284] *Wash. Post. Co.*, 456 U.S. at 600, 602; *see also id.* (stating that Congress "'intended [Exemption 6] to cover detailed Government records on an individual which can be identified as applying to that individual'" (quoting H.R. REP. NO. 1497, at 11 (1966)).

[285] Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989).

[286] *Wash. Post. Co.*, 456 U.S. at 602.

[287] *See, e.g.*, Phillips v. ICE, 385 F. Supp. 2d 296, 304 (S.D.N.Y. 2005); *see also* Cook v. Nat'l Archives & Records Admin., 758 F.3d 168, 174–75 (2d Cir. 2014) (noting that "Passport Office records revealing citizenship status; an investigation report revealing alleged misconduct; letters to Guantanamo Bay detainees revealing the names and addresses of family members; and records of interview of deported aliens revealing their identities" are all "types of records [that] have been deemed 'similar files' for purposes of Exemption 6") (footnotes omitted).

[288] Rural Hous. All. v. USDA, 498 F.2d 73, 77 (D.C. Cir. 1974).

[289] 5 U.S.C. § 552(b)(6). The Supreme Court has explained that "the purposes for which [a] request for information is (continued...)

disclosure would rise to such a level, agencies and courts balance the privacy interest[290] associated with the requested information against "the public interest in disclosure."[291] Courts typically require that an agency assert a privacy interest that is "substantial" (or more than "*de minimis*") to justify withholding the information.[292] The Supreme Court has held that "the only relevant public interest in disclosure ... is the extent to which disclosure would serve the core purpose of FOIA, which is contributing significantly to public understanding of the operations or activities of the government."[293] If the asserted privacy interest outweighs the public interest in disclosure, the information is exempt.[294]

made" do not govern "whether an invasion of privacy is warranted." DOD v. Fed. Labor Relations Auth., 510 U.S. 487, 496 (1994) (emphasis omitted) (quoting *Reporters Comm.*, 489 U.S. at 771).

[290] According to the Supreme Court, "[t]he privacy interest[s] protected by Exemption 6 encompass the individual's control of information concerning his or her person." *Fed. Labor Relations Auth.*, 510 U.S. at 500 (citation and alteration omitted). In *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004), in which the Court considered whether death-scene photographs of a former deputy counsel to the President—Vincent Foster, Jr.—were exempt under Exemption 7(C), 5 U.S.C. § 552(b)(7), the Court held that FOIA's privacy protections extended to the privacy interests of the close relatives of a record's subject. 541 U.S. at 161, 168, 171. Exemption 7(C) contains similar invasion-of-privacy language as Exemption 6. *See infra* "Exemption 7: Law Enforcement Records or Information." *See also* Clark, *supra* note 92, at 305 (explaining that Exemption 6 was designed to exempt "all personnel and medical files, and all private or personal information contained in other files," where disclosure "would amount to a clearly unwarranted invasion of the privacy of any person, including members of the family of the person to whom the information pertains").

[291] *Fed. Labor Relations Auth.*, 510 U.S. at 495 (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776 (1989)); *see* Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976). FOIA's legislative history indicates that Congress understood Exemption 6 to require a balancing of private and public interests. *See* H.R. REP. NO. 1497, at 11 (1966) (writing that "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual"); S. REP. NO. 813, at 9 (1965) (explaining that "[t]he phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information").

[292] *See, e.g.*, Am. Farm Bureau Fed'n v. EPA, 836 F.3d 963, 970 (8th Cir. 2016); Cook v. Nat'l Archives & Records Admin., 758 F.3d 168, 175–76 (2d Cir. 2014); Multi AG Media LLC v. USDA, 515 F.3d 1224, 1229–30 (D.C. Cir. 2008); *see* DOJ GUIDE, EXEMPTION 6, *supra* note 282, at 9–10. The necessary privacy interest for the Exemption 6 balancing analysis has also been described as one that is "significant," *see Multi AG Media*, 515 F.3d at 1229 (citation omitted), or "nontrivial," *see* Cameranesi v. DOD, 856 F.3d 626, 637 (9th Cir. 2017).

[293] *Fed. Labor Relations Auth.*, 510 U.S. at 495 (emphasis omitted) (quoting *Reporters Comm*, 489 U.S. at 777); *see also id.* at 497 (declaring that "the only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens known 'what their government is up to'" (quoting *Reporters Comm*, 489 U.S. at 773)); Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, 355–56 (1997) (per curiam) (same); Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976) (explaining that "Congress sought to construct an exemption [in Exemption 6] that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of [FOIA] 'to open agency action to the light of public scrutiny'" (quoting Rose v. Dep't of Air Force, 495 F.2d 261, 263 (2d Cir. 1974), *aff'd*, 425 U.S. 352)).

In *National Archives and Records Administration v. Favish*, the Supreme Court construed Exemption 7(C) so that a requester must "establish a sufficient reason for ... disclosure." 541 U.S. at 172. To meet this burden, he or she must establish (1) "that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and (2) that "the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted." *Id.* When the public interest asserted by the requester concerns government misconduct or negligence, the Court held that "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred," a showing requiring "more than a bare suspicion." *Id.* at 174.

[294] *See, e.g.*, *Fed. Labor Relations Auth.*, 510 U.S. at 502 ("Because the privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially out-weighs the negligible FOIA-related public interest in disclosure, we conclude that disclosure would constitute a 'clearly unwarranted invasion of personal privacy'" and that (continued...)

Exemption 7: Law Enforcement Records or Information

FOIA's seventh exemption applies to "records or information compiled for law enforcement purposes" but only where disclosure of such agency records "would" or "could reasonably be expected to" result in certain harms specified by the exemption (as discussed below).[295] As the Supreme Court has explained, Exemption 7 stemmed from Congress's belief "that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case."[296]

To qualify as exempt under Exemption 7, a record must have been "compiled" for law enforcement purposes.[297] This criterion may be satisfied even if the record was not *originally* compiled for law enforcement purposes, as the Supreme Court has held that this exemption also applies if material was subsequently gathered for law enforcement purposes, prior to the agency's response to the FOIA request.[298] Further, the Court has held that material that an agency originally compiled "for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where [it] is reproduced or summarized in a new document prepared for a non-law-enforcement purpose."[299] As explained by the D.C. Circuit, "the term 'compiled' in Exemption 7 requires that a document be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invokes the exemption."[300]

Courts have applied Exemption 7 to records compiled for criminal, civil, and administrative enforcement, as well as to materials associated with agencies' national and homeland security functions.[301] Further, the exemption not only applies to agencies that primarily engage in law

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"FOIA, thus, does not require the agencies to divulge the addresses.... " (quoting 5 U.S.C. § 552(b)(6))). If, on the other hand, the public interest in disclosure outweighs the asserted privacy interest, the information is not covered by Exemption 6. *See, e.g.*, Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 37 (D.C. 2002) ("Given the strong public interest in knowing 'what the government is up to,' we hold that the Secretary has failed to rebut the presumption favoring disclosure.... " (citation omitted).

An agency's redaction of sensitive information may, depending on the circumstances, be adequate to remove the remaining contents of a record from Exemption 6's protection. *See Rose*, 425 U.S. at 380–81 (writing that respondents' "request for access to [the requested documents] with personal references or other identifying information deleted[] respected the confidentiality interests embodied in Exemption 6," but that if "deletion of personal references and other identifying information is not sufficient to safeguard privacy, then the [documents] should not be disclosed" (internal citations omitted)).

[295] 5 U.S.C. § 552(b)(7)(A)–(F); John Doe Agency v. John Doe Corp., 493 U.S. 146, 156 (1989) ("Exemption 7 requires the Government to demonstrate that a record is 'compiled for law enforcement purposes' and that disclosure would effectuate one or more of ... six specified harms." (quoting 5 U.S.C. § 552(b)(7))). Exemption 7 is not limited to *investigative* records. *See* Tax Analysts v. IRS, 294 F.3d 71, 79 (D.C. Cir. 2002); S. REP. NO. 221, at 23 (1983). Although at one time the act did confine the exemption's scope to such records, *see* 5 U.S.C. § 552(b)(7) (1982), in 1986, Congress amended Exemption 7 "by deleting the word 'investigatory' and inserting the words 'or information,' so that protection is now available to all 'records or information compiled for law enforcement purposes.'" Abdelfattah v. DHS, 488 F.3d 178, 184 (3d Cir. 2007) (per curiam) (alteration omitted) (quoting 5 U.S.C. § 552(b)(7)); *see* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207–48 (1986).

[296] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978).

[297] 5 U.S.C. § 552(b)(7).

[298] *John Doe Agency*, 493 U.S. at 155.

[299] FBI v. Abramson, 456 U.S. 615, 631–32 (1982).

[300] Public Emp.'s for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, 740 F.3d 195, 203 (D.C. Cir. 2014) (Kavanaugh, J.).

[301] DOJ, Office of Info. Pol'y, Guide to the Freedom of Information Act, Exemption 7, at 7–9 (Jan. 27, 2022) [hereinafter DOJ Guide, Exemption 7], https://www.justice.gov/oip/foia-guide/exemption_7/dl?inline; *see, e.g.*, Stein v. (continued...)

enforcement, but also to agencies that possess both administrative and law enforcement responsibilities ("mixed-function agencies").[302] Although, on judicial review, an agency must establish that materials withheld under Exemption 7 are compiled for purposes of law enforcement to properly invoke the exemption, agencies whose primary function is criminal law enforcement are often subject to comparatively relaxed standards of proof on this question than are mixed-function agencies.[303]

Exemption 7 applies only to certain statutorily specified types of law enforcement records.[304] Therefore, establishing that material has been compiled for law enforcement purposes is insufficient to exempt it from disclosure under FOIA; even if a withheld record was compiled for such purposes, it may be exempted from disclosure only if disclosure may or will lead to one of the harms identified in subexemptions (A) through (F).[305]

United States SEC, 266 F. Supp. 3d 326, 343 (D.D.C. 2017) ("Exemption 7(A) applies to law enforcement records compiled for civil, administrative, and criminal matters.") (citing Tax Analysts, 294 F.3d at 77)); Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 926 (2003) (determining that 9/11 detainees' names satisfied Exemption 7's threshold requirement because "[t]he terrorism investigation is one of DOJ's chief law enforcement duties, and the investigation concerns a heinous violation of federal law as well as a breach of this nation's security") (citation omitted); see also Milner v. Dep't of Navy, 562 U.S. 562, 582–83 (2011) (Alito, J., concurring) (writing that "[t]he ordinary understanding of law enforcement includes not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity and to maintain security" and that "in recent years, terrorism prevention and national security measures have been recognized as vital to effective law enforcement efforts in our Nation").

[302] *See, e.g., Tax Analysts*, 294 F.3d at 77 (stating that "FOIA makes no distinction between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions" and that "agencies like IRS [the Internal Revenue Service], that combine administrative and law enforcement functions, as well as agencies like the Federal Bureau of Investigation ('FBI'), whose principal function is criminal law enforcement, may seek to avoid disclosure of records or information pursuant to Exemption 7"); *id.* (writing that "the District Court [below] correctly identified IRS as a mixed-function agency"). *See* Margaret Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 217 (2013) ("Both agencies whose principal function is law enforcement, such as the [FBI], and agencies that engage in law enforcement activities and other administrative functions, such as the [IRS], can claim this exemption.") (citing *Tax Analysts*, 294 F.3d at 77).

[303] *See* Pratt v. Webster, 673 F.2d 408, 418 (D.C. Cir. 1982). Courts have generally applied one of two tests when evaluating whether records withheld by an agency whose principal purpose is criminal law enforcement were compiled for law enforcement purposes. *See* Jordan v. DOJ, 668 F.3d 1188, 1193–94 (10th Cir. 2011) (summarizing the two tests). Many apply what is known as the "rational nexus test," which demands that, in the words of the U.S. Court of Appeals for the Third Circuit, "an agency ... demonstrate that the relationship between its authority to enforce a statute or regulation and the activity giving rise to the requested documents is based upon information sufficient to support at least a colorable claim of the relationship's rationality." *Abdelfattah*, 488 F.3d at 186. The rational nexus test was first articulated by the D.C. Circuit in *Pratt v. Webster*. *See* 673 F.2d at 420–21 (holding, prior to the 1986 amendments that broadened Exemption 7 to embrace noninvestigatory records, *see* discussion and sources *supra* note 295, that an agency must establish that the "investigatory activities that give rise to the documents sought ... relate[] to the enforcement of federal laws or to the maintenance of national security" and that "the nexus between the investigation and one of the agency's law enforcement duties ... [is] based on information sufficient to support at least a 'colorable claim' of its rationality"). In contrast, pursuant to the "per se rule," materials withheld by agencies that primarily engage in criminal law enforcement are deemed to be "inherently records compiled for law enforcement purposes within the meaning of Exemption 7." Curran v. DOJ, 813 F.2d 473, 475 (1st Cir. 1987) (citation omitted). However, courts often require a more rigorous showing from mixed-function agencies that the information being withheld was compiled for law enforcement purposes. *See, e.g.*, *Tax Analysts*, 294 F.3d at 77 (explaining that the IRS was "subject to an exacting standard when it comes to the threshold requirement of Exemption 7"); Mayer, Brown, Rowe & Maw LLP v. IRS, No. 04-2187, 2006 WL 2425523, at *7 (D.D.C. Aug. 21, 2006) ("Because the IRS is an agency that combines administrative and law enforcement functions, it is entitled to less deference when evaluating its claim that information was compiled for law enforcement purposes."). *See* DOJ GUIDE, EXEMPTION 7, *supra* note **Error! Bookmark not defined.**, at 17–21.

[304] *See* 5 U.S.C. § 552(b)(7)(A)–(F).

[305] *See John Doe Agency*, 493 U.S. at 156.

Exemption 7(A)

Exemption 7(A) authorizes the withholding of law enforcement records where disclosure "could reasonably be expected to interfere with enforcement proceedings."[306] Courts have held that Exemption 7(A) applies in the context of a "pending or prospective" enforcement proceeding and where disclosure "could reasonably be expected to cause some articulable harm" to those proceedings,[307] such as by obstructing an agency's investigation or placing an agency "at a disadvantage when it came time to present [its] case."[308] Courts, however, have established limits to Exemption 7(A)'s application. For example, many courts have held that agencies must satisfy a high burden in proving that harm will occur from "the release of information that the targets of the investigation already possess."[309]

Exemption 7(B)

Exemption 7(B) applies where disclosure of law enforcement records "would deprive a person of a right to a fair trial or an impartial adjudication."[310] The D.C. Circuit has explained "that a trial or adjudication [must be] pending or truly imminent" in order to trigger Exemption 7(B), and "that it [must be] more probable than not that disclosure ... would seriously interfere with the fairness of those proceedings."[311] The D.C. Circuit has held that, as to a disclosure's effect on the fairness of proceedings, courts must examine "the significance of any alleged unfairness in light

[306] 5 U.S.C. § 552(b)(7)(A).

[307] Manna v. DOJ, 51 F.3d 1158, 1164 (3d Cir. 1995); *see also* Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1114 (D.C. Cir. 2007) (explaining that Exemption 7(A) applies where enforcement proceedings are "reasonably anticipated") (internal citation omitted). In *NLRB v. Robbins Tire & Rubber Co.*, the Supreme Court explained that mandating the disclosure of witness statements prior to an NLRB unfair practices hearing raises the risk that employers or unions "will coerce or intimidate employees and other[]" witnesses and may "have a chilling effect on the Board's sources." 437 U.S. at 239–41. The Court held that disclosure in such an instance "would constitute an 'interference' with NLRB enforcement proceedings" in that it would "giv[e] a party litigant earlier and greater access to the Board's case than he would otherwise have." *Id.* at 241. Crucially, the Court also held that, under Exemption 7(A), courts are authorized to determine "that, with respect to *particular kinds* of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would *generally* 'interfere with enforcement proceedings.'" *Id.* at 236 (emphasis added) (quoting 5 U.S.C. § 552(b)(7)(A)). This "generic" method allows agencies to eschew the "document-by-document" approach to justifying withholding decisions. DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 7(A), at 20 (Aug. 21, 2019), https://www.justice.gov/oip/page/file/1197816/download.

[308] NLRB v. Tire & Rubber Co., 437 U.S. 214, 224 (1978) ("In originally enacting Exemption 7, Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases.").

[309] Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng'rs, 677 F. Supp. 2d 101, 108 (D.D.C. 2009) (emphasis omitted) (citing Campbell v. HHS, 682 F.2d 256, 265 (D.C. Cir. 1982)); *cf.* Wright v. Occupational Safety & Health Admin., 822 F.2d 642, 646 (7th Cir. 1987) (internal citation omitted) ("We also find that [the Occupational Safety and Health Administration (OSHA)] has not provided an adequate factual basis to allow a court to determine whether the category of evidence and supporting information compiled by the [compliance safety health officer] is exempt from disclosure. Although there may be reason to believe that such information should be exempt under [Exemption] 7(A) to prevent giving away OSHA's case, this category may contain documents that Union Oil itself provided to OSHA during the course of the agency's investigation. In that case, it is not clear to us why public disclosure of this information would provide Union Oil with any information that it does not already have.").

[310] 5 U.S.C. § 552(b)(7)(B).

[311] Chiquita Brands Int'l v. SEC, 805 F.3d 289, 294 (D.C. Cir. 2015) (quoting Wash. Post Co. v. DOJ, 863 F.2d 96, 102 (D.C. Cir. 1988)). The D.C. Circuit has held that a "trial" as used in Exemption 7(B) refers to "the ultimate determination of factual and legal claims by judge or jury in a judicial proceeding" and "that Exemption 7(B) comes into play only when it is probable that the release of law enforcement records will seriously interfere with the fairness of that final step [of a judicial proceeding] which is called the trial." *Id.* at 295 (citation omitted). The court also held that Exemption 7(B)'s reference to "adjudication" "refers to determinations made by administrative agencies, not," as the appellant in the case argued, "to pretrial decisions issued by a judge." *Id.* at 296.

of its effect ... on the proceedings as a whole," and not simply whether disclosure would bestow "a slight advantage ... on a party in a single phase of a case."[312]

Exemption 7(C)

Exemption 7(C) authorizes the withholding of law enforcement records where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[313] Like Exemption 6,[314] Exemption 7(C) was designed to protect personal privacy interests. As the Supreme Court has explained, however, Exemption 7(C) provides more protection for materials under its coverage than does Exemption 6.[315] Exemption 6 applies only to disclosures that "*would* constitute a *clearly* unwarranted invasion of personal privacy."[316] Exemption 7(C) is more encompassing: it does not include the word "clearly," and it protects against disclosures that merely "*could* reasonably be expected to" effect an unwarranted intrusion into personal privacy.[317] Despite these differences, however, both exemptions are guided by many of the same privacy principles discussed above in relation to Exemption 6.[318] For example, courts determining the availability of Exemption 7(C) often engage in the same type of case-by-case balancing of the private interests at stake and the public interest in disclosure as they do in the Exemption 6 context.[319]

Under Exemption 7(C), case-by-case balancing may be eschewed in favor of a categorical approach in some circumstances.[320] In *Kissinger v. Reporters Committee for Freedom of the Press*, the Supreme Court determined that there was a "substantial" privacy interest in "rap sheets"—records of individuals' criminal histories—which the Court described as publicly available but practically obscure.[321] In asserting the principle of "categorical balancing" in the Exemption 7(C) context, the Court explained, "When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir."[322] "Such a disparity on the scales of justice," the Court continued, "holds for a class of cases without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided."[323]

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[312] *Id.* at 297–98.

[313] 5 U.S.C. § 552(b)(7)(C).

[314] *Id.* § 552(b)(6). *See supra* Exemption 6: Personnel, Medical, and Similar Files.

[315] DOD v. Fed. Labor Relations Auth., 510 U.S. 487, 496 n.6 (1994); *see also* HICKMAN & PIERCE, JR., *supra* note 147, § 21.13, at 2234.

[316] 5 U.S.C. § 552(b)(6) (emphasis added).

[317] *Id.* § 552(b)(7)(C) (emphasis added); *Reporters Comm.*, 489 U.S. at 756; *see also* PIERCE, JR., *supra* note 150, at 396.

[318] *See supra* Exemption 6: Personnel, Medical, and Similar Files; DOJ GUIDE, EXEMPTION 6, *supra* note 282, *passim*.

[319] *See, e.g.*, CREW v. DOJ, 746 F.3d 1082, 1091–96 (D.C. Cir. 2014).

[320] *See Reporters Comm.*, 489 U.S. at 776 (holding "that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction").

[321] *Id.* at 751, 764, 780.

[322] *Id.* at 780.

[323] *Id.*; *see* PIERCE, JR., *supra* note 150, at 396 (writing that the *Reporters Committee* "Court adopted a 'categorical' approach by holding that rap sheets could not be obtained through the FOIA pursuant to this or any other request").

Exemption 7(D)

Exemption 7(D) applies to disclosures of law enforcement material that "could reasonably be expected to disclose the identity of a confidential source," as well as to "information furnished by a confidential source" where "record[s] or information [were] compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation."[324] A source is "confidential" if the government expressly pledges to keep information supplied by the source in confidence or if "such an assurance could be reasonably inferred" from the circumstances.[325] According to the Supreme Court's decision in *DOJ v. Landano*, a "source should be deemed confidential if the source furnished information with the understanding that the [agency] would not divulge the communication except to the extent [it] thought necessary for law enforcement purposes."[326] Although the Court in *Landano* rejected the government's argument that confidentiality is generally presumed simply because a source has worked with the FBI during a criminal investigation, it did hold that such a presumption may exist where "circumstances such as the nature of the crime investigated and the witness' relation to it support an inference of confidentiality."[327]

Exemption 7(E)

Exemption 7(E) provides that an agency may withhold law enforcement records where their release "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."[328] This subexemption applies to two different types of investigation and prosecution materials: "techniques and procedures" and "guidelines." Courts are split as to whether the circumvention requirement applies to the disclosure of both types of materials or only to the "guidelines" mentioned in the subexemption's second clause.[329]

[324] 5 U.S.C. § 552(b)(7)(D). Exemption 7(D) states, in full, that "records or information compiled for law enforcement purposes" are exempt where disclosure "could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." *Id.*

[325] DOJ v. Landano, 508 U.S. 165, 172 (1993) (quoting S. REP. NO. 1200, at 13 (1974) (Conf. Rep.)).

[326] *Id.* at 174.

[327] *Id.* at 180–81.

[328] 5 U.S.C. § 552(b)(7)(E).

[329] *Compare, e.g.*, Hamdan v. DOJ, 797 F.3d 759, 778 (9th Cir. 2015), and Allard K. Lowenstein Int'l Human Rights Project v. DHS, 626 F.3d 678, 681 (2d Cir. 2010) (declaring that "basic rules of grammar and punctuation dictate that the [circumvention language] modifies only the immediately antecedent 'guidelines' clause and not the more remote 'techniques and procedures' clause), *with* Sack v. DOD, 823 F.3d 687, 694 (D.C. Cir. 2016) and Catledge v. Mueller, 323 F. App'x 464, 466–67 (7th Cir. 2009) (explaining that "[u]nder [Exemption 7(E)] government agencies may refuse to release 'records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... would disclose techniques and procedures for law enforcement investigations or prosecutions ... if such disclosure could reasonably be expected to risk circumvention of the law.'" (quoting 5 U.S.C. § 552(b)(7)(E)).

Exemption 7(F)

Exemption 7(F) authorizes withholding law enforcement records where disclosure "could reasonably be expected to endanger the life or physical safety of any individual."[330] Prior to 1986, this subexemption only protected against disclosures that could endanger law enforcement personnel.[331] The 1986 amendments to FOIA expanded Exemption 7(F)'s coverage by substituting "any individual" for "law enforcement personnel."[332]

Exemption 8: Financial Institution Reports

Exemption 8 protects matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[333] The Senate report accompanying the original law explains that, by limiting the availability of the covered financial reports to the agencies tasked with overseeing financial institutions, the exemption was intended to protect such institutions' security.[334] Courts have interpreted Exemption 8 broadly.[335] Courts have also opined that Exemption 8 was intended "to safeguard the relationship between the banks and their supervising agencies."[336]

Exemption 9: Geological and Geophysical Information and Data Concerning Wells

Exemption 9 exempts from disclosure "geological and geophysical information and data, including maps, concerning wells."[337] Courts have not had many opportunities to interpret this exemption, as agencies do not often invoke it.[338]

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[330] 5 U.S.C. § 552(b)(7)(F).

[331] Meese Memorandum, *supra* note 8 (citing 5 U.S.C. § 552(b)(7)(F) (1982)).

[332] *Id.* (citing Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207–49 (1986)).

[333] 5 U.S.C. § 552(b)(8).

[334] S. REP. NO. 813, at 10 (1965); *accord* H.R. REP. NO. 1497, at 11 (1966) (explaining that Exemption 8 "is designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm"). The D.C. Circuit has written that "there was concern that disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks might undermine public confidence and cause unwarranted runs on banks." Consumers Union of U.S., Inc. v. Heimann, 589 F.2d 531, 534 (D.C. Cir. 1978).

[335] *See, e.g.*, Williams & Connolly LLP v. Office of the Comptroller of the Currency, 39 F. Supp. 3d 82, 90 (D.D.C. 2014) (explaining that "this Circuit has repeatedly recognized the broad scope Congress accorded Exemption 8"); Pub. Investors Arbitration Bar Ass'n v. SEC, 930 F. Supp. 2d 55, 62 (D.D.C. 2013) ("[T]he 'related to' language [in Exemption 8] casts a wide net of non-disclosure over any documents that are logically connected to an 'examination, operating, or condition report[].'") (alteration in original) (quoting 5 U.S.C. § 552(b)(8)).

[336] *Heimann*, 589 F.2d at 534. The *Heimann* court explained that, "[i]f details of the bank examinations were made freely available to the public and to banking competitors, there was concern that banks would cooperate less than fully with federal authorities." *Id.*

[337] 5 U.S.C. § 552(b)(9).

[338] PIERCE, JR., *supra* note 150, at 397 (noting that Exemption 9 "is rarely invoked or interpreted"). *See also* O'REILLY, *supra* note 22, § 18:1, at 391 (stating that Exemptions 8 and 9 "are [FOIA's] most obscure and least utilized" exemptions).

Glomar Responses

An agency may use a special response to a request where the fact that a record exists is itself exempt from disclosure—although such a response is not expressly authorized under FOIA's statutory exemptions. These responses, often delivered in the form of "the agency can neither confirm nor deny" the existence of the requested records, are known as *Glomar responses*.[339]

Glomar: Exemptions v. Exclusions

A *Glomar* response must be used in conjunction with one of FOIA's exemptions.[340] Invocation of *Glomar* is not limited to a particular exemption or particular subject of the requested records.[341] *Glomar* responses are accordingly part of the FOIA *exemption* process, meaning the relevant records are still subject to FOIA. Exemptions, however, are distinct from FOIA's *exclusions*. While a *Glomar* response may hide the existence of certain records, because *Glomar* must be invoked in conjunction with a specific exemption, the invocation of a specific exemption may reveal some information about the records sought if they exist. For that reason, FOIA's *exclusions* (discussed below) exclude certain records from FOIA altogether.[342] Because records subject to an exclusion are not subject to FOIA at all, the agency is not required to respond to a request seeking such records. Thus, although they are similar, the *Glomar* response serves a distinct function from FOIA's exclusions.

Development of the *Glomar* Response

Executive Order 13,526 permits agencies to "refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors."[343] Over the past half-century, courts have accepted the *Glomar* response as appropriate in some circumstances.

Glomar responses are named after the deep-sea salvage vessel *Hughes Glomar Explorer*.[344] The *Hughes Glomar Explorer* was built as part of a secret Central Intelligence Agency (CIA) operation called Project Azorian to recover a Soviet submarine (*K-129*) that sank in the Pacific Ocean in 1968 in 17,000 feet of water.[345] Using the cover story that two Howard Hughes–owned companies, Summa Corporation and Global Marine Development, were conducting deep-sea mining, the CIA recovered a portion of the Soviet submarine in 1974.[346] Shortly after the recovery operation concluded, the offices of Howard Hughes were burglarized, and documents related to the *Glomar Explorer* were stolen.[347] Months later, in March 1975, newspapers reported that the

[339] Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007).

[340] Wilner v. NSA, 592 F.3d 60, 68 (2d Cir. 2009) ("To properly employ the *Glomar* response ... an agency must tether its refusal to respond to one of the nine FOIA exemptions.").

[341] Wadhwa v. Sec'y U.S. Dep't of Veterans Affs., 707 F. App'x 61, 65 (3d Cir. 2017); Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982).

[342] *See infra* Exclusions.

[343] Exec. Order No. 13,526, 79 Fed. Reg. 44093 (Jul. 30, 2014).

[344] Military Audit Project v. Casey, 656 F.2d 724, 728–29 (D.C. Cir. 1981); *see also* JOSH DEAN, THE TAKING OF K-129 389 (2017).

[345] Phillipi v. CIA, 655 F.2d 1325, 1327 (D.C. Cir. 1981).

[346] *Id.*; *Military Audit Project*, 656 F.2d at 742.

[347] The D.C. Circuit described the burglary as "mysterious" explaining that a "handful of armed men overwhelmed a guard and slipped past a sophisticated electronic alarm system, then burned their way into a Hughes safe containing a document describing the project." Phillippi v. CIA, 655 F.2d 1325, 1327 (D.C. Cir. 1981).

Glomar Explorer was purportedly owned by the United States government and was involved in a secret recovery operation.[348] Following the initial publications, further reports alleged that the CIA attempted to dissuade news media organizations from publishing what they had learned about the *Glomar Explorer*.[349] The activities of the *Glomar Explorer* and the alleged cover-up interested journalists and government watchdog groups.[350] They filed a series of FOIA requests seeking documents related to the *Glomar Explorer* and the alleged cover-up.[351] The CIA responded by claiming that "in the interest of national security, involvement by the U.S. Government in the activities which are the subject matter of your request can *neither be confirmed nor denied*."[352]

Two appeals were filed in the D.C. federal courts challenging the CIA's use of the *Glomar* response. During the litigation, however, the Carter Administration publicly acknowledged ownership of the *Glomar Explorer*, the contract with Hughes's corporations, and the attempted cover-up.[353] The D.C. Circuit, accordingly, did not address the legality of the CIA's *Glomar* response in that case, but it has had occasion to do so in subsequent cases.[354]

In *Gardels v. CIA*, the D.C. Circuit held that an agency may invoke a *Glomar* response "where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception."[355] Put differently, "the existence or nonexistence of a record is a fact exempt from disclosure under a FOIA exemption."[356] In *Gardels*, for example, the CIA refused to confirm or deny whether it had records pertaining to covert contacts for foreign intelligence purposes between the agency and students and professors at the University of California.[357] The CIA invoked Exemption 1 and Exemption 3 to support its response.[358] The court upheld the CIA's use of a *Glomar* response pursuant to Exemption 3 because divulging the existence of records of contacts could reveal intelligence sources and methods, which is prohibited by Section 403(b)(3) of the National

[348] *Phillipi*, 655 F.2d at 1327.

[349] *Id.*

[350] *Id.*

[351] *Id.*

[352] Phillipi v. CIA, 556 F.2d 1009, 1012 (D.C. Cir. 1976). Although the CIA's *Glomar* response gave rise to the appeal in *Phillipi*, the appellant in that case did not challenge the CIA's legal authority to invoke such a response. *Id.* The appellant confined her appeal to whether the CIA adequately supported its justification for invoking a *Glomar* response. *Id.*

[353] Military Audit Project v. Casey, 656 F.2d 724, 729 (D.C. Cir. 1981) Questions about the true purpose of the *Glomar Explorer* still lingered. "Then there is the puzzle of why so many reporters for major newspapers, magazines and TV networks simultaneously stumbled upon the [*Glomar Explorer*] trail. [S]ome journalists got the feeling that the CIA had actually been helpful all along in getting the story out, while at the same time it apparently tried to suppress the story. The last theory goes off into the wild blue yonder, suggesting that raising a Soviet submarine was not [the *Glomar Explorer*'s] mission at all, but the supreme cover for a secret mission as yet safely secure." *Espionage: The Great Submarine Snatch*, TIME, Mar. 31, 1975, https://content.time.com/time/subscriber/article/0,33009,879453-8,00.html.

[354] *See* Phillipi v. CIA, 556 F.2d 1009 (D.C. Cir. 1976); Phillipi v. CIA, 655 F.2d 1325 (D.C. Cir. 1981); Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981).

[355] 689 F.2d 1100, 1103 (D.C. Cir. 1982); *see also* Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007).

[356] Int'l Counsel Bureau v. CIA, 774 F. Supp. 2d 262, 266 (D.D.C. 2011).

[357] *Id.*

[358] *Id.*

Security Act.[359] The D.C. Circuit had found Section 403(d)(3) of the National Security Act to be an Exemption 3 statute.[360]

Glomar responses are not confined to national security. For example, the Department of Defense issued a policy statement explaining that it would invoke a *Glomar* response pursuant to Exemption 7 in responding to requests pertaining to investigative material by the name of the person investigated.[361] At least one lower court has upheld invocation of *Glomar* in these circumstances, where revealing the existence of investigatory records would "cause an unwarranted invasion of personal privacy" protected by Exemption 7.[362]

Exclusions

Sometimes, for an agency with enforcement authority, even admitting that a record *exists* would potentially cause harm to the agency's investigation or an associated individual. Therefore, in addition to its nine exemptions, FOIA also contains three records exclusions. FOIA's exclusions allow an agency, in response to a request for certain law enforcement records, to "treat the records as not subject to the requirements of" FOIA.[363] As the *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* explains, when an agency receives a request for records that fall within the coverage of an exclusion, the agency is authorized to withhold the records and "respond to the request as if the excluded records d[o] not exist."[364] FOIA's exclusions, in other words, allow agencies to "withhold documents without comment."[365] Conversely, when an agency invokes a FOIA *exemption* in response to a request for records, it is required to "reveal the fact of and grounds for any withholdings" to the requester.[366] FOIA's exclusions, therefore, are designed to allow agencies to avoid disclosure of the existence of certain records to which the exclusions apply.[367] The exclusions are also intended to cover those situations where an agency's issuance of a *Glomar* response would be insufficient to protect certain kinds of sensitive records.[368] As discussed above, when an agency issues a *Glomar*

[359] *Id.* at 1105. In finding that disclosing the records would reveal intelligence sources or methods, the court held that it "must according substantial weight to the Agency's determinations." *Id.* at 1104.

[360] *Id.* (citing Halperin v. CIA, 629 F.2d 144, 147 (D.C. Cir. 1980)).

[361] Memorandum from Will Kammer, Chief, Defense Freedom of Info. Policy Office, U.S. Dep't of Defense, to Dep't of Defense Policy Offices on FOIA Policy on Privacy Protection in Investigations, (Feb. 8, 2006), https://open.defense.gov/Portals/23/Documents/FOIA/FOIA_Resources/Memo-Privacy_Protection_in_Investigations.pdf.

[362] *See* Wadhwa v. Sec'y U.S. Dep't of Veterans Affs., 707 F. App'x 61, 65 (3d Cir. 2017). *But see* Roth v. DOJ, 642 F.3d 1161, 1183 (D.C. Cir. 2011) (finding that the public interest in shedding light on the conduct of a government agency in investigating and prosecuting a man for murder outweighed any privacy interests in the subjects of the investigation protected by Exemption 7(C)); McMicheal v. DOD, 910 F. Supp. 2d 47, 54–55 (D.D.C. 2012) (finding that the public interest outweighed any privacy interests in an inspector general investigation into allegations of abusive command environment pursuant to Exemption 7(C)).

[363] 5 U.S.C. § 552(c)(1)–(3).

[364] Meese Memorandum, *supra* note 8, at 18.

[365] Labow v. DOJ, 831 F.3d 523, 532 (D.C. Cir. 2016).

[366] Memphis Publ'g Co. v. FBI, 879 F. Supp. 2d 1, 6–7 (D.D.C. 2012); *see* CREW v. FEC, 711 F.3d 180, 182–83 (D.C. Cir. 2013) (Kavanaugh, J.) (holding that, when making an initial "determination" of a FOIA request under 5 U.S.C. § 552(a)(6)(A)(i), an "agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents").

[367] *Cf.* Meese Memorandum, *supra* note 8, at 26 (writing that, in contrast to the *Glomar* principle, FOIA's exclusions "afford[] a higher level of protection" to covered records).

[368] *See id.*

response, it refuses to either confirm or deny whether records exist.[369] To deploy a *Glomar* response, the agency must invoke an exemption and provide a public explanation of the exemption that would apply if the records did exist.[370] Exclusions, however, serve to remove records from FOIA's scope entirely. Accordingly, *Glomar* is less protective than an exclusion, because invoking an exemption in a *Glomar* response could result in the dangers sought to be prevented by FOIA's exclusions. Each of FOIA's three exclusions is codified at 5 U.S.C. § 552(c).

Exclusion (c)(1). The first exclusion covers records protected by Exemption 7(A) (i.e., records for which disclosure "could reasonably be expected to interfere with enforcement proceedings"),[371] but only if

- the relevant law enforcement proceeding or investigation concerns a "possible" criminal violation;[372] and
- the agency has "reason to believe" both that
    - the pendency of the proceeding or investigation is unknown to the subject of the proceeding or investigation, and
    - revealing the records' existence "could reasonably be expected to interfere with enforcement proceedings."[373]

The exclusion was intended to prevent an agency from "tipping off" an individual about the existence of an investigation of which he or she is a subject by stating, in response to a FOIA request, that requested records are exempt from disclosure under Exemption 7(A).[374] While agencies can rely on this exclusion to prevent such an outcome, by its terms, exclusion (c)(1) is only available to an agency while the conditions described in its text continue.[375] Accordingly, once the investigation becomes public, this exclusion no longer applies.[376]

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[369] *See supra Glomar* Responses.

[370] ACLU v. FBI, 734 F.3d 460, 469, 470 (6th Cir. 2013); DOJ, OFFICE OF INFO. POL'Y, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXCLUSIONS 2 (June 3, 2022) [hereinafter DOJ GUIDE, EXCLUSIONS], https://www.justice.gov/oip/foia-guide/exclusions/dl?inline; *see, e.g.*, Pickard v. DOJ, 653 F.3d 782, 784 (9th Cir. 2011) (noting, while explaining the procedural background of the case, that in response to the plaintiff's FOIA request, the agency had cited Exemptions 6 and 7(C) and neither confirmed nor denied whether any responsive records existed).

[371] 5 U.S.C. § 552(b)(7)(A); *see supra* Exemption 7: Law Enforcement Records or Information.

[372] 5 U.S.C. § 552(c)(1)(A).

[373] *Id.* § 552(c)(1)(B).

[374] *See* Meese Memorandum, *supra* note 8, at 19 ("To avail itself of Exemption 7(A) ... an agency must routinely specify that it is relying on that exemption—first administratively and then, if sued, in court—even where it is invoking the exemption to withhold all responsive records in their entireties. The difficulty is that in those unusual situations in which the investigation's subject is as yet unaware of the investigation's existence, the agency's specific reliance on Exemption 7(A) can 'tip off' the subject and thereby cause harm."); *id.* at 20 ("The (c)(1) exclusion permits agencies to avoid having to disclose to investigative subjects a sensitive fact (*i.e.*, whether there is an investigation ongoing or not) that would be disclosed by the mere invocation of Exemption 7(A)."). The Attorney General's memorandum on the 1986 FOIA amendments also states in the case of an individual who submits a request for records in an attempt to determine whether he or she is the subject of an investigation, "[a]n agency response invoking Exemption 7(A) would confirm the existence of an ongoing investigation," and that "any response that *did not invoke* Exemption 7(A) in withholding law enforcement files would tell such a requester that his activities (or perhaps those of some other entity named in the request) have thus far escaped detection." *Id.* at 20 (emphasis added).

[375] 5 U.S.C. § 552(c)(1).

[376] *See* Meese Memorandum, *supra* note 8, at 22 ("Once a law enforcement matter reaches a stage at which all subjects are aware of its pendency, or at which the agency otherwise determines that the public disclosure of that pendency no longer could lead to harm, the exclusion should be regarded as no longer applicable.").

Exclusion (c)(2). The second exclusion applies to records that are "maintained by a criminal law enforcement agency under an informant's name or personal identifier."[377] When a third party requests such records "according to the informant's name or personal identifier," exclusion (c)(2) authorizes the agency to "treat the records as not subject to the requirements of" FOIA.[378] The Attorney General's memorandum on the 1986 amendments to FOIA describes FOIA's second exclusion as contemplating "the situation in which a sophisticated requester could try to ferret out an informant in his organization by forcing a law enforcement agency" to invoke FOIA's exemption for records relating to a confidential source (Exemption 7(D)), an action that would likely corroborate the requester's suspicion that the individual subject to the request is a confidential informant.[379] The memorandum cites as an example the situation in which a criminal organization that suspects one of its members is a criminal informant either requires that the suspected informant request law enforcement records about himself or herself, or else compels the individual to submit a privacy waiver to allow a member of the organization to make such a request.[380] Exclusion (c)(2) authorizes law enforcement agencies to protect against the disclosure of the identities of their confidential informants in such situations. Like exclusion (c)(1), an agency's ability to use the second exclusion is subject to an important limitation: an agency may not use the second exclusion if "the informant's status as an informant has been officially confirmed."[381]

Exclusion (c)(3). FOIA's third exclusion protects a subset of FBI records concerning "foreign intelligence," "counterintelligence," or "international terrorism."[382] The FBI may treat such records as excluded from FOIA if "the existence of the records is classified information as provided in" Exemption 1.[383] Exclusion (c)(3) seeks to prevent the harm that may occur from an agency publicly claiming the protection of Exemption 1 in response to a request and, therefore, admitting that such sensitive records do indeed exist.[384] Like the other exclusions, however, the third exclusion's protective ambit is limited—an agency may use exclusion (c)(3) only for such time "as the existence of [such] records remains classified information."[385]

FOIA-Related Litigation: Selected Issues

FOIA not only established a statutory right of access to agency records but also provided a means for requesters to enforce that right through judicial review of agency decisions to withhold

[377] 5 U.S.C. § 552(c)(2).

[378] *Id.*

[379] Meese Memorandum, *supra* note 8, at 23; *see* 5 U.S.C. § 552(b)(7)(D). This report discusses Exemption 7(D) above. *See supra* Exemption 7: Law Enforcement Records or Information.

[380] Meese Memorandum, *supra* note 8, at 23–24.

[381] 5 U.S.C. § 552(c)(2); *see* Meese Memorandum, *supra* note 8, at 24 n.43. For information on judicial treatment of the "officially confirmed" limitation of Exclusion (c)(2), see DOJ GUIDE, EXCLUSIONS, *supra* note 370, at 9–11.

[382] 5 U.S.C. § 552(c)(3).

[383] *Id.*; *see* 5 U.S.C. § 552(b)(1). *See supra* Exemption 1: National Defense or Foreign Policy.

[384] DOJ GUIDE, EXCLUSIONS, *supra* note 370, at 12.

[385] 5 U.S.C. § 552(c)(3). The Attorney General's memorandum on the 1986 FOIA amendments states that, while Exclusion (c)(3) explicitly concerns FBI records, "it is conceivable that records derived from such FBI records might be maintained elsewhere, potentially in contexts in which the harm sought to be prevented by this exclusion is no less threatened." Meese Memorandum, *supra* note 8, at 25 n.45. For "any such extreme situation," the memorandum states that "it would be appropriate for another agency and the FBI jointly to consider the possible applicability of this exclusion, on a derivative basis, where necessary to avoid an anomalous result." *Id.*

records.[386] Conversely, parties may initiate legal actions to prevent agencies from disclosing information requested under FOIA in certain situations. These aspects of FOIA and FOIA-related litigation—judicial review of agencies' withholding decisions and so-called reverse-FOIA litigation—are discussed below.

Judicial Review of Agency Withholding Decisions

Under 5 U.S.C. § 552(a)(4)(B), federal district courts have "jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."[387] The Supreme Court, accordingly, has explained that a court has jurisdiction under § 552(a)(4)(B) if it can be shown "that an agency has (1) improperly; (2) withheld; (3) agency records."[388]

FOIA instructs courts to review appeals from agency withholding decisions "de novo."[389] Under this standard of review, a court accords no deference to the agency's decision below.[390] That said, courts will sometimes defer to an agency's judgment in some aspects of FOIA litigation. For example, courts in FOIA disputes generally accord "some measure of deference to the executive in cases implicating national security."[391]

The agency has the burden of proving that it properly withheld information under a FOIA exemption.[392] To withhold information the agency must point to a specific exemption that permits it to withhold the requested documents. In *DOJ v. Tax Analysts*, the Supreme Court held that, because FOIA's exemptions are "exclusive," agency records are "improperly" withheld when an

[386] FOIA's judicial review provision was a notable distinction from the APA's prior public information section. *See* S. REP. NO. 813, at 5 (1965) (listing as one of the problems associated with the APA's prior information-access section the fact that "[t]here is no remedy in case of wrongful withholding of information from citizens by Government officials"). While the discussion in this section pertains to the general requirements governing legal challenges to agency withholding decisions, FOIA requesters may also challenge other agency FOIA-related actions in federal court. *See, e.g.*, 5 U.S.C. § 552(a)(4)(A)(vii) (authorizing "action[s] ... regarding the waiver of [request processing] fees").

[387] 5 U.S.C. § 552(a)(4)(B). Venue is available "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia." *Id.* The U.S. District Court for the District of Columbia reviews a considerably large number of FOIA lawsuits. *See* Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 261 (2011) ("The District Court for the District of Columbia is the forum for a disproportionate share of FOIA cases, disposing of 38% of all FOIA cases in the country, even though it disposes of only 1.3% of all district court litigation.") (citing FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATABASES (1979–2008)); *cf.* LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 325 (Harry A. Hammitt et al. eds., 25th ed. 2010) ("Because the vast majority of FOIA lawsuits are filed in the District of Columbia, the district court and court of appeals there have developed a substantial body of expertise in FOIA matters that may be lacking in other jurisdictions.").

[388] *See* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980) (internal citation omitted). All three elements must be established in order to obtain judicial review of an agency's withholding decision. *Id.* at 150; *accord* DOJ v. Tax Analysts, 492 U.S. 136, 142 (1989).

[389] 5 U.S.C. § 552(a)(4)(B). Judicial review of an agency's decision to deny a fee waiver is also reviewed under the de novo standard. 5 U.S.C. § 552(a)(4)(A)(vii); *see* DOJ GUIDE, LITIGATION CONSIDERATIONS, *supra* note 144, at 28.

[390] *See* Louis v. U.S. Dep't of Labor, 419 F.3d 970, 977 (9th Cir. 2005).

[391] Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 926–27 (D.C. Cir. 2013); *id.* at 927 ("[B]oth the Supreme Court and this Court have expressly recognized the propriety of deference to the executive in the context of FOIA claims which implicate national security."); *see* CIA v. Sims, 471 U.S. 159, 179 (1985) ("Here the Director concluded that disclosure of the institutional affiliations of the MKULTRA researchers could lead to identifying the researchers themselves and thus the disclosure posed an unacceptable risk of revealing protected 'intelligence sources.' The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.") (footnote omitted).

[392] 5 U.S.C. § 552(a)(4)(B).

agency refuses to disclose requested records that are not protected by an applicable exemption.[393] At the same time, the Court has also held that an agency's decision to withhold a record is not "improper" if a court order prohibits the agency from disclosing the record.[394] Further, in *Kissinger v. Reporters Committee for Freedom of the Press*, the Court held that records are not "withheld" under § 552(a)(4)(B) if, before a request was filed, the records were "removed from the possession of the agency."[395] The Court did not answer whether an agency "withholds" a record when it "purposefully route[s] a document out of agency possession in order to circumvent a FOIA request."[396] As one court has explained, however, "an agency's FOIA obligations might extend to documents that are not in the agency's immediate custody or control ... when there is evidence to suggest that the requested records are outside of the agency's control *precisely because* the agency has attempted to shield its records from search or disclosure under the FOIA."[397]

An improper withholding is not limited to those situations in which an agency explicitly rejects a FOIA request or fails to respond to a request. An inadequate search for responsive records is also an improper withholding.[398]

Agencies defending withholding decisions in federal court often supply what is known as a "*Vaughn* Index" to aid in justifying their decisions.[399] In FOIA lawsuits, the plaintiff generally does not know with any specificity the contents of the requested records, which the D.C. Circuit has declared can "seriously distort[] the traditional adversary nature of our legal system's form of dispute resolution."[400] A *Vaughn* Index, which is akin to a privilege log, is a response to this

[393] 492 U.S. at 151 ("It follows from the exclusive nature of the § 552(b) exemption scheme that agency records which do not fall within one of the exemptions are 'improperly' withheld.").

[394] GTE Sylvania v. Consumers Union of U.S., Inc., 445 U.S. 375, 384, 386–87 (1980) (holding that the Consumer Product Safety Commission had not withheld records "improperly" where the agency was enjoined by a federal court from disclosing them in unrelated litigation); *see* Alley v. HHS, 590 F.3d 1195, 1198 (11th Cir. 2009) ("Under the rule of *GTE Sylvania*[], an agency that complies with a court order forbidding disclosure does not violate the FOIA."). In *Tax Analysts*, 492 U.S. at 154, the Court acknowledged that the records at issue in *GTE Sylvania* had not been covered by any exemptions. While observing that "*GTE Sylvania* represents a departure from the FOIA's self-contained exemption scheme," the Court explained that "this departure was a slight one at best, and was necessary in order to serve a critical goal independent of FOIA—the enforcement of a court order." *Id.* at 155.

[395] 445 U.S. at 150. "In such a case," the Court wrote, "the agency has neither the custody nor control necessary to enable it to withhold." *Id.* at 150–51. The Court further explained that an agency's "refusal to resort to legal remedies to obtain possession" of documents that were formerly within the agency's control does not constitute a withholding under FOIA. *Id.* at 151; *see also Tax Analysts*, 492 U.S. at 149 (holding that DOJ "withheld" requested copies of district court tax decisions that it had received when it "refused to comply with [the complainant's] requests," even though the decisions were made publicly available by the issuing court).

[396] *Kissinger*, 445 U.S. at 155 n.9. The Court also did not decide whether an agency "withholding" occurs when an individual "wrongfully remove[s]" a record from an agency after the filing of a request. *Id.*

[397] Gawker Media, LLC v. U.S. Dep't of State, 266 F. Supp. 3d 152, 159 (D.D.C. 2017); *cf.* Judicial Watch v. U.S. Dep't of State, No. 13-1363, 2016 WL 11530536, at *4–6 (D.D.C. May 4, 2016).

[398] *See* Lockett v. Wray, 271 F. Supp. 3d 205, 208 (D.D.C. 2017) ("An inadequate search for records constitutes an improper withholding under the FOIA."). The requirement that an agency conduct an adequate search is discussed above. *See supra* Request-Driven Disclosure.

[399] This process stems from the decision in *Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973), from which it takes its name. *See* DOJ GUIDE, LITIGATION CONSIDERATIONS, *supra* note 144, at 82 ("A distinguishing feature of FOIA litigation is that the defendant agency bears the burden of sustaining its action of withholding records. The most commonly used device for meeting this burden of proof is the *Vaughn* Index, fashioned by the Court of Appeals for the District of Columbia Circuit in a case entitled *Vaughn v. Rosen*.") (footnotes omitted); *accord* Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Rev., 830 F.3d 667, 673 (D.C. Cir. 2016) ("An agency can carry its burden by submitting a *Vaughn* index.... ").

[400] King v. DOJ, 830 F.2d 210, 218 (D.C. Cir. 1987) (quoting *Vaughn*, 484 F.2d at 825).

informational asymmetry.[401] The D.C. Circuit has held that a proper *Vaughn* Index provides "a relatively detailed justification [for withholdings], 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."[402] Agencies can also justify nondisclosure decisions through the submission of affidavits of agency officials that, per the D.C. Circuit, "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."[403]

FOIA also authorizes courts to review records *in camera* (i.e., privately and outside of the plaintiffs' view) to determine whether the records have been appropriately withheld.[404] Courts often conduct *in camera* inspection of withheld information when an agency has not "provide[d] a sufficiently detailed explanation to enable the ... court to make a de novo determination of the agency's claims of exemption."[405] Courts retain discretion whether to conduct *in camera* review but generally do so only in "exceptional" cases.[406] In certain situations, courts may authorize agencies to submit *in camera* agency affidavits. However, as opposed to *in camera* inspection of withheld records, "use of in camera affidavits has generally been disfavored."[407]

Reverse-FOIA Litigation

Although requesters often seek judicial review of an agency's decision to withhold information under FOIA, in some circumstances parties may pursue judicial action to *prevent* an agency's disclosure of information in response to a FOIA request.[408] These actions are often called reverse-

[401] *Id.* Specifically, the D.C. Circuit has explained that the *Vaughn* Index was intended to "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 documents themselves, as well as to produce a record that will render [its] decision capable of meaningful review on appeal." *Id.* at 218–19 (footnotes omitted).

[402] Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977).

[403] *Am. Immigration Lawyers Ass'n*, 830 F.3d at 673 (citation omitted); *see* Dutton v. DOJ, 302 F. Supp. 3d 109, 121 (D.D.C. 2018) ("[W]hen an agency seeks to withhold information, it must provide a relatively detailed justification for the withholding ... through a *Vaughn* index, an affidavit, or by other means." (citations omitted) (alteration in original)); *see also* CREW v. DOJ, 746 F.3d 1082, 1088 (D.C. Cir. 2014) ("Agency affidavits sometimes take the form of a '*Vaughn* index'.... ").

[404] 5 U.S.C. § 552(a)(4)(B) (providing that district courts "may examine the contents of [withheld] agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of [§ 552]").

[405] Spirko v. USPS, 147 F.3d 992, 997 (D.C. Cir. 1998). *In camera* review may occur in other situations. *See id.* at 996 ("[*I*]*n camera* inspection 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, when the number of withheld documents is relatively small, and when the dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents.") (citation omitted).

[406] *See* NLRB v. Robbins Tire & Rubber, 437 U.S. 214, 224 (1978) ("The *in camera* review provision is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be resolved."); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 119 (D.D.C. 2005) ("[C]ourts disfavor *in camera* inspection and it is more appropriate in only the exceptional case.").

[407] Armstrong v. EOP, 97 F.3d 575, 580 (D.C. Cir. 1996).

[408] Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 717 (2002). Reverse-FOIA suits ordinarily arise after an agency informs a party that the agency has received a request for the records at issue or that it has decided to release such records in response to a request. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 287 (1979) (explaining that the lawsuit "began ... when the [agency] informed Chrysler that third parties had made an FOIA request for disclosure of the [records at issue]"); Nat'l Bus. Aviation Ass'n v. FAA, 686 F. Supp. 2d 80, 83–84 (D.D.C. 2010) ("The [Federal Aviation Administration (FAA)] contacted the [plaintiff] by (continued...)

FOIA lawsuits.[409] An entity ordinarily institutes a reverse-FOIA action to prevent an agency from disclosing sensitive information, often concerning commercial or financial matters, that the entity had previously submitted to the agency.[410] In *Chrysler Corporation v. Brown*, the Supreme Court held that neither FOIA nor the TSA authorizes a private right of action to enjoin an agency from disclosing information in violation of the TSA.[411] The Court held, however, that judicial review of such actions is available under the APA.[412] In reverse-FOIA suits, courts generally review an agency's decision to disclose information under § 706(2)(A) of the APA, which provides that courts are to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[413] The burden of proof in a reverse-FOIA action is on the plaintiff (i.e., the party attempting to prevent the agency from disclosing information).[414]

Under Executive Order 12,600, an agency is required, in certain circumstances, to provide notice to those who submitted "records containing confidential commercial information" if the agency has concluded that the records may need to be disclosed in response to a FOIA request.[415] Agency procedures generally must allow applicable submitters to object to disclosure and provide that the agency, in the event it disagrees with the submitter's objection, supply the submitter with the reasons for its disagreement.[416] The executive order defines "confidential commercial information" as information submitted to an agency "that arguably contain[s] material exempt from release under Exemption 4 ... because disclosure could reasonably be expected to cause substantial competitive harm."[417] Notably,[418] the Supreme Court abrogated the "substantial competitive harm" test for Exemption 4 in *FMI v. Argus Leader Media*.[419] In response, DOJ has advised agencies to use the broader definition of "confidential" declared in *FMI* in their predisclosure notification procedures.[420]

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telephone and advised that the FAA had made an initial determination that the [material at issue] was releasable in response to [a FOIA] request. The FAA asked for input from the [plaintiff] before making a final decision. The [plaintiff] objected to the proposed release on the basis of FOIA Exemption 4. Subsequently, the FAA determined that the [material] was not protected from disclosure under Exemption 4 because it was not a trade secret or commercial or financial information..... After receiving [FAA's explanation], the [plaintiff] filed this suit seeking to enjoin the FAA's release of the [material].... ") (citations omitted).

[409] *Chrysler*, 441 U.S. at 285.

[410] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1134 n.1 (D.C. Cir. 1987) (explaining that, in a reverse-FOIA suit, "[t]ypically, a submitter of information—usually a corporation or other business entity required to report various and sundry data on its policies, operations, or products—seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request").

[411] *Chrysler*, 441 U.S. at 294, 316–17. The TSA is a criminal statute that prohibits the unlawful disclosure of a variety of commercial and financial information. *See* 18 U.S.C. § 1905. The statute allows disclosure of covered information when disclosure is "authorized by law." *Id.*

[412] *Chrysler*, 441 U.S. at 317–18.

[413] 5 U.S.C. § 706(2)(A); *see CNA*, 830 F.2d at 1162; *Chrysler*, 441 U.S. at 318. Review under this standard is more deferential to the agency than is the *de novo* review of agency withholding decisions required by FOIA. *See supra* Judicial Review of Agency Withholding Decisions. In *Chrysler*, 441 U.S. at 318, the Court explained that "any disclosure that violates [the TSA] is 'not in accordance with law' within the meaning of 5 U.S.C. § 706(2)(A)."

[414] *See* AAR Airlift Grp., Inc. v. U.S. Transp. Command, 161 F. Supp. 3d 37, 43 (D.D.C. 2015).

[415] Exec. Order No. 12,600 §§ 1, 3 (Jan. 1, 1987).

[416] *Id.* §§ 5, 6.

[417] *Id.* § 2(a).

[418] *See supra* Exemption 4: Trade Secrets and Commercial or Financial Information.

[419] 139 S. Ct. 2356, 2363–66 (2019).

[420] *See* DOJ, Office of Info. Pol'y, *Exemption 4 After the Supreme Court's Ruling in* Food Marketing Institute v. Argus (continued...)

Selected Issues of Potential Interest for Congress

While Congress is not subject to FOIA, the act raises questions of particular relevance to the legislative branch. For example, per the act, an agency may not "withhold information from Congress" on the basis that such information is exempt under FOIA.[421] There are different views, however, about what "Congress" means in this instance—in particular, whether this withholding prohibition applies to requests from individual Members of Congress or whether the provision is limited to access requests from each house of Congress or congressional committees. In addition, although Congress is under no obligation to disclose its own materials under FOIA, whether a congressional document possessed by an *agency* is subject to FOIA depends on whether Congress clearly expressed its determination to retain control over the document.[422]

Although this section discusses only the two topics just mentioned, FOIA implicates congressional interests in many other ways. For example, Congress has often expressed its interest in the frequency with which agencies use exemptions to withhold information from requesters, as well as the general backlog of FOIA requests.[423] Further, FOIA evidences Congress's general interest in executive branch transparency, and Congress has amended FOIA several times since its 1965 enactment, often due or in response to judicial interpretations of the act or agencies' administration thereof.[424]

Congressional Access to Agency Information: FOIA's "Special Access" Provision

FOIA's "special access"[425] provision—codified at 5 U.S.C. § 552(d)—states that FOIA "is not authority to withhold information from Congress."[426] The Senate report accompanying the original act explained that this provision is intended to clarify "that, because [FOIA] only refers

Leader Media (last updated Oct. 4, 2019), https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media ("Many agency predisclosure notification regulations have followed the model provided by [DOJ], which defines the term 'confidential commercial information' more broadly, without reference to competitive harm, and instead refers more generically to material that may be protected under Exemption 4. In the wake of *Argus Leader*, agencies should now use those predisclosure notification procedures when necessary to seek the submitter's views on whether the two conditions [stemming from the Court's decision, *see supra* text accompanying note 225] that agencies should consider in determining whether information is 'confidential' for purposes of Exemption 4 of the FOIA ... are met.").

[421] 5 U.S.C. § 552(d).

[422] ACLU v. CIA, 823 F.3d 655, 662–63 (D.C. Cir. 2016).

[423] *See* S. REP. NO. 4, at 2–3 (2015).

[424] *See, e.g.*, *id.* at 2, 7–8 (explaining that "there are concerns that some agencies are overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure" and that the 2016 amendments to FOIA codified "[t]he standard ... that an agency may withhold information only if it *reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law*"); H.R. REP. NO. 1441, at 14 (1976) (Conf. Rep.) (writing that "[t]he conferees intend [the 1976 amendments to Exemption 3] to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975)"); S. REP. NO. 1200, at 9 (1974) (Conf. Rep.) (explaining that, "[i]n *Environmental Protection Agency* v. *Mink,* et al., 410 U.S. 73 (1973), the Supreme Court ruled that *in camera* inspection of documents withheld under section 552(b) (1) of the law, authorizing the withholding of classified information, would ordinarily be precluded in [FOIA] cases, unless Congress directed otherwise," and that the 1974 amendments to FOIA "amend[] the present law to permit such *in camera* examination at the discretion of the court").

[425] *See* DOJ, Office of Info. Pol'y, *Congressional Access Under FOIA*, 5 FOIA UPDATE 1 (Jan. 1, 1984) [hereinafter *Congressional Access Under FOIA*], https://www.justice.gov/oip/blog/foia-update-oip-guidance-congressional-access-under-foia.

[426] 5 U.S.C. § 552(d).

to the public's right to know, it cannot ... be backhandedly construed as authorizing the withholding of information from the Congress, the collective representative of the public."[427] Although this provision undoubtedly prohibits agencies from withholding information from *Congress* based on a FOIA exemption, there is some dispute over whether subsection (d) affords individual Members of Congress access to otherwise exempt records under FOIA or, on the other hand, whether the provision is limited to access requests from either house of Congress and congressional committees.[428]

DOJ has long maintained that the special access provision does not generally apply to records requests from individual Members of Congress. In 1984, DOJ issued an opinion explaining its position on FOIA's special access provision. In the opinion, DOJ distinguishes between requests for information from (1) "a House of Congress as a whole (including through its committee structure)" and (2) individual Members.[429] In DOJ's view, an agency cannot invoke a FOIA exemption to requests from a house of Congress or a committee. Requests from individual Members of Congress, however, are subject to FOIA's exemptions even if the individual Member is "clearly acting in a completely official capacity" in making the request.[430] A request by an individual Member in his or her official capacity is covered by the special access provision only if the request is from the chair of a committee or subcommittee or authorized by a committee or subcommittee.[431]

DOJ's interpretation stems from its view that to treat individual Member requests the same as requests from a house of Congress or a committee violates FOIA's text and legislative history.[432] DOJ has argued, for example, that interpreting "Congress" as it is used in the special access provision—i.e., to include individual Members—conflicts with Article I, § 1 of the Constitution, which provides that Congress "consist[s] of a Senate and a House of Representatives" but does not mention the individuals who serve in those chambers.[433] Moreover, DOJ has argued that individual Members do not exercise Congress's constitutional investigatory powers.[434] Under the Constitution, Congress has inherent power to gather information in aid of its legislative functions and compel the disclosure of that information if necessary.[435] According to DOJ, however, Congress has not typically delegated its investigatory authority to individual Members who are

[427] S. REP. NO. 813, at 10 (1965).

[428] While the special access provision may prohibit application of a FOIA exemption to prevent disclosure to Congress, it does not govern whether another source of law, such as executive privilege, may protect information from disclosure. *Congressional Access Under FOIA*, *supra* note 425.

[429] *Id.*

[430] *Id.*

[431] *Id.*; *see also* Authority of Individual Members of Congress to Conduct Oversight of the Exec. Branch, 41 Op. O.L.C. 1, 1 (2017) (opining that "the constitutional authority to conduct oversight ... may be exercised only be each house of Congress or, under existing delegations, by committees and subcommittees (or their chairmen)" and that "[i]ndividual members of Congress ... do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee"); *id.* at 3 (asserting that "[i]ndividual members who have not been authorized to conduct oversight are entitled to no more than the voluntary cooperation of agency officials or private persons") (internal citation omitted).

[432] *See Congressional Access Under FOIA*, *supra* note 425; U.S. DOJ, Office of Info. Pol'y, *Release of Exempt Information to Members of Congress: The Impact of the* Murphy *Decision*, 1 FOIA UPDATE 4 (Jan. 1, 1980) [hereinafter *Release of Exempt Information to Members of Congress*], https://www.justice.gov/oip/blog/foia-update-policy-guidance-release-exempt-information-members-congress-impact-murphy.

[433] U.S. CONST. art. I, § 1; *Release of Exempt Information to Members of Congress*, *infra* note 431.

[434] Authority of Individual Members of Congress to Conduct Oversight of the Exec. Branch, 41 Op. O.L.C. 1, 2 (2017).

[435] *Id.* at 1 (citing McGrain v. Daugherty, 273 U.S. 135, 174 (1927)).

not committee chairs.[436] DOJ thus claims that individual Members who are not committee chairs do not fall within the meaning of "Congress" in FOIA's special access provision because they are not authorized to wield Congress's constitutional oversight authority.[437]

DOJ also asserts that its position finds support in the 1966 House report for FOIA.[438] In discussing the special access provision, the report states that "Members of Congress have all of the rights of access guaranteed to '*any person*' by [FOIA], and the Congress has additional rights of access to all Government information which it deems necessary to carry out its functions."[439]

DOJ's interpretation of the special access provision was in response to the D.C. Circuit's decision in *Murphy v. Department of the Army*,[440] which interpreted the provision as applying to individual Members acting in their *official capacities*.[441] The court held that the Army had not waived Exemption 5 protection for an internal agency memorandum by sharing it with an individual Member of Congress.[442] The court based its holding on an interpretation of the special access provision, concluding that agencies will not waive the exemption in such circumstances "to the extent that Congress has reserved to itself in Section 552([d]) the right to receive information not available to the general public."[443] In responding to the requester's argument that the special access provision was limited to Congress as a whole (and not its component parts—including individual Members), the court wrote:

> All Members have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information. It would be an inappropriate intrusion into the legislative sphere for the courts to decide without congressional direction that, for example, only the chairman of a committee shall be regarded as the official voice of the Congress for purposes of receiving such information, as distinguished from its ranking minority member, other committee members, or other members of the Congress. Each of them participates in the law-making process; each has a voice and a vote in that process; and each is entitled to request such information from the executive agencies as will enable him to carry out the responsibilities of a legislator.[444]

Instead, the court opined that the special access rule applies when a Member's request is made in his or her official—as opposed to "purely private or personal"—capacity.[445]

DOJ has maintained that the D.C. Circuit's discussion of FOIA's application to individual Members "was not indispensable to the [*Murphy*] decision" and therefore does not constitute a binding rule.[446] More recently, DOJ has contended that the executive branch's treatment of

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[436] *Id.* at 2.

[437] *Id.* at 3.

[438] *Congressional Access Under FOIA*, *supra* note 425 (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11–12 (1966)).

[439] H.R. REP. NO. 1497, at 11–12 (1966) (emphasis added); *Congressional Access Under FOIA*, *supra* note 425.

[440] 613 F.2d 1151 (D.C. Cir. 1979).

[441] *See* All Party Parliamentary Grp. on Extraordinary Rendition v. DOD, 754 F.3d 1047, 1052 (D.C. Cir. 2014) (explaining that *Murphy*, 613 F.2d at 1157, interpreted the special access provision "as requiring agencies to distinguish between requests made by members of Congress in their official capacities and those made in their individual capacities").

[442] *See Murphy*, 613 F.2d at 1154, 1159.

[443] *Id.* at 1156.

[444] *Id.* at 1157.

[445] *Id.*

[446] *Release of Exempt Information to Members of Congress*, *infra* note 431.

requests from individual Members is "consistent" with *Murphy*.[447] DOJ asserts that although *Murphy* found that FOIA does not limit the flow of information between federal agencies and individual Members, that point does not undercut DOJ's constitutional argument that individual Members do not typically exercise Congress's oversight authority.[448] While the D.C. Circuit has not had opportunity to revisit *Murphy* on the question of FOIA's application to agency communications with individual Members, later appellate panel and lower court decisions within the circuit have appeared to treat *Murphy*'s interpretation as controlling.[449]

Some Members of Congress have criticized DOJ's interpretation of the special access provision as too narrow. Members of Congress from both major political parties have cited *Murphy* in support of individual Members' right to access information from the executive branch.[450] Despite *Murphy* and Members' reliance on the decision, DOJ has consistently asserted that the provision does not apply to individual Member requests. Nonetheless, DOJ has vacillated on whether the executive branch should grant individual Member requests some special consideration.[451] DOJ issued two opinions—one in 2017 and another in 2019—discussing the executive branch's treatment of individual Member requests for information. The 2017 opinion reiterated DOJ's position that FOIA's special access provision applies only to a request from a house of Congress, a committee, or a Member authorized by a committee.[452] For requests from individual Members not authorized by Congress to conduct oversight, the executive branch would follow "a general policy of providing only documents and information that are already public or would be available to the public through the Freedom of Information Act."[453] In other words, individual Members of Congress can submit FOIA requests to the same extent as the public.[454] In response to the 2017 opinion, Senator Charles Grassley sent a letter to Steven A. Engel, the then-nominee to be head of DOJ's Office of Legal Counsel, objecting to DOJ's position differentiating between requests from "Congress" and those from individual Members and treating individual Members' requests in the same way as those received from the public pursuant to FOIA.[455] The letter inquired about the nominee's views regarding DOJ's 2017 memo.[456]

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[447] Requests by Individual Members of Congress for Exec. Branch Information, 43 Op. O.L.C. 1, 9 (2019).

[448] *Id.*

[449] *See, e.g.*, All Party Parliamentary Grp. on Extraordinary Rendition v. DOD, 754 F.3d 1047, 1052 (D.C. Cir. 2014) ("[T]his Court has interpreted FOIA section 552(d), which provides that FOIA exemptions do not apply to requests from Congress, as requiring agencies to distinguish between requests made by members of Congress in their official capacities and those made in their individual capacities.") (citing Murphy v. Dep't of Army, 613 F.2d 1151, 1157 (D.C. Cir. 1979)); Elec. Privacy Info. Ctr. v. Transp. Sec. Admin., 928 F. Supp. 2d 156, 165 (D.D.C. 2013) ("[E]arlier, in *Murphy v. Department of the Army*, the Circuit held that a document disclosed by the Army to a congressman was protected under Exemption 5 even where the army did not actively condition disclosure on confidentiality." (citing *Murphy*, 613 F.2d at 1156)).

[450] *See, e.g.*, Letter to Gary M. Stern, Gen'l Counsel, Nat'l Archives & Rec. Admin., from Senators Richard Blumenthal, et al. (Aug. 8, 2018); 163 CONG. REC. 11130–32 (2017) (statement of Sen. Charles E. Grassley).

[451] *Compare* Authority of Individual Members of Congress to Conduct Oversight of the Exec. Branch, 41 Op. O.L.C. 1, 3 (2017), *with* Requests by Individual Members of Congress for Exec. Branch Information, 43 Op. O.L.C. 1, 7–8 (2019).

[452] Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C. 1, 2 (2017).

[453] *Id.*

[454] *See* H.R. REP. NO. 1497, at 11–12 (1966).

[455] 163 CONG. REC. 11130 (2017).

[456] *Id.* Mr. Engel provided responses to Senator Grassley in two separate letters, both reprinted in the Congressional Record. 163 CONG. REC. 11130–32 (2017). In his responses, Mr. Engel committed to reviewing the 2017 opinion and agreed that "in the interest of comity, the Executive Branch should give due weight and sympathetic consideration to (continued...)

DOJ's subsequent opinion issued in 2019 appeared to soften its stance on treatment of information requests from individual Members.[457] Although DOJ continued to maintain its position that individual Members lacked constitutional oversight authority, DOJ explained that it is appropriate for agencies to "give due weight and sympathetic consideration to requests for information from individual members of Congress."[458] Executive branch policy is to provide "good-faith responses" to Member inquiries, which in turn exhibits "a proper respect" for a coordinate branch of government.[459] These good-faith responses may "and often do" exceed what a federal agency discloses pursuant to FOIA.[460] Nonetheless, DOJ considers these responses to be "discretionary."[461] According to DOJ, agencies may decline to respond to individual Member requests if responding to the requests would "be overly burdensome; inhibit the Executive's responsibility to protect information that is privileged, confidential, or otherwise protected by law; or would interfere with the ability to respond in a timely manner to requests for information submitted pursuant to Congress's oversight authority."[462]

Congressional Records

As discussed above, FOIA requires federal agencies to disclose "agency records" after receiving a valid request.[463] Congress is not an "agency" under FOIA.[464] Congress, accordingly, is not obligated to respond to FOIA requests for documents in its possession.[465] Congress's exemption from FOIA extends beyond requests directed specifically at it. Crucially, the D.C. Circuit has held that a document that an agency obtains from Congress or creates in response to a congressional request qualifies as a congressional record exempt from FOIA if "Congress manifested a clear intent to control the document."[466]

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requests from individual Members of Congress." *Id.* Citing *Murphy*, Mr. Engel also explained that the D.C. Circuit has recognized that an individual member has a "constitutionally recognized status that includes a legitimate need to request such information from executive agencies as will enable him to carry out the responsibilities as a legislator," but noted that it is a separate question as to whether Congress has by its own rules empowered individual members to seek such information from the executive branch. *Id.*

[457] Requests by Individual Members of Congress for Exec. Branch Information, 43 Op. O.L.C. 1, 7–8 (2019).

[458] *Id.*

[459] *Id.* at 7.

[460] *Id.* at 8.

[461] *Id.* at 7.

[462] *Id.* at 8.

[463] *See supra* "Agency Records" 5 U.S.C. § 552(a)(3)(A), (4)(B).

[464] *See* 5 U.S.C. §§ 551(1), 552(f)(1); *see also* ACLU v. CIA, 823 F.3d 655, 662 (D.C. Cir. 2016) ("[I]t is undisputed that Congress is not an agency, it is also undisputed that 'congressional documents are not subject to FOIA's disclosure requirements.'" (quoting United We Stand Am., Inc. v. IRS, 359 F.3d 595, 597 (D.C. Cir. 2004)); *see* Dow Jones & Co. v. DOJ, 917 F.2d 571, 574 (D.C. Cir. 1990) ("[M]embers of Congress are not within the definition of agency under FOIA.").

[465] *See ACLU*, 823 F.3d at 662.

[466] *Id.* at 662–63 (quoting Judicial Watch, Inc. v. U.S. Secret Serv., 726 F.3d 208, 221 (D.C. Cir. 2013)).

As discussed above, material does not qualify as an "agency record" if an agency does not have "control" of it at the time a FOIA request for the material is issued. *See supra* "Agency Records" DOJ v. Tax Analysts, 492 U.S. 136, 145 (1989). This report previously explained that the D.C. Circuit developed the "*Burka* test" for determining whether an agency has "control" over material that it has created or obtained. *See supra* "Agency Records" The test considers (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files. Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (citation omitted). The court has explained that the congressional-intent-to-control test "renders the first two factors of the [*Burka*] test effectively dispositive." *Judicial Watch*, 726 F.3d at 221.

The D.C. Circuit uses the congressional-intent-to-control test when determining whether material created or obtained by an agency is a congressional record, because focusing "on Congress' intent to control (and not on the agency's) reflects those special policy considerations which counsel in favor of according due deference to Congress' affirmatively expressed intent to control its own documents."[467] As the court has explained, under the congressional-intent-to-control test, if "Congress has manifested its own intent to retain control, then the agency—by definition—cannot lawfully 'control' the documents ... , and hence they are not 'agency records.'"[468]

Congress is not required to provide "contemporaneous instructions when forwarding" documents to agencies to manifest its intent to control a document.[469] In *American Civil Liberties Union v. CIA*, the D.C. Circuit determined that a confidential report authored by the Senate Select Committee on Intelligence was a congressional record and, therefore, not subject to FOIA.[470] The case concerned the committee's evaluation of a CIA program on detention and interrogation.[471] In 2014, the committee completed a final report based on its review.[472] Although the committee did not publicly release the final report, it distributed copies to the President and other executive branch officials.[473] In 2009, before beginning its review, the committee's chair and vice chair sent a letter to the CIA memorializing an agreement concerning the committee's examination of CIA documents at a secure electronic CIA reading room.[474] The letter provided the following conditions:

> Any documents generated on the network drive referenced in paragraph 5, as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee and will be kept at the Reading Room solely for secure safekeeping and ease of reference. These documents remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee. As such, these records are not CIA records under [FOIA] or any other law.... If the CIA receives any request or demand for access to these records from outside the CIA under [FOIA] or any other authority, the CIA will immediately notify the Committee and will respond to the request or demand based upon the understanding that these are congressional, not CIA, records.[475]

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[467] Paisley v. CIA, 712 F.2d 686, 693 n.30 (D.C. Cir. 1983); *see also* Goland v. CIA, 607 F.2d 339, 346 (D.C. Cir. 1978) (explaining that a test that would provide that "an agency's possession of a document *per se* dictates that document's status as an 'agency record'" would mean that "Congress would be forced either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role").

[468] *Paisley*, 712 F.2d at 693 (footnotes omitted). The court has also used the intent-to-control test in regard to records created by the Office of the President, portions of which are not subject to FOIA. Judicial Watch, Inc. v. Secret Service, 726 F.3d 208, 222–23 (D.C. Cir. 2013); *cf.* Doyle v. DHS, 959 F.3d 72, 78 (2d Cir. 2020) (following "the lead of *Judicial Watch* [*v. Secret Service*] in declining to compel the disclosure of [visitor logs for the presidential residence at the Mar-a-Lago resort in Florida and the White House Complex] under FOIA given the difficult but avoidable constitutional question that compelling disclosure would raise if [the court] were to interpret 'agency records'" in a way that compelled disclosure in such a way as to possibly infringe on the President's constitutional privileges).

[469] Holy Spirit Ass'n for Unification of World Christianity v. CIA, 636 F.2d 838, 842 (D.C. Cir. 1980); *see ACLU*, 823 F.3d at 664 (explaining that D.C. Circuit precedent "make[s] it clear that Congress may manifest an intent to retain control over documents *either* when the documents are created *or* when the documents are transmitted to an agency").

[470] *ACLU*, 823 F.3d at 667–68.

[471] *Id.* at 658.

[472] *Id.* at 658.

[473] *Id.* at 660.

[474] *Id.* at 659.

[475] *Id.* at 665.

The D.C. Circuit reasoned that these conditions made "it plain that the Senate Committee intended to control any and all of its work product, including the [resulting 2014 final report], emanating from its oversight investigation of the CIA."[476] The committee's subsequent transmission of the report to executive branch officials, with the instruction to the CIA and other agencies to use the report "as broadly as appropriate" both to ensure that the practices the report criticized were never repeated and to help in the development of CIA programs and executive branch guidelines, did not erase "the Senate Committee's clear intent to maintain control of the [final] report.... "[477]

Whether Congress's manifestation of intent to control extends to a particular record depends on the language used in Congress's directive to the agency. In *United We Stand America v. Internal Revenue Service (IRS)*, the D.C. Circuit held that a letter sent from the chief of staff of the Joint Committee on Taxation to the IRS requesting information in connection with a committee investigation did not fully protect the IRS's response.[478] The request stated:

> This document is a congressional record and is entrusted to the [IRS] for your use only. This document may not be disclosed without the prior approval of the Joint Committee.[479]

The IRS transmitted documents in response to the committee's request (of which the agency retained a copy).[480] In litigation arising from a FOIA request for the committee's request and the agency's response thereto, the court held that, although the language from the committee's request quoted above—which referred to "[t]his document"—conveyed a sufficient manifestation of intent to control the committee's request, that manifestation of intent did not extend to the IRS's response, save for "those portions of the IRS response that would effectively disclose th[e] [committee's] request."[481] As the court explained, "[if] the Joint Committee intended to keep confidential not just 'this document' but also the IRS response, it could have done so by referring to 'this document and all IRS documents created in response to it.'"[482] Accordingly, the court of appeals remanded the case to the district court to conclude whether information in the response that would reveal the committee's request could be redacted and to direct the agency to "release any segregable portions that are not otherwise protected by one of FOIA's nine exemptions."[483]

The D.C. Circuit has articulated other principles that may be helpful for determining whether Congress has manifested sufficient intent to control a particular record. For example, the court has found that "post-hoc objections" to disclosure raised by Congress "long after the ... record[s'] creation" and "in response to the FOIA litigation" do not convey sufficient manifestations of intent to control.[484] Nor are proper manifestations of intent contained in expressions that are "too

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[476] It further explained that its "command is unequivocal, and it contains no temporal limitations." *ACLU*, 823 F.3d at 665 (citation omitted).

[477] *Id.* at 667. The court's decision was supported by the fact that the committee had publicly released the report's executive summary, only provided copies of the final report to a limited number of executive branch officials, and, when the committee submitted a draft of the report to executive branch officials in 2012, the committee "made it clear that [it] would determine if and when to publicly disseminate the" final report." *Id.* at 666–67.

[478] *United We Stand*, 359 F.3d at 602.

[479] *Id.* at 597 (citation omitted).

[480] *Id.*

[481] *Id.* at 602.

[482] *Id.* at 601.

[483] *Id.* at 605.

[484] *Id.* at 602; *see ACLU*, 823 F.3d at 664 (explaining that a letter sent by the new chairman of the committee to the President demanding the return of the final report "was sent after Appellants had submitted their FOIA request and after they had filed suit in the District Court" and concluding, accordingly, that the letter "is a 'post-hoc objection[] to (continued...)

general and sweeping."[485] In *Paisley v. CIA*, for example, the court acknowledged that letters sent by the Senate Select Committee on Intelligence to the CIA "indicate[d] the Committee's desire to prevent release without its approval of any documents generated by the Committee or by an intelligence agency in response to a Committee inquiry."[486] However, the court held that the letters did not alone manifest sufficient congressional-intent-to-control the documents at issue because "there [was] no discussion of any particular documents or of any particular criteria by which to evaluate and limit the breadth of [the Committee's] interdiction."[487]

Whether Congress has sufficiently manifested intent to control a document ultimately depends on the circumstances underlying each case.[488] For example, in *United We Stand* (discussed above), the D.C. Circuit specifically underscored that the manifestation of intent to control at issue in that case was contained "in a letter written by the Joint Committee's chief of staff as part of an investigation authorized by the chairman, vice-chairman, and ranking members of the Joint Committee," as well as that an IRS document that the committee relied on "expressly recognize[d] the confidentiality of Joint Committee requests."[489] In *American Oversight, Inc. v. Department of Health & Human Services*, the United States District Court for the District of Columbia relied on its reading of language contained in email messages between staff of the House Committee on Ways and Means and executive branch personnel addressing "health care reform" to find that Congress had manifested its intent to retain control over the messages.[490]

Records that are not "congressional records"—as that term has been defined by the courts but originated in Congress and were transmitted to the agency as advice solicited by the agency—may also be withheld under Exemption 5's consultant corollary.[491] Congress, in other words, can be considered a "consultant" for the purposes of Exemption 5 in certain circumstances. In *Ryan v.*

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disclosure,' and, as such, it 'cannot manifest the clear assertion of congressional control that our case law requires.'") (citation omitted) (alteration in original).

[485] *Paisley*, 712 F.2d at 694; *see United We Stand*, 359 F.3d at 602 (rejecting agency's argument that the congressional committee had an expectation of confidentiality regarding its communications with the agency based "on its consistent course of dealing with the" agency, as "such an understanding is far too general to remove the [document] from FOIA's disclosure requirement").

[486] *Paisley*, 712 F.2d at 695.

[487] *Id.*

[488] *See Goland*, 607 F.2d at 347 ("Whether a congressionally generated document has become an agency record ... depends on whether under all the facts of the case, the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides.").

[489] *United We Stand*, 359 F.3d at 605. The court "express[ed] no view about the sufficiency of congressional manifestations of intent to control documents that are created under other circumstances." *Id.*

[490] Am. Oversight, Inc. v. U.S. Dep't of Health & Hum. Servs., No. CV 17-827 EGS/DAR, 2018 WL 4765145, at *4–6 (D.D.C. Aug. 10, 2018), *report and recommendation adopted in part, rejected in part*, No. CV 17-827 (EGS/DAR), 2022 WL 1719001 (D.D.C. May 27, 2022). The language consisted of boilerplate that the committee included in each email chain at issue and stated:

> This document and any related documents, notes, draft and final legislation, recommendations, reports, or other materials generated by the Members or staff of the Committee on Ways and Means are records of the Committee, remain subject to the Committee's control, and are entrusted to your agency only for use in handling this matter. Any such documents created or compiled by an agency in connection with any response to this Committee document or any related Committee communications, including but not limited to any replies to the Committee, are also records of the Committee and remain subject to the Committee's control. Accordingly, the aforementioned documents are not 'agency records' for purposes of the Freedom of Information Act or other law.

Id. at *3 (citation omitted).

[491] *See, e.g.*, Rockwell Int'l Corp. v. DOJ, 235 F.3d 598, 604 (D.C. Cir. 2001); Ryan v. DOJ, 617 F.2d, 781, 790 (D.C. Cir. 1980).

DOJ, for example, DOJ sent questionnaires to all Senators regarding judicial appointments.[492] The Senators' responses, held by DOJ, were then the subject of a FOIA request.[493] The D.C. Circuit held that the Senators' responses were "intra-agency" memoranda pursuant to Exemption 5 because DOJ solicited the responses and they were part of DOJ's deliberative process.[494] Records or information originating from Congress, however, must still meet the two-part consultant corollary test discussed above to qualify as intra-agency memoranda under Exemption 5.[495] It may be difficult for Members and their staff to meet the consultant corollary test, however. In order to meet the test, Members and their staff must be "the functional equivalent of an agency employee working on the same matter."[496] That is, they cannot "have a stake in the outcome of the agency's process" or "represent an interest of [their] own."[497] In May 2024, the D.C. Circuit held that communications between the executive branch and Members and their staff related to pending legislation was not protected by the consultant corollary, because "[w]hen members of Congress and their staffs engage with executive agencies concerning legislation, they are almost inevitably acting on behalf of other interests than those of the agencies, including those of Congress as an institution and those of their constituents."[498] The court declined to determine whether Members and their staff could ever satisfy the consultant corollary test.[499]

Related Open Government and Information Laws: FACA, the Sunshine Act, and the Privacy Act

FOIA is the primary statutory mechanism by which the public may gain access to federal government records and information. Other laws—specifically FACA, the Sunshine Act, and the Privacy Act—also set forth rights and limitations on the public's access to government information or activities.[500] FACA governs the establishment and operation of certain advisory committees created to supply advice and recommendations to federal agencies or the President.[501] Among other things, the statute generally mandates the public availability of an advisory

[492] 617 F.2d at 784.

[493] *Id.*

[494] *Id.* at 790.

[495] *See* Am. Oversight v. DOT, No. 18-1272 (CKK), 2022 WL 103306, at *5 (D.D.C. Jan. 11, 2022); Am. Oversight v. HHS, No. 17-827 (EGS/DAR), 2022 WL 1719001, at *12–*14 (D.D.C. May 27, 2022), *reversed and remanded by* 101 F.4th 909, (D.C. Cir. 2024).

[496] Am. Oversight v. HHS, 101 F.4th 909, 917 (D.C. Cir. 2024).

[497] *Id.*

[498] *Id.* at *8.

[499] *Id.*

[500] Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972), 5 U.S.C. §§ 1001–1014; Government in the Sunshine Act (Sunshine Act), Pub. L. No. 94-409, 90 Stat. 1241 (1976) 5 U.S.C. § 552b; Privacy Act, Pub. L. No. 93-579, 88 Stat. 1896 (1974), 5 U.S.C. § 552a; CRS Report R47058, *Access to Government Information: An Overview*, by Meghan M. Stuessy (2023).

[501] An "advisory committee," as defined by FACA, is "any committee, board, commission, council, conference, panel, task force, or other similar group" that has been "established by statute or reorganization plan" or "established or utilized" by either the President or an agency "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. app. 2 § 3. However, groups that are entirely composed of federal employees are excluded from the definition of "advisory committee," as are committees of the National Academy of Sciences and National Academy of Public Administration. *Id.*; *see also id.* § 4 (providing that FACA does not apply to committees established or utilized by the CIA, Federal Reserve System, or Office of the Director of National Intelligence (ODNI) (but only, in regard to the ODNI, to the extent that the Director "determines that for reasons of national security such advisory committee cannot comply with" FACA).

committee's "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents,"[502] and members of the public are authorized under FACA to attend and participate in advisory committee meetings.[503] The availability of an advisory committee's papers is subject to FOIA's exemptions.[504]

Another general open government statute, the Sunshine Act, imposes transparency obligations on the meetings of certain multimember boards and commissions.[505] The statute requires that covered agencies allow the public to attend their meetings[506] and have access to relevant information.[507] Meetings and information required to be disclosed under the act are subject to ten exemptions, many of which resemble FOIA's.[508]

Lastly, the Privacy Act governs the "collection, maintenance, use and dissemination" of agency records that contain individually identifiable information about United States citizens and lawful permanent residents.[509] The act forbids the disclosure of covered records without the written consent or request of the individual identified by the record, subject to twelve exceptions.[510] One Privacy Act exception covers records for which disclosure "would be ... required" by FOIA.[511] Under this exception, an agency record subject to the Privacy Act that is *not* protected by any of FOIA's exemptions—and which therefore must be disclosed under FOIA upon request—is not prohibited from being disclosed by the Privacy Act.[512] The Privacy Act also permits individuals to

[502] *Id.* § 10(b).

[503] *Id.* § 10(a)(1), (3). *But see id.* § 10(d) (providing that these requirements "shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with [the Sunshine Act]").

[504] *See id.* § 10(b); Nat. Res. Def. Council v. Johnson, 488 F.3d 1002, 1003 (D.C. Cir. 2007) (explaining that FACA, at § 10(b), "incorporates the FOIA exemptions").

[505] *See* 5 U.S.C. § 552b. The Sunshine Act specifically applies to each "agency" (as that term is described in FOIA at § 552(f)) that is "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency." *Id.* § 552b(a)(1).

[506] The Sunshine Act defines "meeting" to generally mean "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." 5 U.S.C. § 552b(a)(2).

[507] *See id.* § 552b(b); *see also, e.g.*, *id.* § 552b(f)(2) (directing agencies to "make promptly available to the public ... the transcript, electronic recording, or minutes ... of the discussion of any item on the agenda, or of any item of the testimony of any witness received at [a] meeting" or portion of a meeting that was closed by the agency pursuant to the exemptions contained in § 552b(c).

[508] *See id.* § 552b(c)(1)–(10).

[509] Bartel v. FAA, 725 F.2d 1403, 1407 (D.C. Cir. 1984); *see* 5 U.S.C. § 552a(a)(2) (defining "individual" for purposes of the Privacy Act as "a citizen of the United States or an alien lawfully admitted for permanent residence"). For more information about the Privacy Act *see* CRS Report R47863, *The Privacy Act of 1974: Overview and Issues for Congress*, by Meghan M. Stuessy (2023).

[510] 5 U.S.C. § 552a(b)(1)–(12). The Privacy Act applies to "any record which is contained in a system of records." *Id.* The act defines "record" as "any item, collection, or grouping of information about an individual that is maintained by an agency ... and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." *Id.* § 552a(a)(4). A "system of records" is "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." *Id.* § 552a(a)(5).

[511] *Id.* § 552a(b)(2).

[512] *See, e.g.*, DOD v. Fed. Labor Relations Auth., 510 U.S. 487, 502 (1994) (holding that "FOIA ... does not require the agencies to divulge the [records at issue], and the Privacy Act, therefore, prohibits their release").

request "access to [their] record[s] or to any information pertaining to [them] which is contained in" a system of records, and to seek the amendment of such records, subject to exemptions.[513]

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[513] *See* 5 U.S.C. § 552a(d), (j), (k). FOIA's exemptions may not be used "to withhold from an individual any record which is otherwise accessible to such individual under the provisions of" the Privacy Act. *Id.* § 552a(t)(1).

The Privacy Act also authorizes individuals to request accountings of certain disclosures of records in which they are identified, and requires agencies to "inform any person or other agency about any correction or notation of dispute made by the agency ... of any record that has been disclosed to the person or agency if an accounting of the disclosure was made." *Id.* § 552a(c)(3), (4). An agency may, under certain circumstances, exempt a system of records from those provisions. *See id.* § 552a(j), (k).