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FEDERAL BUREAU OF INVESTIGATION

**FREEDOM OF  
INFORMATION AND  
PRIVACY ACTS  
REFERENCE MANUAL**

**PART 1 OF 9**



*Freedom of Information  
and  
Privacy Acts  
Reference Manual*



Federal Bureau of Investigation

# **FREEDOM OF INFORMATION ACT**

# The Freedom of Information Act

TITLE 5, U.S.C.

Sec. 552

## § 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not 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. For the purpose of this paragraph, 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.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying 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. Each agency shall promptly publish, quarterly or more frequently, 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. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include

only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such 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 this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Repealed.]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsi-

ble for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(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.

(C) 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. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(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;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) 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;

(8) 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; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;



(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title 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.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561-1564; Pub. L. 94-409, § 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95-454, title IX, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. 98-620, Nov. 8, 1984, 98 Stat. 335; Pub. L. 99-570, Oct. 27, 1986, 100 Stat. 3207-48 and 3207-49.)



FEDERAL BUREAU OF INVESTIGATION

**FREEDOM OF  
INFORMATION AND  
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REFERENCE MANUAL**

**PART 2 OF 9**

# **PRIVACY ACT**

# The Privacy Act

TITLE 5, U.S.C.

Sec. 552a

## § 552a. Records Maintained on Individuals

(a) DEFINITIONS.—For purposes of this section—

(1) the term “agency” means agency as defined in section 552(e) of this title;

(2) the term “individual” means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term “maintain” includes maintain, collect, use, or disseminate;

(4) the term “record” means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history 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;

(5) the term “system of records” means 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;

(6) the term “statistical record” means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program"—

(A) means any computerized comparison of—

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of—

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include—

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 464 or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches—

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

- (II) conducted by an agency using only records maintained by that agency;  
if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel; or
- (vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;
- (9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;
- (10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;
- (11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;
- (12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent of State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and
- (13) the term "Federal personnel" means officers and employees of the government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) **CONDITIONS OF DISCLOSURE.**—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

- (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
- (2) required under section 552 of this title;
- (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
- (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
- (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; and

(12) to a consumer reporting agency in accordance with section 3711(f) of title 31.

(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system of records under its control shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—



(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is

made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information

pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) CIVIL REMEDIES.—Whenever any agency—

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any

case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) RIGHTS OF LEGAL GUARDIANS.—For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than \$5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than \$5,000.

(j) GENERAL EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b) (1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of

this section except subsections (b), (c) (1) and (2), (e)(4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) SPECIFIC EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b) (1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a

source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(1)(1) ARCHIVAL RECORDS.—Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4) (A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4) (A) through (G) and (e)(9) of this section.

(m) GOVERNMENT CONTRACTORS.—(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this

section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(f) of title 31 shall not be considered a contractor for the purposes of this section.

(n) **MAILING LISTS.**—An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) **MATCHING AGREEMENTS.**—(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying—

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the director of the Office of Management and Budget pursuant to subsection (v)), to—

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of

the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2)(A) A copy of each agreement entered into pursuant to paragraph (1) shall—

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if—

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) VERIFICATION AND OPPORTUNITY TO CONTEST FINDINGS.—(1) In order to protect any individual whose records are used in matching programs, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual as a result of information produced by such matching programs, until an officer or employee of such agency has independently verified such information. Such independent verification may be satisfied by verification in accordance with (A) the requirements of paragraph (2); and (B) any additional requirements governing verification under such Federal benefit program.

(2) Independent verification referred to in paragraph (1) requires independent investigation and confirmation of any information used as a basis for an adverse action against an individual including, where applicable—

(A) the amount of the asset or income involved,

(B) whether such individual actually has or had access to such asset or income for such individual's own use, and

(C) the period or periods when the individual actually had such asset or income.



(3) No recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to any individual described in paragraph (1), or take other adverse action against such individual as a result of information produced by a matching program, (A) unless such individual has received notice from such agency containing a statement of its findings and informing the individual of the opportunity to contest such findings, and (B) until the subsequent expiration of any notice period provided by the program's law or regulations, or 30 days, whichever is later. Such opportunity to contest may be satisfied by notice, hearing, and appeal rights governing such Federal benefit program. The exercise of any such rights shall not affect any rights available under this section.

(4) Notwithstanding paragraph (3), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during the notice period required by such paragraph.

(q) **SANCTIONS.**—(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless—

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) **REPORT ON NEW SYSTEMS AND MATCHING PROGRAMS.**—Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) **BIENNIAL REPORT.**—The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report—

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t)(1) **EFFECT OF OTHER LAWS.**—No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(u) **DATA INTEGRITY BOARDS.**—(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board—

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency including—

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4)(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that—

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) The Director of the Office of Management and Budget shall, annually during the first 3 years after the date of enactment of

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this subsection and biennially thereafter, consolidate in a report to the Congress the information contained in the reports from the various Data Integrity Boards under paragraph (3)(D). Such report shall include detailed information about costs and benefits of matching programs that are conducted during the period covered by such consolidated report, and shall identify each waiver granted by a Data Integrity Board of the requirement for completion and submission of a cost-benefit analysis and the reasons for granting the waiver.

(7) In the reports required by paragraphs (3)(D) and (6), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) OFFICE OF MANAGEMENT AND BUDGET RESPONSIBILITIES.—The Director of the Office of Management and Budget shall—

(1) develop and, after notice and opportunity for public comment; prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

(Added Pub. L. 93-579, § 3, Dec. 31, 1974, 88 Stat. 1897, and amended Pub. L. 94-183, § 2(2), Dec. 31, 1975, 89 Stat. 1057; Pub. L. 97-365, § 2, Oct. 25, 1982, 96 Stat. 1749; Pub. L. 97-375, title II, § 201(a), (b), Dec. 21, 1982, 96 Stat. 1821; Pub. L. 97-452, § 2(a)(1), Jan. 12, 1983, 96 Stat. 2478; Pub. L. 98-477, Oct. 15, 1984, 98 Stat. 2211; Pub. L. 98-497, Oct. 19, 1984, 98 Stat. 2292; Pub. L. 100-503, Oct. 18, 1988, 102 Stat. 2507.)





FEDERAL BUREAU OF INVESTIGATION

**FREEDOM OF  
INFORMATION AND  
PRIVACY ACTS  
REFERENCE MANUAL**

**PART 3 OF 9**

# **CODE OF FEDERAL REGULATIONS**

# code of federal regulations

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Judicial  
Administration

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PARTS 0 TO 42

Revised as of July 1, 1994

CONTAINING  
A CODIFICATION OF DOCUMENTS  
OF GENERAL APPLICABILITY  
AND FUTURE EFFECT

AS OF JULY 1, 1994

*With Ancillaries*

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### APPENDIX I TO PART 16—COMPONENTS OF THE DEPARTMENT OF JUSTICE

AUTHORITY: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

### Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

SOURCE: Order No. 1055-84, 49 FR 12254, Mar. 29, 1984, unless otherwise noted.

## § 16.1 General provisions.

(a) This subpart contains the regulations of the Department of Justice implementing the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. All requests for records that are not processed under subparts C or D of this part shall be processed under this subpart. Information customarily furnished to

the public in the regular course of the performance of official duties may continue to be furnished to the public without complying with this subpart, provided that the furnishing of such information would not violate the Privacy Act of 1974, 5 U.S.C. 552a, and would not be inconsistent with subparts C, D, or E of this part. To the extent permitted by other laws, the Department will also consider making available records which it is permitted to withhold under the FOIA if it determines that such disclosure could be in the public interest.

(b) As used in this subpart, the following terms shall have the following meanings:

(1) *Appeal* means the appeal by a requester of an adverse determination of his request, as described in 5 U.S.C. 552(a)(6)(A)(ii).

(2) *Agency* has the meaning given in 5 U.S.C. 551(1) and 5 U.S.C. 552(e).

(3) *Component* means each separate bureau, office, board, division, commission, service, or administration of the Department of Justice.

(4) *Request* means any request for records made pursuant to 5 U.S.C. 552(a)(3).

(5) *Requester* means any person who makes a request to a component.

(6) *Business information* means trade secrets or other commercial or financial information.

(7) *Business submitter* means any commercial entity which provides business information to the Department of Justice and which has a proprietary interest in the information.

(c) The Assistant Attorney General, Office of Legal Policy, shall be responsible to the Attorney General for all matters pertaining to the administration of this subpart within the Department of Justice. The Assistant Attorney General, Office of Legal Policy, may take or direct such actions, directly or through the Office of Information and Privacy within the Office of Legal Policy, to carry out this responsibility as he deems necessary.

(d) Components of the Department of Justice shall comply with the time limits set forth in the FOIA for responding to and processing requests and appeals, unless there are exceptional circumstances within the mean-

ing of 5 U.S.C. 552(a)(6)(C). A component shall notify a requester whenever the component is unable to respond to or process the request or appeal within the time limits established by the FOIA. Components shall respond to and process requests and appeals in their approximate order of receipt, to the extent consistent with sound administrative practice.

#### § 16.2 Public reference facilities.

(a) The Department of Justice shall maintain public reading rooms or areas at the locations listed below:

(1) United States Attorneys and United States Marshals—at the principal offices of the United States Attorneys listed in the United States Government Manual;

(2) Federal Bureau of Investigation—at the J. Edgar Hoover Building, 9th Street and Pennsylvania Avenue NW., Washington, DC;

(3) Immigration and Naturalization Service—at the Central Office, 425 I Street NW., Washington, DC, and at each District Office in the United States listed in the United States Government Manual;

(4) Drug Enforcement Administration—in Room 1207, 1405 I Street NW., Washington, DC;

(5) Civil Rights Division—in Room 948, 320 First Street, NW., Washington, DC;

(6) Community Relations Service—in Suite 330, 5550 Friendship Boulevard, Chevy Chase, Maryland;

(7) Office of the Pardon Attorney—in Suite 490, 5550 Friendship Boulevard, Chevy Chase, Maryland;

(8) United States Parole Commission—on the Fourth Floor, 5550 Friendship Boulevard, Chevy Chase, Maryland;

(9) Office of Justice Programs—in Room 1268 B, 633 Indiana Avenue, NW., Washington, DC;

(10) Foreign Claims Settlement Commission—in Room 400, 1120 20th Street, NW., Washington, DC;

(11) Executive Office For Immigration Review (Board of Immigration Appeals)—in Suite 1609, 5203 Leesburg Pike, Falls Church, Virginia;

(12) INTERPOL—in Room 907, 806 15th Street, NW., Washington, DC;

(13) All other components of the Department of Justice—at the Department of Justice, 10th Street and Constitution Avenue, NW., Washington, DC.

The public reference facilities of all components shall contain the materials relating to those components which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying.

(b) Each component shall maintain, make available for public inspection and copying, and publish each quarter a current index of the materials available at its public reading room or area which are required to be indexed under 5 U.S.C. 552(a)(2). However, if a component determines by order published in the FEDERAL REGISTER that publication of such an index would be unnecessary or impracticable, then it shall not be required to publish the index.

(c) Each component is responsible for determining which materials it generates or maintains are required to be indexed under 5 U.S.C. 552(a)(2). The Justice Management Division shall ensure that a current index of all materials required to be indexed under 5 U.S.C. 552(a)(2) is published in the FEDERAL REGISTER, except to the extent that such publication is considered unnecessary or impracticable and an order to that effect is published in the FEDERAL REGISTER.

[Order No. 1055-84, 49 FR 12254, Mar. 29, 1984, as amended by Order No. 1286-88, 53 FR 27161, July 19, 1988]

### § 16.3 Requirements pertaining to requests.

(a) *How made and addressed.* A requester may make a request under this subpart for a record of the Department of Justice by writing to the component that maintains the record. A request should be sent to the component at its proper address and both the envelope and the request itself should be clearly marked: "Freedom of Information Act Request." (appendix I to this part lists the components of the Department and their addresses. The functions of each component are summarized in part 0 of this title and in the description of the Department and its components in the United States Government Manual, which is issued annually and is avail-

able from the Superintendent of Documents.) A requester in need of guidance in defining a request or determining the proper component to which he should send his request may write to the FOIA/PA Section, Justice Management Division, United States Department of Justice, 10th Street and Constitution Avenue NW., Washington, DC 20530. Requests for certain historical records of the Department maintained in National Archives and Records Service centers must be directed to the General Services Administration in accordance with its regulations.

(b) *Request must reasonably describe the records sought.* A request must describe the records sought in sufficient detail to enable Department personnel to locate the records with a reasonable amount of effort. A request for a specific category of records shall be regarded as fulfilling this requirement if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive of Department operations. Wherever possible, a request should include specific information about each record sought, such as date, title or name, author, recipient, and subject matter of the record. In addition, if the request seeks records pertaining to pending litigation, the request should indicate the title of the case, the court in which the case was filed, and the nature of the case. To the extent possible, requesters are encouraged also to include in their requests the file designations of the records they seek. If a component determines that a request does not reasonably describe the records sought, the component shall either advise the requester what additional information is needed or otherwise state why the request is insufficient. The component also shall extend to the requester an opportunity to confer with Department personnel with the objective of reformulating the request in a manner which will meet the requirements of this section.

(c) *Agreement to pay fees.* The filing of a request under this subpart shall be deemed to constitute an agreement by the requester to pay all applicable fees charged under § 16.10 of this subpart up to \$25, unless a waiver of fees is sought. The component responsible for re-

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sponding to the request shall confirm this agreement in its letter of acknowledgement to the requester. When filing a request, a requester may specify a willingness to pay a greater amount, if applicable.

### **§ 16.4 Responses by components to requests.**

(a) *In general.* Except as otherwise provided in this section, the component that: (1) First receives a request for a record; and (2) has possession of the requested record is the component ordinarily responsible for responding to the request.

(b) *Authority to grant or deny requests.* The head of a component, or his designee, is authorized to grant or deny any request for a record of that component.

(c) *Initial action by the receiving component.* When a component receives a request for a record in its possession, the component shall promptly determine whether another component, or another agency of the Government, is better able to determine: (1) Whether the record is exempt, to any extent, from mandatory disclosure under the FOIA; and (2) whether the record, if exempt to any extent from mandatory disclosure under the FOIA, should nonetheless be released to the requester as a matter of discretion. If the receiving component determines that it is the component or agency best able to determine whether or not to disclose the record in response to the request, then the receiving component shall respond to the request. If the receiving component determines that it is not the component or agency best able to determine whether or not to disclose the record in response to the request, the receiving component shall either:

(i) Respond to the request, after consulting with the component or other agency best able to determine whether or not to disclose the record and with any other component or agency having a substantial interest in the requested record or the information contained therein; or

(ii) Refer the responsibility for responding to the request to the component best able to determine whether or not to disclose the record, or to another agency that generated or origi-

nated the record, but only if the component or agency is subject to the provisions of the FOIA.

Under ordinary circumstances, the component or agency that generated or originated a requested record is presumed to be the component or agency best able to determine whether or not to disclose the record in response to the request. However, this section shall prohibit a component that generated or originated a requested record from referring responsibility for responding to the request to another component or agency that generated or originated the requested record, if that the other component has a substantial interest in the requested record or the information contained therein.

(d) *Law enforcement.* Whenever a request is made for a record containing information that relates to an investigation or prosecution of a violation of criminal law or federal law enforcement process which was generated or originated by another component or agency, the receiving component shall refer responsibility for responding to the request to that other component or agency; however, such referral shall be limited only to the information generated or originated by that other component or agency.

(e) *Classified information.* Whenever a request is made for a record containing information which has been classified, or which may be eligible for classification, by another component or agency under the provisions of Executive Order 12356 or any other order concerning the classification of records, the receiving component shall refer the responsibility for responding to the request to the component or agency that classified the information, or should consider the information in light of its classification. Whenever a component obtains information that has been classified by another component or agency, the receiving component shall refer the responsibility for responding to the request to that component or agency that classified the information, or should consider the information in light of its classification. Whenever a component obtains information that has been classified by another component or agency, the receiving component shall refer the responsibility for responding to the request to that component or agency that classified the information, or should consider the information in light of its classification. Whenever a component obtains information that has been classified by another component or agency, the receiving component shall refer the responsibility for responding to the request to that component or agency that classified the information, or should consider the information in light of its classification. Whenever a component obtains information that has been classified by another component or agency, the receiving component shall refer the responsibility for responding to the request to that component or agency that classified the information, or should consider the information in light of its classification.

information classified by the other component or agency.

(f) *Notice of referral.* Whenever a component refers all or any part of the responsibility for responding to a request to another component or to another agency, it ordinarily shall notify the requester of the referral and inform the requester of the name and address of each component or agency to which the request has been referred and the portions of the request so referred.

(g) *Agreements regarding consultations and referrals.* No provision of this section shall preclude formal or informal agreements between components, or between a component and another agency, to eliminate the need for consultations or referrals of requests or classes of requests.

(h) *Separate referrals of portions of a request.* Portions of a request may be referred separately to one or more components or to one or more other agencies whenever necessary to process the request in accordance with the provisions of this section.

(i) *Processing of requests that are not properly addressed.* A request that is not properly addressed as specified in § 16.3(a) of this subpart shall be forwarded to the FOIA/PA Section, Justice Management Division, which shall forward the request to the appropriate component or components for processing. A request not addressed to the appropriate component will be deemed not to have been received by the Department of Justice until the FOIA/PA Section has forwarded the request to the appropriate component and that component has received the request, or until the request would have been so forwarded and received with the exercise of reasonable diligence by Department personnel. A component receiving an improperly addressed request forwarded by the FOIA/PA Section shall notify the requester of the date on which it received the request.

(j) *Date for determining responsive records.* In determining records responsive to a request, a component ordinarily will include only those records within the component's possession and control as of the date of its receipt of the request.

#### § 16.5 Form and content of component responses.

(a) *Form of notice granting a request.* After a component has made a determination to grant a request in whole or in part, the component shall so notify the requester in writing. The notice shall describe the manner in which the record will be disclosed, whether by providing a copy of the record to the requester or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection shall not unreasonably disrupt the operations of the component. The component shall inform the requester in the notice of any fees to be charged in accordance with the provisions of § 16.10 of this subpart.

(b) *Form of notice denying a request.* A component denying a request in whole or in part shall so notify the requester in writing. The notice must be signed by the head of the component, or his designee, and shall include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including the FOIA exemption or exemptions which the component has relied upon in denying the request and a brief explanation of the manner in which the exemption or exemptions apply to each record withheld; and

(3) A statement that the denial may be appealed under § 16.8(a) and a description of the requirements of that subsection.

(c) *Record cannot be located or has been destroyed.* If a requested record cannot be located from the information supplied, or is known or believed to have been destroyed or otherwise disposed of, the component shall so notify the requester in writing.

#### § 16.6 Classified information.

In processing a request for information that is classified or classifiable under Executive Order 12356 or any other Executive order concerning the classification of records, a component shall review the information to determine whether it warrants classification. Information which does not warrant classification shall not be withheld from a requester on the basis of 5

U.S.C. 552(b)(1). The Office of Information and Privacy shall, upon receipt of any appeal involving classified or classifiable information, take appropriate action to ensure compliance with part 17 of this chapter.

**§ 16.7 Business information.**

(a) *In general.* Business information provided to the Department of Justice by a submitter shall not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section.

(b) *Definitions.* The following definitions are used in reference to this section:

*Business information* means commercial or financial information provided to the Department by a submitter that arguably is protected from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4).

*Submitter* means any person or entity who provides business information, directly or indirectly, to the Department. The term includes, but is not limited to, corporations, state governments and foreign governments.

(c) *Notice to submitters.* A component shall, to the extent permitted by law, provide a submitter with prompt written notice of a Freedom of Information Act request or administrative appeal encompassing its business information wherever required under paragraph (d) of this section, except as is provided for in paragraph (i) of this section, in order to afford the submitter an opportunity to object to disclosure pursuant to paragraph (f) of this section. Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information. The requester also shall be notified that notice and an opportunity to object are being provided to a submitter.

(d) *When notice is required.* Notice shall be given to a submitter whenever:

- (1) The information has been designated in good faith by the submitter as information deemed protected from disclosure under Exemption 4, or
- (2) the component has reason to believe that the information may be protected from disclosure under Exemption 4.

(e) *Designation of business information.* Submitters of business information shall use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, those portions of their submissions which they deem to be protected from disclosure under Exemption 4. Such designations shall be deemed to have expired ten years after the date of the submission unless the submitter requests, and provides reasonable justification for, a designation period of greater duration.

(f) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, a component shall afford a submitter a reasonable period of time within which to provide the component with a detailed written statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act and, in the case of Exemption 4, shall demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* A component shall consider carefully a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever a component decides to disclose business information over the objection of a submitter, the component shall forward to the submitter a written notice which shall include:

- (1) A statement of the reasons for which the submitter's disclosure objections were not sustained;
- (2) A description of the business information to be disclosed; and
- (3) A specified disclosure date.

Such notice of intent to disclose shall be forwarded to the submitter a reasonable number of days prior to the

specified disclosure date and the requester shall be notified likewise.

(h) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information, the component shall promptly notify the submitter.

(i) *Exceptions to notice requirements.* The notice requirements of paragraph (c) of this section shall not apply if:

(1) The component determines that the information should not be disclosed;

(2) The information lawfully has been published or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The designation made by the submitter in accordance with paragraph (e) of this section appears obviously frivolous; except that, in such case, the component shall provide the submitter with written notice of any final administrative decision to disclose business information within a reasonable number of days prior to a specified disclosure date.

(Order No. 1286-88, 53 FR 27161, July 19, 1988)

#### § 16.8 Appeals.

(a) *Appeals to the Attorney General.* When a request for access to records or for a waiver of fees has been denied in whole or in part, or when a component fails to respond to a request within the time limits set forth in the FOIA, the requester may appeal the denial of the request to the Attorney General within 30 days of his receipt of a notice denying his request. An appeal to the Attorney General shall be made in writing and addressed to the Office of Information and Privacy, United States Department of Justice, 10th Street and Constitution Avenue, NW., Washington, DC 20530. Both the envelope and the letter of appeal itself must be clearly marked: "Freedom of Information Act Appeal." An appeal not so addressed and marked will be forwarded to the Office of Information and Privacy as soon as it is identified. An appeal that is improperly addressed will be deemed not to have been received by the Department until the Office of Information and Privacy receives the appeal, or would have done so with the

exercise of reasonable diligence by Department personnel.

(b) *Action on appeals by the Office of Information and Privacy.* Unless the Attorney General otherwise directs, the Director, Office of Information and Privacy, under the supervision of the Assistant Attorney General, Office of Legal Policy, shall act on behalf of the Attorney General on all appeals under this section, except that:

(1) In the case of a denial of a request by the Assistant Attorney General, Office of Legal Policy, the Attorney General or his designee shall act on the appeal, and

(2) A denial of a request by the Attorney General shall constitute the final action of the Department on that request.

(c) *Form of action on appeal.* The disposition of an appeal shall be in writing. A decision affirming in whole or in part the denial of a request shall include a brief statement of the reason or reasons for the affirmance, including each FOIA exemption relied upon and its relation to each record withheld, and a statement that judicial review of the denial is available in the U.S. District Court for the judicial district in which the requester resides or has his principal place of business, the judicial district in which the requested records are located, or the District of Columbia. If the denial of a request is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

#### § 16.9 Preservation of records.

Each component shall preserve all correspondence relating to the requests it receives under this subpart, and all records processed pursuant to such requests, until such time as the destruction of such correspondence and records is authorized pursuant to title 44 of the U.S. Code. Under no circumstances shall records be destroyed while they are the subject of a pending request, appeal, or lawsuit under the Act.

#### § 16.10 Fees.

(a) *In general.* Fees pursuant to 5 U.S.C. 552 shall be assessed according to the schedule contained in paragraph



(b) of this section for services rendered by components in responding to and processing requests for records under this subpart. All fees so assessed shall be charged to the requester, except where the charging of fees is limited under paragraph (c) of this section or where a waiver or reduction of fees is granted under paragraph (d) of this section. A component shall collect all applicable fees before making copies of requested records available to a requester. Requesters shall pay fees by check or money order made payable to the Treasury of the United States.

(b) *Charges.* In responding to requests under this subpart, the following fees shall be assessed, unless a waiver or reduction of fees has been granted pursuant to paragraph (d) of this section:

(1) *Search.* (i) No search fee shall be assessed with respect to requests by educational institutions, noncommercial scientific institutions, and representatives of the news media (as defined in paragraph (j) (6), (7) and (8) of this section, respectively). Search fees shall be assessed with respect to all other requests, subject to the limitations of paragraph (c) of this section. Components may assess fees for time spent searching even if they fail to locate any respective record or where records located are subsequently determined to be entirely exempt from disclosure.

(ii) For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee shall be \$2.25. Where a search and retrieval cannot be performed entirely by clerical personnel—for example, where the identification of records within the scope of a request requires the use of professional personnel—the fee shall be \$4.50 for each quarter hour of search time spent by such professional personnel. Where the time of managerial personnel is required, the fee shall be \$7.50 for each quarter hour of time spent by such managerial personnel.

(iii) For computer searches of records, which may be undertaken through the use of existing programming, requesters shall be charged the actual direct costs of conducting the search, although certain requesters (as defined in paragraph (c)(2) of this section) shall be entitled to the cost

equivalent of two hours of manual search time without charge. These direct costs shall include the cost of operating a central processing unit for that portion of operating time that is directly attributable to searching for records responsive to a request, as well as the costs of operator/programmer salary apportionable to the search (no more than \$4.50 per quarter hour of time so spent). A component is not required to alter or develop programming to conduct a search.

(2) *Duplication.* Duplication fees shall be assessed with respect to all requesters, subject to the limitations of paragraph (c) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied) the fee shall be \$0.10 per page. For copies produced by computer, such as tapes or printouts, components shall charge the actual direct costs, including operator time, of producing the copy. For other methods of duplication, components shall charge the actual direct costs of duplicating a record.

(3) *Review.* (i) Review fees shall be assessed with respect to only those requesters who seek records for a commercial use, as defined in paragraph (j)(5) of this section. For each quarter hour spent by agency personnel in reviewing a requested record for possible disclosure, the fee shall be \$4.50, except that where the time of managerial personnel is required, the fee shall be \$7.50 for each quarter hour of time spent by such managerial personnel.

(ii) Review fees shall be assessed for the initial record review, i.e., all the review undertaken when a component analyzes the applicability of particular exemption to a particular record or record portion at the initial request level. No charge shall be assessed for review at the administrative appeal level of an exemption already applied. However, records or record portions withheld pursuant to an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs of such a subsequent review are properly assessable, particularly where that review is made necessary by a change of circumstances.

(c) *Limitations on charging fees.* (1) No search or review fee shall be charged for a quarter-hour period unless more than half of that period is required for search or review.

(2) Except for requesters seeking records for a commercial use (as defined in paragraph (j)(5) of this section), components shall provide without charge—

(i) The first 100 pages of duplication (or its cost equivalent), and

(ii) The first two hours of search (or its cost equivalent).

(3) Whenever a total fee calculated under paragraph (b) of this section is \$8.00 or less, no fee shall be charged.

(4) The provisions of paragraph (c) (2) and (3) of this section work together. For requesters other than those seeking records for a commercial use, no fee shall be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages exceeds \$8.00.

(d) *Waiver or reduction of fees.* (1) Records responsive to a request under 5 U.S.C. 552 shall be furnished without charge or at a charge reduced below that established under paragraph (b) of this section where a component determines, based upon information provided by a requester in support of a fee waiver request or otherwise made known to the component, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of fees shall be considered on a case-by-case basis.

(2) In order to determine whether the first fee waiver requirement is met—i.e., that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government—components shall consider the following four factors in sequence:

(i) *The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government."* The subject matter of the requested records, in the context of the request, must specifically concern

identifiable operations or activities of the federal government—with a connection that is direct and clear, not remote or attenuated. Furthermore, the records must be sought for their informative value with respect to those government operations or activities; request for access to records for the intrinsic informational content alone will not satisfy this threshold consideration.

(ii) *The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.* The disclosable portions of the requested records must be meaningfully informative on specific government operations or activities in order to hold potential for contribution to increased public understanding of those operations and activities. Disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be likely to contribute to such understanding, as nothing new would be added to the public record.

(iii) *The contribution to an understanding of the subject by the public likely result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."* The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. A requester's identity and qualifications—e.g., expert in the subject area and ability and intention to effectively convey information to the general public—should be considered. It reasonably may be presumed that a representative of news media (as defined in paragraph (j)(8) of this section) who has access to the means of public dissemination readily will be able to satisfy this consideration. Requests from libraries or other record repositories (or requesters who intend merely to disseminate information to such institutions) shall be analyzed, like those of other requesters, to identify a particular person who represents that he actually will use the requested information in scholarly or other analytic work and then disseminate it to the general public.

(iv) *The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.* The public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent. Components shall not make separate value judgments as to whether information, even though it in fact would contribute significantly to public understanding of the operations or activities of the government, is "important" enough to be made public.

(3) In order to determine whether the second fee waiver requirement is met—i.e., that disclosure of the requested information is not primarily in the commercial interest of the requester—components shall consider the following two factors in sequence:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.* Components shall consider all commercial interests of the requester (with reference to the definition of "commercial use" in paragraph (j)(5) of this section), or any person on whose behalf the requester may be acting, but shall consider only those interests which would be furthered by the requested disclosure. In assessing the magnitude of identified commercial interests, consideration shall be given to the role that such FOIA-disclosed information plays with respect to those commercial interests, as well as to the extent to which FOIA disclosures serve those interests overall. Requesters shall be given a reasonable opportunity in the administrative process to provide information bearing upon this consideration.

(ii) *The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."* A fee waiver or reduction is warranted only where, once the "public interest" standard set out in paragraph (d)(2) of this section is

satisfied, that public interest can fairly be regarded as greater in magnitude than that of the requester's commercial interest in disclosure. Components shall ordinarily presume that, where a news media requester has satisfied the "public interest" standard, that will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who compile and market government information for direct economic return shall not be presumed to primarily serve the "public interest."

(4) Where only a portion of the requested records satisfies both of the requirements for a waiver or reduction of fees under this paragraph, a waiver or reduction shall be granted only as to that portion.

(5) Requests for the waiver or reduction of fees shall address each of the factors listed in paragraph (d) (2) and (3) of this section, as they apply to each record request.

(e) *Notice of anticipated fees in excess of \$25.00.* Where a component determines or estimates that the fees to be assessed under this section may amount to more than \$25.00, the component shall notify the requester as soon as practicable of the actual or estimated amount of the fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. (If only a portion of the fee can be estimated readily, the component shall advise the requester that the estimated fee may be only a portion of the total fee.) In cases where a requester has been notified that actual or estimated fees may amount to more than \$25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to the requester pursuant to this paragraph shall offer him the opportunity to confer with Department personnel in order to reformulate his request to meet his needs at a lower cost.

(f) *Aggregating requests.* Where a component reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a request into a series of requests for the purpose of evading the assessment of fees, the component may aggregate any such requests and charge accordingly.

Components may presume that multiple requests of this type made within a 30-day period have been made in order to evade fees. Where requests are separated by a longer period, components shall aggregate them only where there exists a solid basis for determining that such aggregation is warranted, e.g., where the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(g) *Advance payments.* (1) Where a component estimates that a total fee to be assessed under this section is likely to exceed \$250.00, it may require the requester to make an advance payment of an amount up to the entire estimated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(2) Where a requester has previously failed to pay a records access fee within 30 days of the date of billing, a component may require the requester to pay the full amount owed, plus any applicable interest (as provided for in paragraph (h) of this section), and to make an advance payment of the full amount of any estimated fee before the component begins to process a new request or continues to process a pending request from that requester.

(3) For requests other than those described in paragraphs (g) (1) and (2) of this section, a component shall not require the requester to make an advance payment, i.e., a payment made before work is commenced or continued on a request. Payment owed for work already completed is not an advance payment.

(4) Where a component acts under paragraph (g) (1) or (2) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA for the processing of an initial request or an appeal, plus permissible extensions of these time limits, shall be deemed not to begin to run until the component has received payment of the assessed fee.

(h) *Charging interest.* Components may assess interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent to the requester. Once a fee pay-

ment has been received by a component, even if not processed, the accrual of interest shall be stayed. Interest charges shall be assessed at the rate prescribed in section 3717 of title 31 U.S.C. and shall accrue from the date of the billing. Components shall follow the provisions of the Debt Collection Act of 1982, Public Law 97-265 (Oct. 25, 1982), and its implementing procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(i) *Other statutes specifically providing for fees.* (1) The fee schedule of this section does not apply with respect to the charging of fees under a statute specifically providing for setting the level of fees for particular types of records—i.e., any statute that specifically requires a government entity such as the Government Printing Office or the National Technical Information Service, to set and collect fees for particular types of records—in order to:

(i) Serve both the general public and private sector organizations by conveniently making available government information;

(ii) Ensure that groups and individuals pay the cost of publications and other services that are for their special use so that these costs are not borne by the general taxpaying public;

(iii) Operate an information-dissemination activity on a self-sustaining basis to the maximum extent possible; or

(iv) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

(2) Where records responsive to requests are maintained for distribution by agencies operating statutorily based fee schedule programs, components shall inform requesters of the steps necessary to obtain records from those sources.

(j) *Definitions.* For the purpose of this section:

(1) The term *direct costs* means those expenditures which an agency actually incurs in searching for and duplicating (and, in the case of commercial use requesters, reviewing) records to respond to a FOIA request. Direct costs include, for example the salary of the

employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space and heating or lighting of the facility in which the records are stored.

(2) The term *search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Components shall ensure, however, that searches are undertaken in the most efficient and least expensive manner reasonably possible; thus, for example, components shall not engage in line-by-line search where merely duplicating an entire document would be quicker and less expensive.

(3) The term *duplication* refers to the process of making a copy of a record necessary to respond to a FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine-readable documentation (e.g., magnetic tape or disk), among others. The copy provided shall be in a form that is reasonably usable by requesters.

(4) The term *review* refers to the process of examining a record located in response to a request in order to determine whether any portion of it is permitted to be withheld. It also includes processing any record for disclosure, e.g., doing all that is necessary to excise it and otherwise prepare it for release, although review costs shall be recoverable even where there ultimately is no disclosure of a record. Review time does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(5) The term *commercial use* in the context of a request refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation. Components shall determine, as well as reasonably possible, the use to which a requester will put the records requested. Where

the circumstances of a request suggest that the requester will put the records sought to a commercial use, either because of the nature of the request itself or because a component otherwise has reasonable cause to doubt a requester's stated use, the component shall provide the requester a reasonable opportunity to submit further clarification.

(6) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. To be eligible for inclusion in this category, a requester must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought in furtherance of scholarly research.

(7) The term *noncommercial scientific institution* refers to an institution that is not operated on a "commercial" basis as that term is referenced in paragraph (j)(5) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be eligible for inclusion in this category, a requester must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought in furtherance of scientific research.

(8) The term *representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances where they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. For "free-

lance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization; a publication contract would be the clearest proof, but components shall also look to the past publication record of a requester in making this determination. To be eligible for inclusion in this category, a requester also must not be seeking the requested records for a commercial use. In this regard, a request for records supporting the news dissemination function of the requester shall not be considered to be for a commercial use.

(k) *Charges for other services and materials.* Apart from the other provisions of this section, where a component elects, as a matter of administrative discretion, to comply with a request for a special service or materials, such as certifying that records are true copies or sending them other than by ordinary mail, the actual direct costs of providing the service or materials shall be charged.

[Order 1212-87, 52 FR 33231, Sept. 2, 1987]

#### APPENDIX TO SUBCHAPTER E—TEMPORARY REGULATIONS

[EDITORIAL NOTE: The following is a list of temporary regulations, except delegations of authority, which relate to Federal personnel management and are in effect as of the revision date of this volume.]

FPMR Temp. Reg.	Subject	Expires	FR Publication
<sup>1</sup> E-90 .....	Ordering items from the GSA Supply Catalog.	July 31, 1989 .....	53 FR 29234, Aug. 3, 1988
<sup>1</sup> E-90, Supp. 1 .....	do .....	July 31, 1990 .....	54 FR 31030, July 26, 1989
<sup>1</sup> E-90, Supp. 2 .....	do .....	July 31, 1991 .....	56 FR 33309, Aug. 15, 1991

<sup>1</sup> This temporary regulation appears in full text below.

6.5(b) of title 28 of the Code of Federal Regulations, I hereby delegate authority to the United States Attorney for the District of Columbia to:

- (1) Respond initially to requests;
- (2) Grant and deny access to records;
- (3) Communicate directly with the Office of Information and Privacy concerning administrative appeals; and
- (4) Prepare affidavits, litigation reports, and other necessary documents in preparation for civil litigation in suits pursuant to 5 U.S.C. 552(4)(B).

(b) This authority is limited to those records which are under the custody and control of the United States Attorney for the District of Columbia. The authority delegated herein may be redelegated.

#### § 16.11 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as a matter of right, to any service or to the disclosure of any record to which such person is not entitled under 5 U.S.C. 552.

#### APPENDIX A TO SUBPART A— DELEGATION OF AUTHORITY

1. By virtue of the authority vested in me by § 16.5(b) of title 28 of the Code of Federal Regulations, the authority to deny requests under the Freedom of Information Act is delegated to the occupant of the position of Chief, Freedom of Information-Privacy Section, Records Management Division, Federal Bureau of Investigation. This same authority is delegated to the occupant of the position of Special Agent in Charge of any of the field offices of the Federal Bureau of Investigation for records in their custody and control.

2. This directive is effective June 9, 1987. [46 FR 32021, June 19, 1981, as amended: 46 FR 11625, Mar. 27, 1984]

#### APPENDIX B TO SUBPART A— DELEGATION OF AUTHORITY

- (a) By virtue of the authority vested in me by §

(c) This directive is effective immediately. [49 FR 11625, Mar. 27, 1984]

#### Subpart B—Production or Disclosure in Federal and State Proceedings

SOURCE: Order No. 919-80, 45 FR 83210, 18, 1980, unless otherwise noted.

#### § 16.21 Purpose and scope.

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to the material contained in the files of the

partment, or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status:

(1) In all federal and state proceedings in which the United States is a party; and

(2) In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena, order, or other demand (hereinafter collectively referred to as a "demand") of a court or other authority is issued for such material or information.

(b) For purposes of this subpart, the term *employee of the Department* includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials.

(c) Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prosecutive, or regulatory agencies.

(d) This subpart is intended only to provide guidance for the internal operations of the Department of Justice, and is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

**§ 16.22 General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party.**

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information

or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the U.S. Attorney for the district where the issuing authority is located. The responsible United States Attorney shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible U.S. Attorney shall request a summary of the information sought and its relevance to the proceeding.

**§ 16.23 General disclosure authority in Federal and State proceedings in which the United States is a party.**

(a) Every attorney in the Department of Justice in charge of any case or matter in which the United States is a party is authorized, after consultation with the "originating component" as defined in § 16.24(a) of this part, to reveal and furnish to any person, including an actual or prospective witness, a grand jury, counsel, or a court, either during or preparatory to a proceeding, such testimony, and relevant unclassified material, documents, or information secured by any attorney, or investigator of the Department of Justice, as such attorney shall deem necessary or desirable to the discharge of the attorney's official duties: *Provided*, Such an attorney shall consider, with respect to any disclosure, the factors set

forth in § 16.26(a) of this part: *And further provided*, An attorney shall not reveal or furnish any material, documents, testimony or information when, in the attorney's judgment, any of the factors specified in § 16.26(b) exists, without the express prior approval by the Assistant Attorney General in charge of the division responsible for the case or proceeding, the Director of the Executive Office for United States Trustees (hereinafter referred to as "the EOUST"), or such persons' designees.

(b) An attorney may seek higher level review at any stage of a proceeding, including prior to the issuance of a court order, when the attorney determines that a factor specified in § 16.26(b) exists or foresees that higher level approval will be required before disclosure of the information or testimony in question. Upon referral of a matter under this subsection, the responsible Assistant Attorney General, the Director of EOUST, or their designees shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in a case or matter in which the United States is a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by the party's attorney setting forth a summary of the testimony sought must be furnished to the Department attorney handling the case or matter.

**§ 16.24 Procedure in the event of a demand where disclosure is not otherwise authorized.**

(a) Whenever a matter is referred under § 16.22 of this part to a U.S. Attorney or, under § 16.23 of this part, to an Assistant Attorney General, the Director of the EOUST, or their designees (hereinafter collectively referred to as the "responsible official"), the responsible official shall immediately advise the official in charge of the bureau, division, office, or agency of the Department that was responsible for the collection, assembly, or other preparation of the material demanded or that, at the time the person whose testimony was demanded acquired the information in question, employed such person (hereinafter collectively referred to as

the "originating component's responsible official's designee. In which the responsible official in charge of the component, the responsible official may perform all functions that are vested in the originating component.

(b) The responsible official, subject to the terms of paragraph (a), may authorize the production of a copy of the testimony of a Department employee or the production of material from the originating component if:

(1) There is no objection to the production of the originating component's material.

(2) The demanded material is in the possession, custody, or control of the originating component, and the responsible official determines that disclosure is appropriate under the circumstances set forth in § 16.26(a) of this part.

(3) None of the factors specified in § 16.26(b) of this part exists, and the responsible official determines that disclosure is appropriate under the circumstances set forth in § 16.26(a) of this part.

(c) It is the policy of the Department that the responsible official shall consult with the originating component, and the responsible official shall not authorize the production of a copy of the testimony of a Department employee or the production of material from the originating component without the approval of the originating component's responsible official. That, when it is determined that disclosure is appropriate, the responsible official shall, in connection with litigation supervised by a Department attorney, authorize the production of a copy of the testimony of a Department employee or the production of material from the originating component by the originating component's responsible official. The responsible official may require the originating component to obtain the EOUST's approval before disclosing such information. The responsible official may, however, the responsible official may, through negotiation, determine that appropriate motions should be filed in connection with the demand to inform the responsible official of which would not be inconsistent with the considerations set forth in § 16.26 of this part.

(d)(1) In a case in which the United States is not a party, and the U.S. attorney and the originating component disagree with the propriety of disclosure of a particular document or



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agree that such testimony or such a disclosure should not be made, they shall determine if the demand involves information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department or the EOUST. If so, the U.S. attorney shall notify the Director of the EOUST or the Assistant Attorney General in charge of the division responsible for such litigation or investigation, who may:

(i) Authorize personally or through a Deputy Assistant Attorney General, the demanded testimony or other disclosure of the information if such testimony or other disclosure, in the Assistant or Deputy Assistant Attorney General's judgment or in the judgment of the Director of the EOUST, is consistent with the factors specified in §16.26(a) of this part, and none of the factors specified in §16.26(b) of this part exists with respect to the demanded disclosure;

(ii) Authorize, personally or by a designee, the responsible official, through negotiations and, if necessary, appropriate motions, to seek to limit the demand to matters, the disclosure of which, through testimony or documents, considerations specified in §16.26 of this part, and otherwise to take all appropriate steps to limit the scope or obtain the withdrawal of a demand; or

(iii) If, after all appropriate steps have been taken to limit the scope or obtain the withdrawal of a demand, the Director of the EOUST or the Assistant or Deputy Assistant Attorney General does not authorize the demanded testimony or other disclosure, refer the matter, personally or through a Deputy Assistant Attorney General, for final resolution to the Deputy or Associate Attorney General, as indicated in §16.25 of this part.

(2) If the demand for testimony or other disclosure in such a case does not involve information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department, the originating component shall decide whether disclosure is appropriate, except that, when especially significant issues are raised, the re-

sponsible official may refer the matter to the Deputy or Associate Attorney General, as indicated in §16.25 of this part. If the originating component determines that disclosure would be appropriate and the responsible official does not refer the matter for higher level review, the responsible official shall take all appropriate steps to limit the scope or obtain the withdrawal of a demand.

(e) In a case in which the United States is a party, the Assistant Attorney General or the Director of the EOUST responsible for the case or matter, or persons' designees, are authorized after consultation with the originating component, to exercise the authority specified in paragraph (d)(1)(i) and (iii) of this section: *Provided*, That if the demand involves information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a unit of the Department, the responsible official shall notify the other divisions of the Department and the EOUST concerning the demand and the anticipated response. If the originating units of the Department are unable to resolve a disagreement concerning disclosure, the Assistant Attorney General in charge of the originating divisions in disagreement, or the Director of the EOUST and the appropriate Assistant Attorney General, may refer the matter to the Deputy or Associate Attorney General, as indicated in §16.25(b) of this part.

(f) In any case or matter in which the responsible official and the originating component agree that it would be appropriate to authorize testimony or otherwise to disclose the information demanded, even if a court were to require, no Department attorney responding to the demand should make any representation that implicates the Department would, in fact, withdraw the demand if directed to do so by a court. After taking all appropriate steps in such cases to limit the scope or obtain the withdrawal of a demand, the responsible official shall refer the matter to the Deputy or Associate Attorney General, as indicated in §16.25 of this part.

(g) In any case or matter in which the Attorney General is personally involved in the claim of privilege,

sponsible official may consult with the Attorney General and proceed in accord with the Attorney General's instructions without subsequent review by the Deputy or Associate Attorney General.

**§ 16.25 Final action by the Deputy or Associate Attorney General.**

(a) Unless otherwise indicated, all matters to be referred under § 16.24 by an Assistant Attorney General, the Director of the EOUST, or such person's designees to the Deputy or Associate Attorney General shall be referred (1) to the Deputy Attorney General, if the matter is referred personally by or through the designee of an Assistant Attorney General who is within the general supervision of the Deputy Attorney General, or (2) to the Associate Attorney General, in all other cases.

(b) All other matters to be referred under § 16.24 to the Deputy or Associate Attorney General shall be referred (1) to the Deputy Attorney General, if the originating component is within the supervision of the Deputy Attorney General or is an independent agency that, for administrative purposes, is within the Department of Justice, or (2) to the Associate Attorney General, if the originating component is within the supervision of the Associate Attorney General.

(c) Upon referral, the Deputy or Associate Attorney General shall make the final decision and give notice thereof to the responsible official and such other persons as circumstances may warrant.

**§ 16.26 Considerations in determining whether production or disclosure should be made pursuant to a demand.**

(a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made by

any Department official are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a statute, such as the income tax laws, 26 U.S.C. 6103 and 7213, or a rule of procedure, such as the grand jury secrecy rule, F.R.Cr.P., Rule 6(e).

(2) Disclosure would violate a specific regulation;

(3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency.

(4) Disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection.

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired.

(6) Disclosure would improperly reveal trade secrets without the owner's consent.

(c) In all cases not involving operations specified in paragraphs (b)(1) through (b)(6) of this section, the Deputy or Associate Attorney General will authorize disclosure unless, in that person's judgment, after considering paragraph (a) of this section, disclosure is unwarranted. The Deputy or Associate Attorney General will not approve disclosure if the circumstances specified in paragraphs (b)(1) through (b)(3) of this section exist. The Deputy or Associate Attorney General will not approve disclosure if any of the conditions in paragraphs (b)(4) through (b)(6) of this section exist, unless the Deputy or Associate Attorney General determines that the administration of justice requires disclosure. In this regard if disclosure is necessary to pursue a civil or criminal prosecution or affirmative relief, such as an injunction, consideration shall be given to:

(1) The seriousness of the violation or crime involved.

(2) The past history or criminal record of the violator or accused.

(3) The importance of the relief sought.

(4) The importance of the legal issue presented.

(5) Other matters brought to the attention of the Deputy or Associate Attorney General.

(d) Assistant Attorneys General, U.S. Attorneys, the Director of the EOUST, U.S. Trustees, and their designees, are authorized to issue instructions to attorneys and to adopt supervisory practices, consistent with this subpart, in order to help foster consistent application of the foregoing standards and the requirements of this subpart.

**§ 16.27 Procedure in the event a department decision concerning a demand is not made prior to the time a response to the demand is required.**

If response to a demand is required before the instructions from the appropriate Department official are received, the responsible official or other Department attorney designated for the purpose shall appear and furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been or is being, as the case may be, referred for the prompt consideration of the appropriate Department official and shall respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

**§ 16.28 Procedure in the event of an adverse ruling.**

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 16.27 of this chapter pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions rendered in accordance with §§ 16.24 and 16.25 of this part not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall, if so directed by the responsible Department official, respectfully decline to comply with the demand. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

**§ 16.29 Delegation by Assistant Attorneys General.**

With respect to any function that this subpart permits the designee of an

Assistant Attorney General to perform, the Assistant Attorneys General are authorized to delegate their authority, in any case or matter or any category of cases or matters, to subordinate division officials or U.S. attorneys, as appropriate.

**APPENDIX TO SUBPART B—REDELEGATION OF AUTHORITY TO THE DEPUTY ASSISTANT ATTORNEY GENERAL FOR LITIGATION, ANTITRUST DIVISION, TO AUTHORIZE PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION**

1. By virtue of the authority vested in me by 28 CFR 16.23(b)(1) the authority delegated to me by that section to authorize the production of material and disclosure of information described in 28 CFR 16.21(a) is hereby redelegated to the Deputy Assistant Attorney General for Litigation, Antitrust Division.

2. This directive shall become effective on the date of its publication in the FEDERAL REGISTER.

[Amdt. No. 960-81, 46 FR 52356, Oct. 27, 1981]

**Subpart C—Production of FBI Identification Records in Response to Written Requests by Subjects Thereof**

SOURCE: Order No. 556-73, 38 FR 32806, Nov. 28, 1973, unless otherwise noted.

**§ 16.30 Purpose and scope.**

This subpart contains the regulations of the Federal Bureau of Investigation, hereafter referred to as the FBI, concerning procedures to be followed when the subject of an identification record requests production thereof. It also contains the procedures for obtaining any change, correction or updating of such record.

**§ 16.31 Definition of identification record.**

An FBI identification record, often referred to as a "rap sheet", is a listing of certain information taken from fingerprint cards submitted to and retained by the FBI in connection with arrests and, in some instances, includes information taken from fingerprint cards submitted in connection with Federal employment, naturalization, or military service. The identification record includes the name of the agency

or institution which submitted the fingerprint card to the FBI. If the fingerprint card concerns a criminal offense, the identification record includes the date arrested or received, the arrest charge, and the disposition of the arrest if known to the FBI. All arrest data included in an identification record are obtained from fingerprint cards, disposition reports and other reports submitted by agencies having criminal justice responsibilities. Therefore, the FBI Identification Division is not the source of the arrest data reflected on an identification record.

[Order No. 960-81, 46 FR 52356, Oct. 27, 1981]

**§ 16.32 Procedure to obtain an identification record.**

The subject of an identification record may obtain a copy thereof by submitting a written request via the U.S. mails directly to the FBI, Identification Division, Washington, DC 20537-9700, or may present his/her written request in person during regular business hours to the FBI Identification Division, Room 11262, J. Edgar Hoover F.B.I. Building, Tenth Street and Pennsylvania Avenue, NW., Washington, DC. Such request must be accompanied by satisfactory proof of identity, which shall consist of name, date and place of birth and a set of rolled-in inked fingerprint impressions placed upon fingerprint cards or forms commonly utilized for applicant or law enforcement purposes by law enforcement agencies.

[Order No. 1134-86, 51 FR 16677, May 6, 1986]

**§ 16.33 Fee for production of identification record.**

Each written request for production of an identification record must be accompanied by a fee of \$17.00 in the form of a certified check or money order, payable to the Treasury of the United States. This fee is established pursuant to the provisions of 31 U.S.C. 9701 and is based upon the clerical time beyond the first quarter hour to be spent in searching for, identifying, and reproducing each identification record requested as specified in § 16.10 of this part. Any request for waiver of the fee shall accompany the original request

for the identification record and shall include a claim and proof of indigence.

[Order No. 1494-91, 56 FR 22825, May 17, 1991]

**§ 16.34 Procedure to obtain change, correction or updating of identification records.**

If, after reviewing his/her identification record, the subject thereof believes that it is incorrect or incomplete in any respect and wishes changes, corrections or updating of the alleged deficiency, he/she should make application directly to the agency which contributed the questioned information. The subject of a record may also direct his/her challenge as to the accuracy or completeness of any entry on his/her record to the Assistant Director of the FBI Identification Division, Washington, DC 20537-9700. The FBI will then forward the challenge to the agency which submitted the data requesting that agency to verify or correct the challenged entry. Upon the receipt of an official communication directly from the agency which contributed the original information, the FBI Identification Division will make changes necessary in accordance with the information supplied by that agency.

[Order No. 1134-86, 51 FR 16677, May 6, 1986]

**Subpart D—Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974**

SOURCE: Order No. 1055-84, 49 FR 12258, Mar. 29, 1984, unless otherwise noted.

**§ 16.40 General provisions.**

(a) *Purpose and scope.* This subpart contains the regulations of the Department of Justice implementing the Privacy Act of 1974, 5 U.S.C. 552a. The regulations apply to all records which are contained in systems of records maintained by the Department of Justice and which are retrieved by an individual's name or personal identifier. These regulations set forth the procedures by which an individual may seek access under the Privacy Act to records pertaining to him, may request correction of such records, or may seek an accounting of disclosures of such records.

by the Department. These regulations are applicable to each component of the Department.

(b) *Transfer of law enforcement records.* The head of a component, or his designee, is authorized to make written requests under 5 U.S.C. 552a(b)(7) for transfer of records maintained by other agencies which are necessary to carry out an authorized law enforcement activity of the component.

(c) *Definitions.* As used in this subpart, the following terms shall have the following meanings:

(1) *Agency* has the meaning given in 5 U.S.C. 551(1) and 5 U.S.C. 552a(a)(1).

(2) *Component* means each separate bureau, office, board, division, commission, service, or administration of the Department of Justice.

(3) *Record* means any item, collection, or grouping of information about an individual which is maintained by any component within a system of records and which contains the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint, voiceprint, or photograph.

(4) *Request for access* means a request made pursuant to 5 U.S.C. 552a(d)(1).

(5) *Request for correction* means a request made pursuant to 5 U.S.C. 552a(d)(2).

(6) *Request for an accounting* means a request made pursuant to 5 U.S.C. 552a(c)(3).

(7) *Requester* means an individual who makes either a request for access, a request for correction, or a request for an accounting.

(8) *System of records* means a group of any records under the control of any component from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to that individual.

#### § 16.41 Requests for access to records.

(a) *Procedure for making requests for access to records.* An individual may request access to a record about him by appearing in person or by writing to the component that maintains the record. (appendix I to this part lists the components of the Department of Justice and their addresses. The "Notice of Records Systems" published by the Na-

tional Archives and Records Service, General Services Administration, describes the systems of records maintained by all federal agencies, including the Department and its components.) A requester in need of guidance in defining his request may write to the FOIA/PA Section, Justice Management Division, U.S. Department of Justice, 10th Street and Constitution Avenue, NW., Washington, DC 20530. A request should be addressed to the component that maintains the requested record. Both the envelope and the request itself should be marked: "Privacy Act Request." Requests for certain historical records of the Department maintained in National Archives and Records Service centers must be directed to the General Services Administration in accordance with its regulations.

(b) *Description of records sought.* A request for access to records must describe the records sought in sufficient detail to enable Department personnel to locate the system of records containing the record with a reasonable amount of effort. Whenever possible, a request for access should describe the nature of the record sought, the date of the record or the period in which the record was compiled, and the name or identifying number of the system of records in which the requester believes the record is kept. The Notices the Department publishes in the FEDERAL REGISTER describing its components' systems of records may require, in appropriate instances, that requests for access to records describe the records sought with even greater specificity.

(c) *Agreement to pay fees.* The filing of a request for access to a record under this subpart shall be deemed to constitute an agreement to pay all applicable fees charged under § 16.47 up to \$25.00. The component responsible for responding to the request shall confirm this agreement in its letter of acknowledgment to the requester. When filing a request, a requester may specify a willingness to pay a greater amount, if applicable.

(d) *Verification of identity.* Any individual who submits a request for access to records must verify his identity in one of the following ways, unless the notice published in the FEDERAL REG-

ISTER describing the relevant system of records provides otherwise:

(1) Any requester making a request in writing must state in his request his full name, current address, and date and place of birth. In addition, a requester must provide with his request an example of his signature, which shall be notarized. Sample forms used for such notarized statement of identity may be obtained from the FOIA/PA Section, Justice Management Division, U.S. Department of Justice, 10th Street and Constitution Avenue, NW., Washington, DC 20530. In order to facilitate the identification and location of the requested records, a requester may also, at his option, include in his request his Social Security number.

(2) Any requester submitting a request in person may provide to the component a form of official photographic identification, such as a passport or an identification badge. If a requester is unable to produce a form of photographic identification, he may provide to the component two or more acceptable forms of identification (such as a driver's license or credit card) bearing his name and address.

(e) *Verification of guardianship.* The parent or guardian of a minor (or the guardian of a person judicially determined to be incompetent) who submits a request for access to the records of the minor or incompetent must establish:

(1) His own identity and the identity of the subject of the record, as required in paragraph (d) of this section,

(2) That he is the parent or guardian of the subject of the record, which may be proved by providing a copy of the subject's birth certificate showing parentage or by providing a court order establishing the guardianship, and

(3) That he seeks to act on behalf of the subject of the record.

#### § 16.42 Responses by components to requests for access to records.

(a) *In general.* Except as otherwise provided in this section, the component that: (1) First receives a request for access to a record, and (2) has possession of the requested record is the component ordinarily responsible for responding to the request.

(b) *Authority to grant or deny request.* The head of a component, or his designee, is authorized to grant or deny any request for access to a record of that component.

(c) *Initial action by the receiving component.* When a component receives a request for access to a record in its possession, the component shall promptly determine whether another component, or another Government agency, is better able to determine whether the record is exempt, to any extent, from access. If the receiving component determines that it is the component or agency best able to determine whether the record is exempt, to any extent, from access, then the receiving component shall respond to the request. If the receiving component determines that it is not the component or agency best able to determine whether or not the record is exempt from access, the receiving component shall respond to the request, after consulting with the component or agency best able to determine whether or not the record is exempt from access. Under ordinary circumstances, the component or agency that generated or originated a requested record shall be presumed to be the component or agency best able to determine whether or not the record is exempt from access. However, nothing in this section shall prohibit a component that generated or originated a requested record from consulting with another component or agency, if the component that generated or originated the requested record determines that the other component or agency has an interest in the requested record or the information contained therein.

(d) *Law enforcement information.* Whenever a request for access is made for a record containing information which relates to an investigation of a possible violation of criminal law or to a criminal law enforcement proceeding and which was generated or originated by another component or agency, the receiving component shall consult with that other component or agency, as appropriate.

(e) *Classified information.* When a request for access is made for a record containing information which has been classified, or which may be eligible for

classification, by another component or agency under the provision of Executive Order 12356 or any other Executive order concerning the classification of records, the receiving component shall refer the responsibility for responding to the request to the component or agency that classified the information or should consider the information for classification. Whenever a record contains information that has been derivatively classified by a component because it contains information classified by another component or agency, the component shall refer the responsibility for responding to the request to the component or agency that classified the underlying information; however, such referral shall extend only to the information classified by the other component or agency.

(f) *Agreements regarding consultations.* No provision of this section shall preclude formal or informal agreements between components, or between a component and another agency, to eliminate the need for consultations concerning requests or classes of requests.

(g) *Processing of requests for access not properly addressed.* A request for access that is not properly addressed as specified in § 16.41(a) of this subpart shall be forwarded to the FOIA/PA Section, Justice Management Division, which shall forward the request to the appropriate component or components for processing. A request not addressed to the appropriate component will be deemed not to have been received by the Department until the FOIA/PA Section has forwarded the request to the appropriate component and that component has received the request, or until the request would have been so forwarded and received with the exercise of reasonable diligence by Department personnel. A component receiving an improperly addressed request from the FOIA/PA Section shall notify the requester of the date on which it received the request.

(h) *Date for determining responsive records.* In determining records responsive to a request for access, a component ordinarily will include only those records within the component's possession and control as of the date of its receipt of the request.

#### § 16.43 Form and content of component responses.

(a) *Form of notice granting request for access.* After a component has made a determination to grant a request for access in whole or in part, the component shall so notify the requester in writing. The notice shall describe the manner in which access to the record will be granted and shall inform the requester of any fees to be charged in accordance with § 16.47 of this subpart.

(b) *Form of notice denying request for access.* A component denying a request for access in whole or in part shall so notify the requester in writing. The notice shall be signed by the head of the responsible component, or his designee, and shall include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reason or reasons for the denial, including the Privacy Act exemption or exemptions which the component has relied upon in denying the request and a brief explanation of the manner in which the exemption or exemptions apply to each record withheld; and

(3) A statement that the denial may be appealed under § 16.48(a) of this subpart, and a description of the requirements of that subsection.

(c) *Record cannot be located or has been destroyed.* If a requested record cannot be located from the information supplied, or is known or believed to have been destroyed or otherwise disposed of, the component shall so notify the requester in writing.

(d) *Medical records.* When an individual requests medical records pertaining to himself which are not otherwise exempt from individual access, the component may advise the individual that the records will be provided only to a physician, designated by the individual, who requests the records and establishes his identity in writing. The designated physician shall determine which records should be provided to the individual and which records should not be disclosed to the individual because of possible harm to the individual or another person.

#### § 16.44 Classified information.

In processing a request for access to a record containing information that is

classified or classifiable under Executive Order 12356 or any other Executive order concerning the classification of records, a component shall review the information to determine whether it warrants classification. Information which does not warrant classification shall not be withheld from a requester on the basis of 5 U.S.C. 552a(k)(1). The Office of Information and Privacy shall, upon receipt of any appeal involving classified or classifiable information, take appropriate action to ensure compliance with part 17 of this chapter.

**§ 16.45 Records in exempt systems of records.**

(a) *Law enforcement records exempted under subsection (k)(2).* Before denying a request by an individual for access to a law enforcement record which has been exempted from access pursuant to 5 U.S.C. 552a(k)(2), the component must review the requested record to determine whether information in the record has been used or is being used to deny the individual any right, privilege, or benefit for which he is eligible or to which he would otherwise be entitled under federal law. If so, the component shall notify the requester of the existence of the record and disclose such information to the requester, except to the extent that the information would identify a confidential source. In cases where disclosure of information in a law enforcement record could reasonably be expected to identify a confidential source, the record shall not be disclosed to the requester unless the component is able to delete from such information all material which would identify the confidential source.

(b) *Employee background investigations.* When a requester requests access to a record pertaining to a background investigation and the record has been exempted from access pursuant to 5 U.S.C. 552a(k)(5), the record shall not be disclosed to the requester unless the component is able to delete from such record all information which would identify a confidential source.

**§ 16.46 Access to records.**

(a) *Manner of access.* A component that has made a determination to grant a request for access shall grant

the requester access to the requested record either by: (1) Providing the requester with a copy of the record or (2) making the record available for inspection by the requester at a reasonable time and place. The component shall in either case charge the requester applicable fees in accordance with the provisions of § 16.47 of this subpart. If a component provides access to a record by making the record available for inspection by the requester, the manner of such inspection shall not unreasonably disrupt the operations of the component.

(b) *Accompanying person.* A requester appearing in person to review his records may be accompanied by another individual of his own choosing. Both the requester and the accompanying person shall be required to sign a form stating that the Department of Justice is authorized to disclose the record in the presence of both individuals.

**§ 16.47 Fees for access to records.**

(a) *When charged.* A component shall charge fees pursuant to 31 U.S.C. 501 and 5 U.S.C. 552a(f)(5) for the copying of records to afford access to individuals unless the component, in its discretion, waives or reduces the fees for good cause shown. A component shall charge fees only at the rate of \$0.10 per page. For materials other than paper copies the component may charge the direct costs of reproduction, but only if the requester has been notified of such costs before they are incurred. Fees shall not be charged where they would amount, in the aggregate, for one request or for a series of related requests to less than \$3.00. However, a component may, in its discretion, increase the amount of this minimum fee.

(b) *Notice of estimated fees in excess of \$25.* When a component determines or estimates that the fees to be charged under this section may amount to more than \$25, the component shall notify the requester as soon as practicable of the actual or estimated amount of the fee, unless the requester has indicated in advance his willingness to pay a fee as high as that anticipated. (If only a portion of the fee can be estimated readily, the component shall advise the requester that the est-



mated fee may be only a portion of the total fee.) Where the estimated fee exceeds \$25 and a component has so notified the requester, the component will be deemed not to have received the request for access to records until the requester has agreed to pay the anticipated fee. A notice to a requester pursuant to this paragraph shall offer him the opportunity to confer with Department personnel with the object of reformulating his request to meet his needs at a lower cost.

(c) *Form of payment.* Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(d) *Advance deposits.* (1) Where the estimated fee chargeable under this section exceeds \$25, a component may require a requester to make an advance deposit of 25 percent of the estimated fee or an advance payment of \$25, whichever is greater.

(2) Where a requester has previously failed to pay a fee charged under this part, the requester must pay the component or the Department the full amount owed and make an advance deposit of the full amount of any estimated fee before a component shall be required to process a new or pending request for access from that requester.

#### § 16.48 Appeals from denials of access.

(a) *Appeals to the Attorney General.* When a component denies in whole or in part a request for access to records, the requester may appeal the denial to the Attorney General within 30 days of his receipt of the notice denying his request. An appeal to the Attorney General shall be made in writing, addressed to the Office of Information and Privacy, U.S. Department of Justice, 10th Street and Constitution Avenue, NW., Washington, DC 20530. Both the envelope and the letter of appeal itself must be clearly marked: "Privacy Act Appeal." An appeal not so addressed and marked shall be forwarded to the Office of Information and Privacy as soon as it is identified as an appeal under the Privacy Act. An appeal that is improperly addressed shall be deemed not to have been received by the Department until the Office of Information and Privacy receives the appeal, or until the

appeal would have been so received with the exercise of reasonable diligence by Department personnel.

(b) *Action on appeals by the Office of Information and Privacy.* Unless the Attorney General otherwise directs, the Director, Office of Information and Privacy, under the supervision of the Assistant Attorney General, Office of Legal Policy, shall act on behalf of the Attorney General on all appeals under this section, except that:

(1) In the case of a denial of a request for access by the Assistant Attorney General, Office of Legal Policy, the Attorney General or his designee shall act on the appeal, and

(2) A denial of a request for access to the Attorney General shall constitute the final action of the Department on that request.

(c) *Form of action on appeal.* The position of an appeal shall be in writing. A decision affirming in whole or in part the denial of a request for access shall include a brief statement of reason or reasons for the affirmation including each Privacy Act exemption relied upon and its relation to the record withheld, and a statement that judicial review of the denial is available in the U.S. District Court for the judicial district in which the requester resides or has his principal place of business, the judicial district in which the requested records are located, or the District of Columbia. If the denial of a request for access is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the provisions on appeal.

#### § 16.49 Preservation of records.

Each component shall preserve correspondence relating to the request it receives under this subpart, and records processed pursuant to such requests, until such time as the destruction of such correspondence and records is authorized pursuant to title 44 of the U.S. Code. Under no circumstances shall records be destroyed while they are the subject of a pending request for access, appeal, or lawsuit under the Act.

### § 16.50 Requests for correction of records.

(a) *How made.* Unless a record is exempted from correction and amendment, an individual may submit a request for correction of a record pertaining to him. A request for correction must be made in writing and must be addressed to the component that maintains the record. (appendix I to this part lists the components of the Department and their addresses.) The request must identify the particular record in question, state the correction sought, and set forth the justification for the correction. Both the envelope and the request for correction itself must be clearly marked: "Privacy Act Correction Request." If a requester believes that the same record appears in more than one system of records, he should address his request for correction to each component that controls a system of records which contains the record.

(b) *Initial determination.* Within 10 working days of receiving a request for correction, a component shall notify the requester whether his request will be granted or denied, in whole or in part. If the component grants the request for correction in whole or in part, it shall advise the requester of his right to obtain a copy of the corrected record, in releasable form, upon request. If the component denies the request for correction in whole or in part, it shall notify the requester in writing of the denial. The notice of denial shall state the reason or reasons for the denial and advise the requester of his right to appeal.

(c) *Appeals.* When a request for correction is denied in whole or in part, the requester may appeal the denial to the Attorney General within 30 days of his receipt of the notice denying his request. An appeal to the Attorney General shall be made in writing, shall set forth the specific item of information sought to be corrected, and shall include any documentation said to justify the correction. An appeal shall be addressed to the Office of Information and Privacy, U.S. Department of Justice, 10th Street and Constitution Avenue, NW., Washington, DC 20530, unless the appeal is from a denial by the Assistant Attorney General, Office of

Legal Policy, in which case shall be addressed to the Attorney General, at the same address. The envelope and the letter of request must be clearly marked: "Correction Appeal."

(d) *Determination on appeal.* The Director, Office of Information and Privacy, under the supervision of the Assistant Attorney General for Legal Policy, or the Attorney General in appropriate cases, shall decide appeals from denials of correction of records. All such appeals shall be decided within 30 working days of receipt of the appeal, unless the cause to extend this period of time is affirmed. A request for correction of a record is affirmed if the requester shall be notified in writing and advised of: (1) the reasons the denial is affirmed, (2) the requester's right to file a Statement of Disagreement with the denial provided in paragraph (e) of this section, and (3) the requester's right to seek judicial review of the denial in the District Court for the judicial district in which the requester's principal place of business is located, or the District Court for the district in which the denial is reversed. If the denial is reversed, the requester shall be so notified. The requester shall be so notified of the right to request for correction of the record to the component that denied the request for processing in a record, and the decision on appeal.

(e) *Statements of disagreement.* A requester whose appeal of a denial of correction is denied shall have 30 days to file a Statement of Disagreement with the denial. The Statement of Disagreement shall be filed with the Office of Information and Privacy, 10th Street and Constitution Avenue, NW., Washington, DC 20530, within 30 days of receiving notice of the denial of the appeal. Statements of disagreement may not exceed one type of information disputed. Statements of disagreement shall be returned to the requester for condensation. Upon receipt of a Statement of Disagreement, the Director, Office of Information and Privacy, shall include the statement in the records in which the denial was maintained and shall have the record marked so as to indicate the location of a Statement of Disagreement.

filed, and (2) where in the system of records the Statement may be found.

(f) *Notices of correction or disagreement.* Within 30 working days of the correction of a record, the component that maintains the record shall advise all components or agencies to which it previously disclosed the record that the record has been corrected. Whenever an individual has filed a Statement of Disagreement, a component shall append a copy of the Statement to the disputed record whenever the record is disclosed. The component may also append to the disputed record any written statement it has made denying the component's reasons for denying the request to correct the record.

#### § 16.51 Records not subject to correction.

The following records are not subject to correction or amendment as provided in § 16.50 of this subpart:

(a) Transcripts of testimony given under oath or written statements made under oath;

(b) Transcripts of grand jury proceedings, judicial proceedings, or quasi-judicial proceedings which constitute the official record of such proceedings;

(c) Presentence reports which are the property of the courts, but are maintained by a component in a system of records; and

(d) Records duly exempted from correction pursuant to 5 U.S.C. 552a(j) or 552a(k) by notice published in the FEDERAL REGISTER.

#### § 16.52 Request for accounting of record disclosures.

(a) An individual may request a component that maintains a record pertaining to him to provide him with an accounting of those other agencies to which the component has disclosed the record, and the date, nature, and purpose of each disclosure. A request for an accounting must be made in writing and must identify the particular record for which the accounting is requested. The request also must be addressed to the component that maintains the particular record, and both the envelope and the request itself must clearly be marked: "Privacy Act Accounting Request." (appendix I to this part lists

the components of the Department and their addresses.)

(b) Components shall not be required to provide an accounting to an individual to the extent that the accounting relates to:

(1) Records for which no accounting must be kept pursuant to 5 U.S.C. 552a(c)(1),

(2) Disclosures of records to law enforcement agencies for lawful law enforcement activities, pursuant to written requests from such law enforcement agencies specifying records sought and the law enforcement activities for which the records are sought, under 5 U.S.C. 552a(c)(3) and (b)(7), or

(3) Records for which an accounting need not be disclosed pursuant to 5 U.S.C. 552a(j) or (k).

(c) A denial of a request for an accounting may be appealed to the Attorney General in the same manner as a denial of a request for access, with both the envelope and the letter of appeal itself clearly marked: "Privacy Act Accounting Appeal."

#### § 16.53 Notice of subpoenas and emergency disclosures.

(a) *Subpoenas.* When records pertaining to an individual are subpoenaed by a grand jury, court, or quasi-judicial authority, the official served with the subpoena shall be responsible for ensuring that written notice of its service is forwarded to the individual. Notice shall be provided within 10 working days of the service of the subpoena or, in the case of a grand jury subpoena, within 10 working days of its becoming a matter of public record. Notice shall be mailed to the last known address of the individual and shall contain the following information: The date the subpoena is returnable, the court or quasi-judicial authority to which it is returnable, the name and number of the case or proceeding, and the nature of the records sought. Notice of the service of a subpoena is not required if the system of records has been exempted from the notice requirement of 5 U.S.C. 522a(e)(8), pursuant to 5 U.S.C. 552a(j), by a Notice of Exemption published in the FEDERAL REGISTER.

(b) *Emergency disclosures.* If the record of an individual has been disclosed to any person under compelling cir-

cumstances affecting the health or safety of any person, as described in 5 U.S.C. 552a(b)(8), the individual to whom the record pertains shall be notified of the disclosure at his last known address within 10 working days. The notice of such disclosure shall be in writing and shall state the nature of the information disclosed, the person or agency to whom it was disclosed, the date of disclosure, and the compelling circumstances justifying the disclosure. The officer who made or authorized the disclosure shall be responsible for providing such notification.

**§ 16.54 Security of systems of records.**

(a) The Assistant Attorney General for Administration, Justice Management Division, shall be responsible for issuing regulations governing the security of systems of records. To the extent that such regulations govern the security of automated systems of records, the regulations shall be consistent with the guidelines developed by the National Bureau of Standards.

(b) Each component shall establish administrative and physical controls to prevent unauthorized access to its systems of records, to prevent the unauthorized disclosure of records, and to prevent the physical damage or destruction of records. The stringency of such controls shall reflect the sensitivity of the records the controls protect. At a minimum, however, each component's administrative and physical controls shall ensure that:

(1) Records are protected from public view,

(2) The area in which records are kept is supervised during business hours to prevent unauthorized persons from having access to the records, and

(3) Records are inaccessible to unauthorized persons outside of business hours.

(c) Each component shall establish rules restricting access to records to only those individuals within the Department who must have access to such records in order to perform their duties. Each component also shall adopt procedures to prevent the accidental disclosure of records or the accidental granting of access to records.

**§ 16.55 Contracting record systems.**

(a) No component of the Department shall contract for the operation of a record system by or on behalf of the Department without the express approval of the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for Administration.

(b) Any contract which is approved shall contain the standard contract requirements promulgated by the General Services Administration to ensure compliance with the requirements imposed by the Privacy Act. The contracting component shall have responsibility for ensuring that the contractor complies with the contract requirements relating to privacy.

**§ 16.56 Use and collection of social security numbers.**

(a) Each system manager of a system of records which utilizes Social Security numbers as a method of identification without statutory authorization, or authorization by regulation adopted prior to January 1, 1975, shall take steps to revise the system to avoid future collection and use of the Social Security numbers.

(b) The head of each component shall take such measures as are necessary to ensure that employees authorized to collect information from individuals are advised that individuals may not be required to furnish Social Security numbers without statutory or regulatory authorization and that individuals who are requested to provide Social Security numbers voluntarily must be advised that furnishing the number is not required and that no penalty or denial of benefits will flow from the refusal to provide it.

**§ 16.57 Employee standards of conduct.**

(a) Each component shall inform its employees of the provisions of the Privacy Act, including the Act's civil liability and criminal penalty provisions. Each component also shall notify its employees that they have a duty to:

(1) Protect the security of records.

(2) Ensure the accuracy, relevance, timeliness, and completeness of records.

(3) Avoid the unauthorized disclosure, either verbal or written, of records, and

(4) Ensure that the component maintains no system of records without public notice.

(b) Except to the extent that the Privacy Act permits such activities, an employee of the Department of Justice shall:

(1) Not collect information of a personal nature from individuals unless the employee is authorized to collect such information to perform a function or discharge a responsibility of the Department;

(2) Collect from individuals only that information which is necessary to the performance of the functions or to the discharge of the responsibilities of the Department;

(3) Collect information about an individual directly from that individual, whenever practicable;

(4) Inform each individual from whom information is collected of:

(i) The legal authority that authorizes the Department to collect such information,

(ii) The principal purposes for which the Department intends to use the information,

(iii) The routine uses the Department may make of the information, and

(iv) The practical and legal effects upon the individual of not furnishing the information;

(5) Maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as to ensure fairness to the individual in the determination;

(6) Except as to disclosures to an agency or pursuant to 5 U.S.C. 552a(b)(2), make reasonable efforts, prior to disseminating any record about an individual, to ensure that such records are accurate, relevant, timely, and complete;

(7) Maintain no record concerning an individual's religious or political beliefs or activities, or his membership in associations or organizations, unless:

(i) The individual has volunteered such information for his own benefit,

(ii) A statute expressly authorizes the Department to collect, maintain, use, or disseminate the information, or

(iii) The individual's beliefs, activities, or membership are pertinent to and within the scope of an authorized law enforcement or correctional activity;

(8) Notify the head of the component of the existence or development of any system of records that has not been disclosed to the public;

(9) When required by the Act, maintain an accounting in the prescribed form of all disclosures of records by the Department to agencies or individual's whether verbally or in writing;

(10) Disclose no record to anyone, except a component, for any use, unless authorized by the Act;

(11) Maintain and use records with care to prevent the inadvertent disclosure of a record to anyone; and

(12) Notify the head of the component of any record that contains information that the Act or the foregoing provisions of this paragraph do not permit the Department to maintain.

(c) Not less than once each year, the head of each component shall review the systems of records maintained by that component to ensure that the component is in compliance with the provisions of the Privacy Act.

#### § 16.58 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under 5 U.S.C. 552a.

#### APPENDIX A TO SUBPART D— DELEGATION OF AUTHORITY

1. By virtue of the authority vested in me by § 16.45 of title 28 of the Code of Federal Regulations, the authority to deny requests under the Privacy Act of 1974 is delegated to the occupant of the position of Chief, Freedom of Information-Privacy Acts Section, Records Management Division, Federal Bureau of Investigation. This same authority is delegated to the occupant of the position of Special Agent in Charge of each of the field offices of the Federal Bureau of Investigation for records in their custody and control.

2. This directive is effective June 9, 1981.

[46 FR 36140, July 14, 1981, as amended at 49 FR 11625, Mar. 27, 1984]

#### APPENDIX B TO SUBPART D— DELEGATION OF AUTHORITY

(a) By virtue of the authority vested in me by § 16.45(a) of title 28 of the Code of Federal Regulations, I hereby delegate authority to the United States Attorney for the District of Columbia to:

- (1) Respond initially to requests;
- (2) Grant and deny access to records;
- (3) Communicate directly with the Office of Information and Privacy concerning administrative appeals; and
- (4) Prepare affidavits, litigation reports, and other necessary documents in preparation for civil litigation in suits pursuant to 5 U.S.C. 552a(g)(1)(B).

(b) This authority is limited to those records which are in the systems of records under the custody and control of the United States Attorney for the District of Columbia. The authority delegated herein may be redelegated.

(c) This directive is effective immediately.

[49 FR 11625, Mar. 27, 1984]

#### Subpart E—Exemption of Records Systems Under the Privacy Act

SOURCE: Order No. 645-76, 41 FR 12640, Mar. 26, 1976, unless otherwise noted.

#### § 16.70 Exemption of the Office of the Attorney General System—limited access.

(a) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4); (d); (e) (1), (2) and (3), (e)(4) (G) and (H), (e)(5); and (g):

- (1) General Files System of the Office of the Attorney General (JUSTICE/OAG-001).

These exemptions apply only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(1), (k)(2), and (k)(5).

(b) Exemptions from the particular subsections are justified for the following reasons:

- (1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her would reveal investigative interest on the part of the Department of Justice as well as the recipient agency. This would permit record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel.

(2) From subsection (c)(4) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(3) From subsection (d) because the records contained in this system relate to official Federal investigations. Individual access to these records might compromise ongoing investigations, reveal confidential informants or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation. Amendment of the records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4) From subsections (e) (1) and (5) because in the course of law enforcement investigations, information may occasionally be obtained or introduced the accuracy of which is unclear or which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of criminal activity. Moreover, it would impede the specific investigative process if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.

(5) From subsection (e)(2) because in a law enforcement investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be informed of the existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations or duties.

(6) From subsection (e)(3) because to comply with the requirements of this subsection during the course of an investigation could impede the information gathering process, thus hampering the investigation.

(7) From subsections (e)(4) (G) and (H) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(8) From subsection (g) because this system is exempt from the access and amendment provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

[Order No. 31-85, 51 FR 751, Jan. 8, 1986]

**§ 16.71 Exemption of the Office of the Deputy Attorney General System—limited access.**

(a) The following systems of records and exempt from 5 U.S.C. 552a(d)(1) and (e)(1):

- (1) Presidential Appointee Candidate Records System (JUSTICE/DAG-006).
- (2) Presidential Appointee Records System (JUSTICE/DAG-007).
- (3) Special Candidates for Presidential Appointments Records System (JUSTICE/DAG-008).
- (4) Miscellaneous Attorney Personnel Records System (JUSTICE/DAG-011).

These exemptions apply only to the extent that information in these systems is subject to exemption pursuant to 5 U.S.C. 552a(k)(5).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (d)(1) because many persons are contacted who, without an assurance of anonymity, refuse to provide information concerning a candidate for a Presidential appointee or Department attorney position. Access could reveal the identity of the source of the information and constitute a breach of the promise of confidentiality on the part of the Department of Justice. Such breaches ultimately would restrict the free flow of information vital to a determination of a candidate's qualifications and suitability.

(2) From subsection (e)(1) because in the collection of information for investigative and evaluative purposes, it is impossible to determine in advance what exact information may be of assistance in determining the qualifications and suitability of a candidate. Information which may appear irrelevant, when combined with other seemingly irrelevant information, can on occasion provide a composite picture of a candidate for a position which assists in determining whether that candidate should be nominated for appointment.

(c) The following systems of records are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (2), (3) and (5); and (g):

- (1) Drug Enforcement Task Force Evaluation and Reporting System (JUSTICE/DAG-003).
- (2) General Files System of the Office of the Deputy Attorney General (JUSTICE/DAG-013).

(d) In addition, the Drug Enforcement Task Force Evaluation and Reporting System is exempt from 5 U.S.C. 552a(e)(4)(G) and (H). The exemptions for the Drug Enforcement Task Force Evaluation and Reporting System apply only to the extent that information is subject to exemption pursuant to 5 U.S.C. 552a(j)(2) and (K)(2). The exemptions for the General Files System apply only to the extent that information is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1), (k)(2) and (k)(5).

(e) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her could reveal investigative interest on the part of the Department of Justice, as well as the recipient agency. This would permit record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel. Further, making available to a record subject the accounting of disclosures could reveal the identity of a confidential source. In addition, release of an accounting of disclosures from the General Files System may reveal information that is properly classified pursuant to Executive Order 12356, and thereby cause damage to the national security.

(2) From subsection (c)(4) because these systems are exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(3) From subsection (d) because the records contained in these systems relate to official Federal investigations. Individual access to these records could compromise ongoing investigations, reveal confidential informants and/or

sensitive investigative techniques used in particular investigations, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation. In addition, release of records from the General Files System may reveal information that is properly classified pursuant to Executive Order 12356, and thereby cause damage to the national security. Amendment of the records in either of these systems would interfere with ongoing law enforcement proceedings and impose an impossible administrative burden by requiring law enforcement investigations to be continuously reinvestigated.

(4) From subsections (e)(1) and (e)(5) because in the course of law enforcement investigations information may occasionally be obtained or introduced the accuracy of which is unclear or which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of criminal activity. Moreover, it would impede any investigative process, whether civil or criminal, if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.

(5) From subsection (e)(2) because in a law enforcement investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be informed of the existence of the investigation and may therefore be able to avoid detection, apprehension, or legal obligations or duties.

(6) From subsection (e)(3) because to comply with the requirements of this subsection during the course of an investigation could impede the information gathering process, thus hampering the investigation.

(7) From subsections (e)(4) (G) and (H) because no access to these records is available under subsection (d) of the Privacy Act. (This exemption applies only to the Drug Enforcement Task Force Evaluation and Reporting System.)

(8) From subsection (g) because these systems of records are exempt from the access and amendment provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

[Order No. 57-91, 56 FR 58305, Nov. 19, 1991]

**§ 16.72 Exemption of Office of the Associate Attorney General System—limited access.**

(a) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4); (d); (e)(1), (2), (3) and (5); and (g):

(1) General Files System of the Office of the Associate Attorney General (JUSTICE/AAG-001).

These exemptions apply only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1), (k)(2) and (k)(5).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her could reveal investigative interest on the part of the Department of Justice, as well as the recipient agency. This would permit record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel. Further, making available to a record subject the accounting of disclosures could reveal the identity of a confidential source. In addition, release of an accounting of disclosures may reveal information that is properly classified pursuant to Executive Order 12356, and thereby cause damage to the national security.

(2) From subsection (c)(4) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j)(2), (k)(1), (k)(2) and (k)(5) of the Privacy Act.

(3) From subsection (d) because the records contained in this system relate to official Federal investigations. Individual access to these records could compromise ongoing investigations, reveal confidential informants and sensitive investigative techniques used in particular investigations, or constitute unwarranted invasions of the



personal privacy of third parties who are involved in a certain investigation. In addition, release of these records may reveal information that is properly classified pursuant to Executive Order 12356, and thereby cause damage to the national security. Amendment of the records in this system would interfere with ongoing law enforcement proceedings and impose an impossible administrative burden by requiring law enforcement investigations to be continuously reinvestigated.

(4) From subsections (e)(1) and (e)(5) because in the course of law enforcement investigations information may occasionally be obtained or introduced the accuracy of which is unclear or which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of criminal activity. Moreover, it would impede any investigative process, whether civil or criminal, if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.

(5) From subsection (e)(2) because in a law enforcement investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be informed of the existence of the investigation and may therefore be able to avoid detection, apprehension, or legal obligations or duties.

(6) From subsection (e)(3) because to comply with the requirements of this subsection during the course of an investigation could impede the information gathering process, thus hampering the investigation.

(7) From subsection (g) because this system of records is exempt from the access and amendment provisions of subsection (d) pursuant to subsections (j)(2), (k)(1), (k)(2) and (k)(5) of the Privacy Act.

[Order No. 57-91, 56 FR 58305, Nov. 19, 1991]

**§ 16.73 Exemption of Office of Legal Policy System—limited access.**

(a) The following system of records is exempt from 5 U.S.C 552a (d)(1), (2), (3)

and (4); (e)(1) and (2), (e)(4)(G) and (H), (e)(5); and (g):

(1) Freedom of Information and Privacy Appeals Index (JUSTICE/OLP-001).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(2) and (k)(5).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsections (d)(1), (2), (3), and (4) to the extent that information in this record system relates to official Federal investigations and matters of law enforcement. Individual access to these records might compromise ongoing investigations, reveal confidential informants or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation. Amendment of the records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(2) From subsections (e)(1) and (5) because in the course of law enforcement investigations, information may occasionally be obtained or introduced the accuracy of which is unclear or which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of criminal activity. Moreover, it would impede the specific investigative process if it were necessary to assure the relevance, accuracy, timeliness, and completeness of all information obtained.

(3) From subsection (e)(2) because in a law enforcement investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be informed of the existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations or duties.

(4) From subsections (e)(4)(G) and (H) because this system is exempt from the

access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(5) From subsection (g) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(c) The following system of records is exempt from 5 U.S.C. 552a(d)(1) and (e)(1):

(1) U.S. Judges Records System (JUSTICE/OLP-002).

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k)(5).

(d) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (d)(1) because many persons are contracted who, without an assurance of anonymity, refuse to provide information concerning a candidate for a judgeship. Access could reveal the identity of the source of the information and constitute a breach of the promised confidentiality on the part of the Department. Such breaches ultimately would restrict the free flow of information vital to the determination of a candidate's qualifications and suitability.

(2) From subsection (e)(1) because in the collection of information for investigative and evaluative purposes, it is impossible to determine advance what exact information may be of assistance in determining the qualifications and suitability of a candidate. Information which may seem irrelevant, when combined with other seemingly irrelevant information, can on occasion provide a composite picture of a candidate which assists in determining whether that candidate should be nominated for appointment.

(e) The following system of records is exempt from U.S.C. 552a(c) (3) and (4); (d); (e)(1), (2) and (3), (e)(4)(G) and (H) (e)(5); and (g):

(1) General Files System of the Office of Legal Policy (JUSTICE/OLP-003).

These exemptions apply only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), and (k)(5).

(f) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her would reveal investigative interest on the part of the Department as well as the recipient agency. This would permit record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel.

(2) From subsection (c)(4) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(3) From subsection (d) because the records contained in this system relate to official Federal investigations. Individual access to these records might compromise ongoing investigations, reveal confidential informants, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation. Amendment of records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4) From subsections (e) (1) and (5) because in the course of law enforcement investigations, information may occasionally be obtained or introduced the accuracy of which is unclear or which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information since it may aid in establishing patterns of criminal activity. Moreover, it would impede the specific investigation process if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.

(5) From subsections (e)(2) because in a law enforcement investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to enforcement in that the subject of the investigation would be informed of the

System" is not accessed by any other agency. All disclosures of computerized information are made in printed form in accordance with the routine uses which are set forth below.

Records also are maintained on a temporary basis relevant to the FBI's domestic police cooperating program, where assistance in obtaining information is provided to state and local police agencies.

Also, personnel type information, dealing with such matters as attendance and production and accuracy

requirements is maintained by some divisions.

(The following chart identifies various listings or indexes maintained by the FBI which have been or are being used by various divisions of the FBI in their day-to-day operations. The chart identifies the list by name, description and use, and where maintained, i.e. FBI Headquarters and/or Field Office. The number in parentheses in the field office column indicates the number of field offices which maintain these indices. The chart indicates, under "status of index," those indexes which are in

current use (designated by the word "active") and those which are no longer being used, although maintained (designated by the word "inactive"). There are 27 separate indices which are classified in accordance with existing regulations and are not included in this chart. The following indices are no longer being used by the FBI and are being maintained at FBIHQ pending receipt of authority to destroy: Black Panther Party Photo Index; Black United Front Index; Security Index; and Wounded Knee Album.)

Title of index	Description and use	Status of index	Maintained at—	
			Headquarters	Field office
Administrative Index (ADEX).....	Consists of cards with descriptive data on individuals who were subject to investigation in a national emergency because they were believed to constitute a potential or active threat to the internal security of the United States. When ADEX was started in 1971, it was made up of people who were formerly on the Security Index, Reserve Index, and Agitator Index. This index is maintained in two separate locations in FBI Headquarters. ADEX was discontinued in January 1978.	Inactive.....	Yes.....	Yes (29).
Anonymous Letter File.....	Consists of photographs of anonymous communications and extortionate credit transactions, kidnapping, extortion and threatening letters.	Active.....	Yes.....	No.
Associates of DEA Class 1 Narcotics Violators Listing.....	Consists of a computer listing of individuals whom DEA has identified as associates of Class 1 Narcotics Violators.	Active.....	Yes.....	Yes (56).
Background Investigation Index—Department of Justice.....	Consists of cards on persons who have been the subject of a full field investigation in connection with their consideration for employment in sensitive positions with Department of Justice, such as U.S. Attorney, Federal judges, or a high level Department position.	Active.....	Yes.....	No.
Background Investigation Index—White House, Other Executive Agencies, and Congress.....	Consists of cards on persons who have been the subject of a full field investigation in connection with their consideration for employment in sensitive positions with the White House, Executive agencies (other than the Department of Justice) and the Congress.	Active.....	Yes.....	No.
Bank Fraud and Embezzlement Index.....	Consists of individuals who have been the subject of "Bank Fraud and Embezzlement" investigation. This file is used as an investigative aid.	Active.....	No.....	Yes (1).
Bank Robbery Album.....	Consists of photos of bank robbers, burglars, and tertiary subjects. In some field offices it will also contain pictures obtained from local police departments of known armed robbers and thus potential bank robbers. The index is used to develop investigative leads in bank robbery cases and may also be used to show to witnesses of bank robberies. It is usually filed by race, height, and age. This index is also maintained in one resident agency (a suboffice of a field office).	Active.....	No.....	Yes (47).
Bank Robbery Nickname Index.....	Consists of nicknames used by known bank robbers. The index card on each would contain the real name and method of operation and are filed in alphabetical order.	Active.....	No.....	Yes (1).
Bank Robbery Note File.....	Consists of photographs of notes used in bank robberies in which the suspect has been identified. This index is used to help solve robberies in which the subject has not been identified but a note was left. The note is compared with the index to try to match the sentence structure and handwriting for the purpose of identifying possible suspects.	Active.....	Yes.....	No.

Title of index	Description and use	Status of index	Maintained at—	
			Headquarters	Field office
Bank Robbery Suspect Index.....	Consists of a control file or index cards with photos, if available, of bank robbers or burglars. In some field offices these people may be part of the bank robbery album. This index is generally maintained and used in the same manner as the bank robbery album.	Active.....	No.....	Yes (33).
Car Ring Case Photo Album.....	Consists of photos of subjects and suspects involved in a large car theft ring investigation. It is used as an investigative aid.	Active.....	No.....	Yes (3).
Car Ring Case Photo Album and Index.....	Consists of photos of subjects and suspects involved in a large car theft ring investigation. The card index maintained in addition to the photo album contains the names and addresses appearing on fraudulent title histories for stolen vehicles. Most of these names appearing on these titles are fictitious. But the photo album and card indexes are used as an investigative aid.	Active.....	No.....	Yes (1).
Car Ring Case Toll Call Index.....	Consists of cards with information on persons who subscribe to telephone numbers to which toll calls have been placed by the major subjects of a large car theft ring investigation. It is maintained numerically by telephone number. It is used to facilitate the development of probable cause for a court-approved wiretap.	Active.....	No.....	Yes (2).
Car Ring Theft Working Index.....	Contains cards on individuals involved in car ring theft cases on which the FBI Laboratory is doing examination work.	Active.....	Yes.....	No.
Carriage Album.....	Consists of photos with descriptive data of individuals who have been convicted of theft from interstate shipment or interstate transportation of stolen property where there is a reason to believe they may repeat the offense. It is used in investigating the above violations.	Active.....	No.....	Yes (3).
Channelizing Index.....	Consists of cards with the names and case file numbers of people who are frequently mentioned in information reports. The index is used to facilitate the distributing or channeling of informant reports to appropriate files.	Active.....	No.....	Yes (9).
Check Circular File.....	Consists of files numerically in a control file on fugitives who are notorious fraudulent check passers and who are engaged in a continuing operation of passing checks. The files which include the subject's name, photo, a summary of the subject's method of operation and other identifying data is used to alert other FBI field offices and business establishments which may be the victims of bad checks.	Active.....	Yes.....	Yes (43).
Computerized Telephone Number File (CTNF) Intelligence.....	Consists of a computer listing of telephone numbers (and subscribers' names and addresses) utilized by subjects and/or certain individuals which come to the FBI's attention during major investigations. During subsequent investigations, telephone numbers, obtained through subpoena, are matched with the telephone numbers on file to determine connections or associations.	Active.....	Yes.....	No.
Con Man Index.....	Consists of computerized names of individuals, along with company affiliation, who travel nationally and internationally while participating in large-dollar-value financial swindles.	Active.....	Yes.....	No.
Confidence Game (Flim Flam) Album.....	Consists of photos with descriptive information on individuals who have been arrested for confidence games and related activities. It is used as an investigative aid.	Active.....	No.....	Yes (4).
Copyright Matters Index.....	Consists of cards of individuals who are film collectors and film titles. It is used as a reference in the investigation of copyright matters.	Active.....	No.....	Yes (1).
Criminal Intelligence Index.....	Consists of cards with name and file number of individuals who have become the subject of an antiracketeering investigation. The index is used as a quick way to ascertain file numbers and the correct spelling of names. This index is also maintained in one resident agency.	Active.....	No.....	Yes (2).
Criminal Informant Index.....	Consists of cards containing identity and brief background information on all active and inactive informants furnishing information in the criminal area.	Active.....	Yes.....	No.

Title of index	Description and use	Status of index	Maintained at—	
			Headquarters	Field office
DEA Class 1 Narcotics Violators Listing	Consists of a computer listing of narcotic violators—persons known to manufacture, supply, or distribute large quantities of illicit drugs—with background data. It is used by the FBI in their role of assisting DEA in disseminating intelligence data concerning illicit drug trafficking. This index is also maintained in two resident agencies.	Active.....	Yes.....	Yes (56)
Deserter Index.....	Contains cards with the names of individuals who are known military deserters. It is used as an investigative aid.	Active.....	No.....	Yes (4).
False Identities Index.....	Contains cards with the names of deceased individuals whose birth certificates have been obtained by other persons for possible false identification uses and in connection with which the FBI laboratory has been requested to perform examinations.	Inactive.....	Yes.....	No.
False Identities List.....	Consist of a listing of names of deceased individuals whose birth certificates have been obtained after the person's death, and thus whose names are possibly being used for false identification purposes. The listing is maintained as part of the FBI's program to find persons using false identities for illegal purposes.	Inactive.....	No.....	Yes (31).
False Identity Photo Album.....	Consists of names and photos of people who have been positively identified as using a false identification. This is used as an investigative aid in the FBI's investigation of false identities.	Inactive.....	No.....	Yes (2).
FBI/Inspector General (IG) Case Pointer System (FICPS).....	Consists of computerized listing of individual names of organizations which are the subject of active and inactive fraud investigations, along with the name of the agency conducting the investigation. Data is available to IG offices throughout the federal government to prevent duplication of investigative activity.	Active.....	Yes.....	No.
FBI Wanted Persons Index.....	Consists of cards on persons being sought on the basis of Federal warrants covering violations which fall under the jurisdiction of the FBI. It is used as a ready reference to identify those fugitives.	Active.....	Yes.....	No.
Foreign Counterintelligence (FCI).....	Consists of cards with identity background data on all active and inactive operational and informational assets in the foreign counterintelligence field. It is used as a reference aid on the FCI Asset program.	Active.....	Yes.....	No.
Fraud Against the Government Index.....	Consists of individuals who have been the subject of a "fraud against the Government" investigation. It is used as investigative aid.	Active.....	No.....	Yes (1)
Fugitive Bank Robbers File.....	Consists of fliers on bank robbery fugitives filed sequentially in a control file. FBI Headquarters distributes to the field offices fliers on bank robbers in a fugitive status for 15 or more days to facilitate their location.	Active.....	Yes.....	Yes (43).
General Security Index.....	Contains cards on all persons that have been the subject of a security classification investigation by the FBI field office. These cards are used for general reference purposes.	Active.....	No.....	Yes (1).
Hoodlum License Plate Index.....	Consists of cards with the license plates numbers and descriptive data on known hoodlums and cars observed in the vicinity of hoodlum homes. It is used for quick identification of such person in the course of investigation. The one index which is not fully retrievable is maintained by a resident agency.	Active.....	No.....	Yes (3)
Identification Order Fugitive Flier File.....	Consists of fliers numerically in a control file. When immediate leads have been exhausted in fugitive investigations and a crime of considerable public interest has been committed, the fliers are given wide circulation among law enforcement agencies throughout the United States and are posted in post offices. The fliers contain the fugitive's photograph, fingerprints, and description.	Active.....	Yes.....	Yes (49).

Title of index	Description and use	Status of index	Maintained at—	
			Headquarters	Field office
Informant Index.....	Consists of cards with the name, symbol numbers, and brief background information on the following categories of active and inactive informants: top echelon criminal informants, security informants, criminal information, operational and informational assets, extremist informants (discontinued), plant informant—informants on and about certain military bases (discontinued), and potential criminal informants.	Active.....	No.....	Yes (56)
Informants in Other Field Offices, Index of.....	Consist of cards with names and/or symbol numbers of informants in other FBI field offices that are in a position to furnish information that would also be included on the index card.	Active.....	No.....	Yes (15).
Interstate Transportation of Stolen Aircraft Photo Album.....	Consists of photos and descriptive data on individuals who are suspects known to have been involved in interstate transportation of stolen aircraft. It is used as an investigative aid.	Active.....	No.....	Yes (1).
IRS Wanted List.....	Consists of one-page fliers from IRS on individuals with background information who are wanted by IRS for tax purposes. It is used in the identification of persons wanted by IRS.	Active.....	No.....	Yes (11).
Kidnapping Book.....	Consists of data, filed chronologically, on kidnappings that have occurred since the early fifties. The victims' names and the suspects, if known, would be listed with a brief description of the circumstances surrounding the kidnapping. The file is used as a reference aid in matching up prior methods of operation in unsolved kidnapping cases.	Active.....	Yes.....	No.
Known Check Passers Album.....	Consists of photos with descriptive data of persons known to pass stolen, forged, or counterfeit checks. It is used as an investigative aid.	Active.....	No.....	Yes (4).
Known Gambler Index.....	Consists of cards with names, descriptive data, and sometimes photos of individuals who are known bookmakers and gamblers. The index is used in organized crime and gambling investigations. Subsequent to GAO's review, and at the recommendation of the inspection team at one of the two field offices where the index was destroyed and thus is not included in the total.	Active.....	No.....	Yes (5)
La Cosa Nostra (LCN) Membership Index.....	Contains cards on individuals having been identified as members of the LCN index. The cards contain personal data and pictures. The index is used solely by FBI agents for assistance in investigating organized crime matters.	Active.....	Yes.....	Yes (55).
Leased Line Letter Request Index.....	Contains cards on individuals and organizations who are or have been the subject of a national security electronic surveillance where a leased line letter was necessary. It is used as an administrative and statistical aid.	Active.....	Yes.....	No.
Mail Cover Index.....	Consists of cards containing a record of all mail covers conducted on individuals and groups since about January 1973. It is used for reference in preparing mail cover requests.	Active.....	Yes.....	No.
Military Deserter Index.....	Consists of cards containing the names of all military deserters where the various military branches have requested FBI assistance in locating. It is used as an administrative aid.	Active.....	Yes.....	No.
National Bank Robbery Album.....	Consists of fliers on bank robbery suspects held sequentially in a control file. When an identifiable bank camera photograph is available and the case has been under investigation for 30 days without identifying the subject, FBIHQ sends a flier to the field offices to help identify the subject.	Active.....	Yes.....	Yes (42).
National Fraudulent Check File.....	Contains photographs of the signature on stolen and counterfeit checks. It is filed alphabetically but there is no way of knowing the names are real or fictitious. The index is used to help solve stolen check cases by matching checks obtained in such cases against the index to identify a possible suspect.	Active.....	Yes.....	No.

Title of index	Description and use	Status of index	Maintained at—	
			Headquarters	Field office
National Security Electronic Surveillance Card File	Contains cards recording electronic surveillances previously authorized by the Attorney General and previously and currently authorized by the FISC; current and previous assets in the foreign counterintelligence field; and a historical, inactive section which contains cards believed to record nonconsented physical entries in national security cases, previously toll billings, mail covers and leased lines. The inactive section also contains cards reflecting previous Attorney General approvals and denials for warrantless electronic surveillance in the national security cases.	Inactive.....	Yes.....	No.
Night Depository Trap Index.....	Contains cards with the names of persons who have been involved in the theft of deposits made in bank night depository boxes. Since these thefts have involved various methods, the FBI uses the index to solve such cases by matching up similar methods to identify possible suspects.	Active.....	Yes.....	No.
Organized Crime Photo Album.....	Consists of photos and background information on individuals involved in organized crime activities. The index is used as a ready reference in identifying organized crime figures within the field offices' jurisdiction.	Active.....	No.....	Yes (13).
Photospread Identification Elimination File.....	Consists of photos of individuals who have been subjects and suspects in FBI investigations. It also includes photos received from other law enforcement agencies. These pictures can be used to show witnesses of certain crimes.	Active.....	No.....	Yes (14).
Prostitute Photo Album.....	Consists of photos with background data on prostitutes who have prior local or Federal arrests for prostitution. It is used to identify prostitutes in connection with investigations under the White Slave Traffic Act.	Active.....	No.....	Yes (4).
Royal Canadian Mounted Police (RCMP) Wanted Circular File.....	Consists of a control file of individuals with background information of persons wanted by the RCMP. It is used to notify the RCMP if an individual is located.	Active.....	No.....	Yes (17).
Security Informant Index.....	Consists of cards containing identity and brief background information on all active and inactive informants furnishing information in the criminal area.	Active.....	Yes.....	No.
Security Subjects Control Index.....	Consists of cards containing the names and case file numbers of individuals who have been subject to security investigations check. It is used as a reference source.	Active.....	No.....	Yes (1).
Security Telephone Number Index.....	Contains cards with telephone subscriber information subpoenaed from the telephone company in any security investigation. It is maintained numerically by the last three digits in the telephone number. It is used for general reference purposes in security investigations.	Active.....	No.....	Yes (1).
Selective Service Violators Index.....	Contains cards on individuals being sought on the basis of Federal warrants for violation of the Selective Service Act.	Active.....	Yes.....	No.
Sources of Information Index.....	Consist of cards on individuals and organizations such as banks, motels, local government that are willing to furnish information to the FBI with sufficient frequency to justify listing for the benefit of all agents. It is maintained to facilitate the use of such sources.	Active.....	No.....	Yes (10).
Special Services Index.....	Contains cards of prominent individuals who are in a position to furnish assistance in connection with FBI investigative responsibility.	Active.....	No.....	Yes (28).
Stolen Checks and Fraud by Wire Index.....	Consists of cards on individuals involved in check and fraud by wire violations. It is used as an investigative aid.	Active.....	No.....	Yes (1).
Stop Notices Index.....	Consists of cards on names of subjects or property where the field office has placed a stop at another law enforcement agency or private business such as pawn shops in the event information comes to the attention of that agency concerning the subject or property. This is filed numerically by investigative classification. It is used to insure that the agency where the stop is placed is notified when the subject is apprehended or the property is located or recovered.	Active.....	No.....	Yes (43).

Title of index	Description and use	Status of index	Maintained at—	
			Headquarters	Field office
Surveillance Locator Index.....	Consists of cards with basic data on individuals and businesses which have come under physical surveillance in the city in which the field office is located. It is used for general reference purposes in antiracketeering investigations.	Active.....	No.....	Yes (2).
Telephone Number Index— Gamblers.	Contains information on persons identified usually as a result of a subpoena for the names of subscribers to particular telephone numbers or toll records for a particular phone number of area gamblers and bookmakers. The index cards are filed by the last three digits of the telephone number. The index is used gambling investigations.	Active.....	No.....	Yes (2).
Telephone Subscriber and Toll Records Check Index.	Contains cards with information on persons identified as the result of a formal request or subpoena to the phone company for the identity of subscribers to particular telephone numbers. The index cards are filed by telephone number and would also include identity of the subscriber, billing party's identity, subscriber's address, date of request from the telephone company, and file number.	Active.....	No.....	Yes (1).
Thieves, Couriers and Fences Photo Index.	Consists of photos and background information on individuals who are or are suspected of being thieves, couriers, or fences based on their past activity in the area of interstate transportation of stolen property. It is used as an investigative aid.	Active.....	No.....	Yes (4).
Toll Record Request Index.....	Contains cards on individuals and organizations on whom toll records have been obtained in national security related cases and with respect to which FBIHQ had to prepare a request letter. It is used primarily to facilitate the handling of repeat requests on individuals listed.	Active.....	Yes.....	No.
Top Burglar Album.....	Consists of photos and background data of known and suspect top burglars involved in the area of interstate transportation of stolen property. It is used as an investigative aid.	Active.....	No.....	Yes (4).
Top Echelon Criminal Inform- er Program (TECIP) Index.	Consists of cards containing identity and brief background information on individuals who are either furnishing high level information in the organized crime area or are under development to furnish such information. The index is used primarily to evaluate, corroborate, and coordinate informant information and to develop prosecutive data against racket figures under Federal, State, and local statutes.	Active.....	Yes.....	No.
Top Ten Program File.....	Consists of files, filed numerically in a control file, on fugitives considered by the FBI to be 1 of the 10 most wanted, including a fugitive of the top 10 usually assures a greater national news coverage as well as nation-wide circulation of the file.	Active.....	Yes.....	Yes (44).
Top Thief Program Index.....	Consists of cards of individuals who are professional burglars, robbers, or fences dealing in items likely to be passed in interstate commerce or who travel interstate to commit the crime. Usually photographs and background information would also be obtained on the index card. The index is used as an investigative aid.	Active.....	No.....	Yes (27).
Truck Hijack Photo Album.....	Contains photos and descriptive data of individuals who are suspected truck hijackers. It is used as an investigative aid and for displaying photos to witnesses and/or victims to identify unknown subjects in hijacking cases.	Active.....	No.....	Yes (4).
Truck Thief Suspect Photo Album.	Consists of photos and background data on individuals previously arrested or are currently suspects regarding vehicle theft. The index is used as an investigative aid.	Active.....	No.....	Yes (1).
Traveling Criminal Photo Album.	Consists of photos with identifying data of individuals convicted of various criminal offenses and may be suspects in other offenses. It is used as an investigative aid.	Active.....	No.....	Yes (1).
Veterans Administrative (VA)/ Federal Housing Adminis- tration Matters (FHA) Index.	Consists of cards of individuals who have been subject of an investigation relative to VA and FHA matters. It is used as an investigative aid.	Active.....	No.....	Yes (1).
Wanted Fliers File.....	Consists of files, filed numerically in a control file, on badly wanted fugitives whose apprehension may be facilitated by a flier. The file contains the names, photographs, aliases, previous convictions, and a caution notice.	Active.....	Yes.....	Yes (46).



Title of index	Description and use	Status of index	Maintained at—	
			Headquarters	Field office
Wheelindex	Contains the nicknames and the case file numbers of organized crime members. It is used in organized crime investigations.	Active	No	Yes (1).
White House Special Index	Contains cards on all potential White House appointees, staff members, guests, and visitors that have been referred to the FBI by the White House security office for a records check to identify any adverse or derogatory information. This index is used to expedite such check in view of the tight timeframe usually required.	Active	Yes	No.
Witness Protection Program Index	Contains cards on individuals who have been furnished a new identity by the U.S. Justice Department because of their testimony in organized crime trials. It is used primarily to notify the U.S. Marshals Service when information related to the safety of a protected witness comes to the FBI's attention.	Active	Yes	No.

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Federal Records Act of 1950, Title 44, United States Code, chapter 31, section 3101; and title 36, Code of Federal Regulations, chapter XII, require Federal agencies to insure that adequate and proper records are made and preserved to document the organization, functions, policies, decisions, procedures and transactions and to protect the legal and financial rights of the Federal Government, title 28, United States Code, section 534, delegates authority to the Attorney General to acquire, collect, classify, and preserve identification, criminal identification, crime and other records.

#### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Records, both investigative and administrative, are maintained in this system in order to permit the FBI to function efficiently as an authority, responsive component of the Department of Justice. Therefore, information in this system is disclosed to officials and employees of the Department of Justice, and/or all components thereof, who have need of the information in the performance of their official duties.

Personal information from this system may be disclosed as a routine use to any Federal agency where the purpose in making the disclosure is compatible with the law enforcement purpose for which it was collected, e.g., to assist the recipient agency in conducting a lawful criminal or intelligence investigation, to assist the recipient agency in making a determination concerning an individual's suitability for employment and/or trustworthiness for employment and/or trustworthiness for access clearance purposes, or to assist the recipient agency in the performance of

any authorized function where access to records in this system is declared by the recipient agency to be relevant to that function.

In addition, personal information may be disclosed from this system to members of the Judicial Branch of the Federal Government in response to a specific request, or at the initiation of the FBI, where disclosure appears relevant to the authorized function of the recipient judicial office or court system. An example would be where an individual is being considered for employment by a Federal judge.

Information in this system may be disclosed as a routine use to any state or local government agency directly engaged in the criminal justice process, e.g., police, prosecution, penal, probation and parole, and the judiciary, where access is directly related to a law enforcement function of the recipient agency e.g. in connection with a lawful criminal or intelligence investigation, or making a determination concerning an individual's suitability for employment as a state or local law enforcement employee or concerning a victim's compensation under a state statute. Disclosure to a state or local government agency, (a) not directly engaged in the criminal justice process or (b) for a licensing or regulatory function, is considered on an individual basis only under exceptional circumstances, as determined by the FBI.

Information in this system pertaining to the use, abuse or traffic of controlled substances may be disclosed as a routine use to federal, state or local law enforcement agencies and to licensing or regulatory agencies empowered to engage in the institution and prosecution of cases before courts and licensing boards in matters relating to controlled substances, including courts and licensing boards responsible for the

licensing or certification of individuals in the fields of pharmacy and medicine.

Information in this system may be disclosed as a routine use in a proceeding before a court or adjudicative body, e.g., the Equal Employment Opportunity Commission and the Merit Systems Protection Board, before which the FBI is authorized to appear, when (a) the FBI or any employee thereof in his or her official capacity, or (b) any employee in his or her individual capacity where the Department of Justice has agreed to represent the employee, or (c) the United States, where the FBI determines it is likely to be affected by the litigation, is a party to litigation or has an interest in litigation and such records are determined by the FBI to be relevant to the litigation.

Information in this system may be disclosed as a routine use to an organization or individual in both the public or private sector if deemed necessary to elicit information or cooperation from the recipient for use by the FBI in the performance of an authorized activity. An example would be where the activities of an individual are disclosed to a member of the public in order to elicit his/her assistance in our apprehension or detection efforts.

Information in this system may be disclosed as a routine use to an organization or individual in both the public or private sector where there is reason to believe the recipient is or could become the target of a particular criminal activity or conspiracy, to the extent the information is relevant to the protection of life or property.

Information in this system may be disclosed to legitimate agency of a foreign government where the FBI determines that the information is relevant to that agency's responsibilities, and dissemination

serves the best interests of the U.S. Government, and where the purpose in making the disclosure is compatible with the purpose for which the information was collected.

Relevant information may be disclosed from this system to the news media and general public where there exists a legitimate public interest, e.g., to assist in the location of Federal fugitives, to provide notification of arrests, and where necessary for protection from imminent threat of life or property. This would include releases of information in accordance with 28 CFR 50.2.

A record relating to an actual or potential civil or criminal violation of the copyright statute, Title 17, United States Code, or the trademark statutes, Titles 15 and 17, U.S. Code, may be disseminated to a person injured by such violation to assist him/her in the institution or maintenance of a suit brought under such titles.

The FBI has received inquiries from private citizens and Congressional offices on behalf of constituents seeking assistance in locating individuals such as missing children and heirs to estates. Where the need is acute, and where it appears FBI files may be the only lead in locating the individual, consideration will be given to furnishing relevant information to the requester. Information will be provided only in those instances where there are reasonable grounds to conclude from available information the individual being sought would want the information to be furnished, e.g., an heir to a large estate. Information with regard to missing children will not be provided where they have reached their majority.

Information contained in this system, may be made available to a Member of Congress or staff acting upon the member's behalf when the member of staff requests the information in behalf of and at the request of the individual who is the subject of the record.

A record from this system of records may be disclosed as a routine use to the *National Archives and Records Administration and General Services Administration* in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906, to the extent that legislation governing the records permits.

#### **POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

##### **STORAGE:**

The active main files are maintained in hard copy form and some inactive records are maintained on microfilm.

Investigative information which is maintained in computerized form may be stored in memory, on disk storage, on computer tape, or on a computer printed listing.

##### **RETRIEVABILITY:**

The FBI General Index must be searched to determine what information, if any, the FBI may have in its files. Index records, or pointers to specific FBI files, are created on all manner of subject matters, but the predominant type record is the name index record. It should be noted the FBI does not index all individuals who furnish information or all names developed during the course of an investigation. Only that information considered pertinent, relevant, or essential for future retrieval, is indexed. In certain major cases, individuals interviewed may be indexed to facilitate the administration of the investigation. The FBI has automated that portion of its index containing the most recent information—15 years for criminal related matters and 30 years for intelligence and other type matters. Automation will not change the "Central Records System"; it will only facilitate more economic and expeditious access to the main files. Searches against the automated records are accomplished on a "batch off-line" basis for certain submitting agencies where the name search requests conform to FBI specified formats and also in an "on-line" mode with the use of video display terminals for other requests. The FBI will not permit any organization, public or private, outside the FBI to have direct access to the FBI indices system. All searches against the indices data base will be performed on site within FBI space by FBI personnel with the assistance of the automated procedures, where feasible. Automation of the various FBI field office indices was completed in 1989. This automation initiative has been on a "day-one" basis. This indices system points to specific files within a given field office.

Additionally, certain complicated investigative matters may be supported by specialized computer systems or by individual microcomputers. Indices created in these environments are maintained as part of the particular computer system and accessible only through the system or through printed listings of the indices. *Full text retrieval is used in a limited number of cases as an investigative technique. It is not part of the normal search process and is not used as a substitute for the General Index or computer indices mentioned above.*

The FBI will transfer historical records to the National Archives

consistent with 44 U.S.C. 2103. No record of individuals or subject matter will be retained for transferred files; however, a record of the file numbers will be retained to provide full accountability of FBI files and thus preserve the integrity of the filing system.

##### **SAFEGUARDS:**

Records are maintained in a restricted area and are accessed only by agency personnel. All FBI employees receive a complete background investigation prior to being hired. All employees are cautioned about divulging confidential information or any information contained in FBI files. Failure to abide by this provision violates Department of Justice regulations and may violate certain statutes providing maximum severe penalties of a ten thousand dollar fine or 10 years imprisonment or both. Employees who resign or retire are also cautioned about divulging information acquired in the jobs. Registered mail is used to transmit routine hard copy records between field offices. Highly classified records are hand carried by Special Agents or personnel of the Armed Forces Courier Service. Highly classified or sensitive privacy information, which is electronically transmitted between field offices, is transmitted in encrypted form to prevent interception and interpretation. Information transmitted in teletype form is placed in the main files of both the receiving and transmitting field offices. Field offices involved in certain complicated investigative matters may be provided with on-line access to the duplicative computerized information which is maintained for them on disk storage in the FBI Computer Center in Washington, D.C., and this computerized data is also transmitted in encrypted form.

##### **RETENTION AND DISPOSAL:**

As the result of an extensive review of FBI records conducted by NARA, records evaluated as historical and permanent will be transferred to the National Archives after established retention periods and administrative needs of the FBI have elapsed. As deemed necessary, certain records may be subject to restricted examination and usage, as provided by 44 U.S.C. section 2104.

FBI record disposition programs relevant to this System are conducted in accordance with the FBI Records Retention Plan and Disposition Schedule which was approved by the Archivist of the United States and the U.S. District Court, District of Columbia.

Investigative, applicant and administrative records which meet the destruction criteria will be destroyed after 20 or 30 years at FBI Headquarters and after 1, 5, 10 or 20 years in FBI Field Offices. Historical records will be transferred to the National Archives after 30 or 50 years, contingent upon investigative and administrative needs. The administrative indices and listings described within this System were appraised separately and disposition authority established. (Job No. NC1-65-82-4 and amendments)

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Federal Bureau of Investigation; Washington, DC 20535.

**NOTIFICATION PROCEDURE:**

Same as above.

**RECORD ACCESS PROCEDURES:**

A request for access to a record from the system shall be made in writing with the envelope and the letter clearly marked "Privacy Access Request". Include in the request your full name, complete address, date of birth, place of birth, notarized signature, and other identifying data you may wish to furnish to assist in making a proper search of our records. Also include the general subject matter of the document or its file number. The requester will also provide a return address for transmitting the information. Requests for access to information maintained at FBI Headquarters must be addressed to the Director, Federal Bureau of Investigation, Washington, DC 20535. Requests for information maintained at FBI field divisions or Legal Attaches must be made separately and addressed to the specific field division or Legal Attache listed in the appendix to this system notice.

**CONTESTING RECORD PROCEDURES:**

Individuals desiring to contest or amend information maintained in the system should also direct their request to the Director, Federal Bureau of Investigation, Washington, DC 20535, stating clearly and concisely what information is being contested, the reasons for contesting it, and the proposed amendment to the information sought.

**RECORD SOURCE CATEGORIES:**

The FBI, by the very nature and requirement to investigate violations of law within its investigative jurisdiction and its responsibility for the internal security of the United States, collects information from a wide variety of sources. Basically, it is the result of investigative efforts and information furnished by other Government

agencies, law enforcement agencies, and the general public, informants, witnesses, and public source material.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

The Attorney General has exempted this system from subsections (c)(3), (d), (e)(1)(2) and (3), (e)(4)(C) and (H), (e)(8)(f), (g), of the Privacy Act pursuant to 5 U.S.C. 552a (j) and (k). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553 (b), (c) and (e)

Appendix of Field Divisions and Legal Attaches for the Federal Bureau of Investigation Field Divisions; Justice/ FBI-999

5th Floor, 445 Broadway, Albany, NY 12201.

POB 25186, Albuquerque, NM 87125.

POB 100560, Anchorage, AK 99510.

POB 1683, Atlanta, GA 30370.

7142 Ambassador Road, Baltimore, MD 21207.

2121 Building, Birmingham, AL 35203.

John F. Kennedy Federal Office Building, Boston, MA 02203.

111 West Huron Street, Buffalo, NY 14202.

6010 Kenley Lane, Charlotte, NC 28217.

219 S. Dearborn St., Chicago, IL 60604.

POB 1277, Cincinnati, OH 45201.

1240 E. 9th St., Cleveland, OH 44199.

POB 137, Columbia, SC 29202.

1801 W. Lamar, Dallas, TX 75202

POB 1229, Denver, CO 80201.

POB 2118, Detroit, MI 48231.

700 E. San Antonio Ave., El Paso, TX 79901.

POB 50164, Honolulu, HI 96850.

POB 61369, Houston, TX 77208.

POB 1186, Indianapolis, IN 46206.

100 W. Capitol St., Jackson, MS 39269.

POB 8928, Jacksonville, FL 32239.

POB 2449, Kansas City, MO 64142.

POB 10368, Knoxville, TN 37919.

POB 16032, Las Vegas, NV 89101.

POB 21470, Little Rock, AR 72221-1470.

11000 Wilshire Blvd., Los Angeles, CA 90024.

POB 2467, Louisville, KY 40201.

167 N. Main St., Memphis, TN 38103.

POB 592418, Miami, FL 33159.

POB 2058, Milwaukee, WI 53201.

392 Federal Building, Minneapolis, MN 55401.

POB 2128, Mobile, AL 36652.

POB 1158, Newark, NJ 07101.

POB 2058, New Haven, CT 06521.

POB 51930, New Orleans, LA 70151.

POB 1425, New York, NY 10008.

POB 3828, Norfolk, VA 23514.

POB 54511, Oklahoma City, OK 73154.

POB 548, Omaha, NE 68101.

600 Arch St., Philadelphia, PA 19106.

201 E. Indianola, Phoenix, AZ 85012.

POB 1315, Pittsburgh, PA 15230.

POB 709, Portland, OR 97207.

POB 12325, Richmond, VA 23241.  
POB 13130, Sacramento, CA 95813.  
POB 7251, St. Louis, MO 63177.  
125 S. State St., Salt Lake City, UT 84138.

POB 1630, San Antonio, TX 78296.

880 Front St., San Diego, CA 92188.

POB 36015, San Francisco, CA 94102.

POB BT, San Juan, PR 00936.

915 2nd Ave., Seattle, WA 98174.

POB 3648, Springfield, IL 62706.

POB 172177, Tampa, FL 33602.

Washington Field Office, Washington, DC 20535.

Federal Bureau of Investigation Academy, Quantico, VA 22135.

Legal Attaches: (Send c/o the American Embassy for the Cities indicated).

Bern, Switzerland.

Bogota, Colombia (APO, Miami 34038).

Bonn, Germany (Box 310, APO, New York 09080).

Bridgetown, Barbados (Box B, FPO, Miami 34054).

Brussels, Belgium (APO, New York 09667).

Canberra, Australia (APO, San Francisco 96404-0001).

Hong Kong, B.C.C. (FPO, San Francisco 96659-0002).

London, England (Box 2, FPO, New York 09509).

Manila, Philippines (APO, San Francisco 96528).

Mexico City, Mexico (POB 3087, Laredo, TX 78044-3087).

Montevideo, Uruguay (APO, Miami 34035).

Ottawa, Canada.

Panama City, Panama (Box E, APO, Miami 34002).

Paris, France (APO, New York 09777).

Rome, Italy (APO, New York 09794).

Tokyo, Japan (APO, San Francisco 96503).

JUSTICE / FBI - 003

**SYSTEM NAME:**

Bureau Mailing Lists.

**SYSTEM LOCATION**

Federal Bureau of Investigation, J. Edgar Hoover Bldg. 10th and Pennsylvania Ave., NW., Washington, DC 20535, 59 field divisions and 16 Legal Attaches (see Appendix to 002)

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals who have requested receipt of Bureau material and who meet established criteria (basically law enforcement or closely related areas). With regard to lists maintained in field divisions or Legal attaches, individuals and organizations who may be in position to furnish assistance to the FBI's law enforcement efforts.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Name, address and business affiliation, if appropriate.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Title 5, U.S. Code, Section 301 and Title 44, U.S. Code, Section 3101.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

For mailing of FBI material whenever necessary. For example, various fugitive publications are furnished to local law enforcement agencies.

*In addition, information may be released to the news media and the public pursuant to 28 CFR 50.2 unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy;*

To a Member of Congress or staff acting upon the member's behalf when the member or staff requests the information on behalf of and at the request of the individual who is the subject of the record; *and,*

To the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:****STORAGE:**

Computerized. In field divisions *some* mailing lists are maintained on addressograph.

**RETRIEVABILITY:**

ID number in computer, alphabetically for addressograph.

**SAFEGUARDS:**

Computer records are maintained in limited access space of the Technical Services Division.

**RETENTION AND DISPOSAL:**

Field offices revise the lists as necessary and/or on an annual basis. The records are destroyed when administrative needs are satisfied (Job No. NC1-65-82-4, Part E. 13 i.)

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, FBI, Washington, D.C. 20535

**NOTIFICATION PROCEDURE:**

Director, FBI, Washington D.C. 20535.

**RECORD ACCESS PROCEDURE:**

Inquiry addressed to Director, FBI, Washington, D.C. 20535.

**CONTESTING RECORD PROCEDURES:**

Same as the above.

**RECORD SOURCE CATEGORIES:**

The mailing list information is based either on information supplied by the individual or public source data.

**SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

**JUSTICE/FBI-004****SYSTEM NAME:**

Routine Correspondence Handled By Preprinted Form.

**SYSTEM LOCATION:**

Federal Bureau of Investigation; J. Edgar Hoover Bldg., 10th and Pennsylvania Ave., NW., Washington, DC 20535.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Routine correspondence from citizens not requiring an original response.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Original correspondence and 3 x 5 index card.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Title 5, U.S. Code, Section 301 and Title 44, U.S. Code, Section 3101.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Internal reference use of record of such correspondence.

*In addition, information may be released to the news media and the public pursuant to 28 CFR 50.2 unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy; to a*

Member of Congress or staff acting upon the *member's* behalf when the *member* or staff requests the information on behalf of and at the request of the individual who is the subject of the record; *and,* to the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:****STORAGE:**

Filing of original correspondence plus 3 x 5 index card.

**RETRIEVABILITY:**

Correspondence alphabetically and chronologically; index card alphabetically.

**SAFEGUARDS:**

Maintained by FBI personnel; locked file cabinets during nonduty hours.

**RETENTION AND DISPOSAL:**

Original correspondence retained 90 days and destroyed; 3 x 5 index cards maintained one year and destroyed. (GRS #14, Item 3)

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, FBI, Washington, DC 20535

**NOTIFICATION PROCEDURE:**

Director, FBI, Washington, DC 20535

**RECORD ACCESS PROCEDURES:**

Inquiry directed to Director, FBI, Washington, DC 20535

**CONTESTING RECORD PROCEDURES:**

Same as the above.

**RECORD SOURCE CATEGORIES:**

Incoming citizen correspondence.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

**JUSTICE/FBI-005****SYSTEM NAME:**

Routine Correspondence Prepared Without File Copy.

**SYSTEM LOCATION:**

Federal Bureau of Investigation; J. Edgar Hoover Bldg., 10th and Pennsylvania Ave., NW., Washington, DC 20535.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

*Citizens who correspond with the FBI.*

**CATEGORIES OF RECORDS IN THE SYSTEM:**

*Copy of routine response and citizen's original letter.*

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Title 5, U.S. Code, Section 301 and Title 44, U.S. Code, Section 3101.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Temporary record of routine inquiries without substantive, historical or record value for which no record is to be made in central FBI files.

*In addition, information may be released to the news media and the public pursuant to 28 CFR 50.2 unless it is determined that release of the specific*

information in the context of a particular case would constitute an unwarranted invasion of personal privacy;

To a Member of Congress or staff acting upon the member's behalf when the member or staff requests the information on behalf of and at the request of the individual who is the subject of the record; and,

To the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper records are stored in file folders. Pertinent information from correspondence is temporarily stored on magnetic tape and disks.

**RETRIEVABILITY:**

Paper records are retrieved by name and date of correspondence. Automated records are retrieved by name, locality, and date.

**SAFEGUARDS:**

Access to all records is limited to FBI personnel. Paper records are maintained in locked file cabinets. Access to automated records is restricted through the use of password.

**RETENTION AND DISPOSAL:**

Paper records retained 90 days and destroyed through confidential trash disposal (GRS #14, Item 3). A one-year retention period has been established for the automated records. (Job No. N1-65-87-5)

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, FBI, Washington, DC 20535.

**NOTIFICATION PROCEDURE:**

Director, FBI Washington, DC 20535.

**RECORD ACCESS PROCEDURE:**

Inquiry directed to Director, FBI, Washington, DC 20535.

**CONTESTING RECORD PROCEDURES:**

Same as the above.

**RECORD SOURCE CATEGORIES:**

Incoming citizen correspondence.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

**JUSTICE/FBI 006**

**SYSTEM NAME:**

Electronic Surveillance (Elsur) Indices.

**SYSTEM LOCATION:**

Federal Bureau of Investigation, J. Edgar Hoover Bldg., 10th and Pennsylvania Ave., NW., Washington, DC 20535. Those field offices which have sought conducted electronic surveillances also maintain an index. See appendix to System 022.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals who have been the targets of direct electronic surveillance coverage by FBI in a court order; those whose communications have been monitored/intercepted by an FBI electronic surveillance installation, those who won, lease, or license premises subjected to electronic surveillance coverage sought by the FBI in a court order.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The ELSUR Index is comprised of three types of 3 x 5 cards: 1. Principal cards identify, by true name or best known name, all interceptees (targets) identified in an application filed by the FBI in support of an affidavit seeking a court order to conduct an electronic surveillance; 2. Proprietary Interest cards identify entities and/or individuals who own, lease, license or otherwise hold a possessory interest in locations subjected to an electronic surveillance sought by the FBI in a court order; and, 3. Overhear cards identify, by true name or best known name, individuals and/or entities who have been reasonably identified by a first name or initial and a last name as being a party to a communication monitored/intercepted by the FBI.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The ELSUR Index was initiated in October, 1966, at the recommendation of the Department of Justice and relates to electronic surveillances conducted/sought by the FBI since 1/1/60. The authority for the maintenance of these records is Title 5, Section 301, USC, which grants the Attorney General the authority to issue rules and regulations prescribing how Department of Justice information can be employed. Title 18, U.S.C., Section 3504, also sets forth recordkeeping requirements.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

The Elsur Indices are utilized: (1) To respond to judicial inquiries about possible electronic surveillance coverage of witnesses, defendants, or attorneys involved in Federal court proceedings, and (2) To enable the Government to certify whether a person

regarding whom court-order author being sought for electronic coverage ever been so covered in the past. The actual users of the indices are always employees of the FBI.

In addition, information may be released to the news media and the public pursuant to 28 CFR 50.2 unless it is determined that release of the information in the context of a particular case would constitute an unwarranted invasion of personal privacy;

Member of Congress or staff acting upon the member's behalf when the member or staff requests the information on behalf of and at the request of the individual who is the subject of the record; and, to the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906 to the extent that legislation governing the records permits.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

The records are maintained manually on 3 x 5 cards.

**RETRIEVABILITY:**

Names/facilities are indexed alphabetically. Telephone numbers, other such serial or identification numbers targeted are indexed numerically. Locations targeted are indexed by address and filed by street name.

**SAFEGUARDS:**

The index is maintained in a restricted access room at all times entrance is equipped with a special locking device and alarm system for duty hours when the index is not in use.

**RETENTION AND DISPOSAL:**

Until advised to the contrary by Department, the courts or Congress these indices will be maintained indefinitely. The indices have been declared permanent by NARA. (Job NC1-65-82-4, Part E. 2.1.)

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Federal Bureau of Investigation, Washington, DC 20535.

**NOTIFICATION PROCEDURE:**

Same as the above.

**RECORD ACCESS PROCEDURES:**

Inquiry addressed to Director, FBI Washington, D.C. 20535.

**CONTESTING RECORD PROCEDURES:**

Same as the above.

**RECORD SOURCE CATEGORIES:**

Category of Individual.

**SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

The Attorney General has exempted this system from subsections (c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4) (G) and (H), (e) (5) and (8), (f), (g) and (m) of the Privacy Act pursuant to 5 U.S.C. 552a(j). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553 (b), (c) and (e) and have been published in the Federal Register.

JUSTICE/FBI-007

**SYSTEM NAME:**

FBI Automated Payroll System.

**SYSTEM LOCATION:**

Federal Bureau of Investigation: J. Edgar Hoover Bldg., 10th and Pennsylvania Avenue NW., Washington, DC 20535.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

(A) Current employees of the Federal Bureau of Investigation (FBI). (B) Resigned employees of the FBI are retained in the automated file for the current year for the purpose of clearing all pay actions and providing for any retroactive actions that might be legislated.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

System contains full record for each employee reflecting all elements relative to payroll status, plus accounting records and authorization records through which payrolls are issued and by which payrolls are audited. For example, this system contains the employees' Social Security Number, time and attendance data, and place assignment.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

System is established and maintained in accordance with Federal pay requirements, and all legislative enactments, Office of Personnel Management regulations, General Accounting Office rulings and decisions. Treasury Department regulation, and Office of Management and Budget regulations relative thereto, Title 5, U.S. Code, Section 301 and Title 44, U.S. Code, Section 3101.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Biweekly issuance of payroll and related matters. Quarterly issuance of State Tax Report and Federal Insurance Contributions Act Report. Resign and End-of-Year Federal Tax Records (W-2's). Bi-weekly, quarterly, fiscal and annual Budget and Accounting Reports. Appropriate information is made available to the Internal Revenue Service, *Social Security Administration (to compute future entitlement to Social Security payments and Medicare/Medicaid benefits)*, *Thrift Board (to report Thrift Savings Plan contributions so the Thrift Board can compute future annuities)*, and state and city tax bureaus.

In addition, information may be released to the news media and the public pursuant to 28 CFR 50.2 unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy;

To a Member of Congress or staff acting upon the member's behalf when the member or staff requests the information on behalf of and at the request of the individual who is the subject of the record; and,

To the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:****STORAGE:**

Information maintained in the system is stored electronically on magnetic tapes and disks for use in a computer environment.

**RETRIEVABILITY:**

Information is retrieved by Social Security Number. (The authority to solicit an employee's Social Security Number is based on Title 26, Code of Federal Regulations, Section 31.6011(b)-2(b).)

**SAFEGUARDS:**

Information contained in the system is relative to the individual employee's payroll status and is considered confidential to that employee and to official business conducted for that employee's pay and accounting purposes. It is safeguarded and protected in accordance with the FBI's Computer Center's regulations that permit access and use by only authorized personnel.

**RETENTION AND DISPOSAL:**

Master payroll and accounting records are stored electronically and retained for a period of three years. Federal tax files are retained for four years. Auxiliary files pertinent to main payroll functions are retained for periods varying from three pay periods to three years, depending on support files needed for any retroactive or audit purposes. (GRS # 2; GSA Reg. 3; GSA Bulletin FPMR B-47, "Archives and Records"; and Job No. NC1-85-82-4, Part E, 13 c. (1))

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Federal Bureau of Investigation, Ninth and Pennsylvania Avenue, NW., Washington, DC 20535.

**NOTIFICATION PROCEDURES:**

Same as the above.

**RECORD ACCESS PROCEDURES:**

A request of access to information may be made by an employee through his supervisor or by a former employee by writing to the Federal Bureau of Investigation, 9th and Pennsylvania Avenue, NW., Washington, DC, 20535, Attention Payroll Office.

**CONTESTING RECORD PROCEDURES:**

Contest of any information should be set out in detail and a check of all supportive records will be made to determine the factual data in existence, which is predetermined by source documents and accounting procedures governing pay matters.

**RECORD SOURCE CATEGORIES:**

Source of information is derived from personnel actions, employee authorizations, and time records which are issued and recorded in accordance with regulations governing Federal pay.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

Justice/FBI-008

Bureau Personnel Management System (BPMS).

**SYSTEM LOCATION:**

Federal Bureau of Investigation, J. Edgar Hoover Building, 10th and Pennsylvania Avenue, NW., Washington, DC 20535.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Federal Bureau of Investigation employees and former employees.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The system contains personnel information which includes information

set forth on (1) Standard Form 50—Notification of Personnel Action, (2) SF 176—T—Federal Employee Group Life Insurance Plan, (3) FBI form 12-60 in lieu of SF 1126—Notification of Pay Change, (4) SF 2801 and CSC 1084—Application for and additional information in support of retirement, respectively, (5) SF 2809—Federal Employment Health Benefit Plan and (6) various intra-agency forms and memoranda.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The system is established and maintained pursuant to regulations set forth in the Federal Personnel Manual, Title 5, U.S. Code, Section 301 and Title 44, U.S. Code, Section 3101.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

The *BPMS* is used (1) to prepare the Notification of Personnel Action, copies of which are furnished to the Office of Personnel Management, (2) to prepare Standard Form 52B—Request for Personnel Action, (3) to generate lists of employees which are used internally by authorized personnel for recordkeeping, planning, and decision making purposes, and (4) as a source for the dissemination of information (A) to federal, state and local agencies and to private organizations pursuant to service record inquiries and (B) pursuant to credit inquiries. In response to proper credit inquiries from credit bureaus and financial institutions, the FBI will verify employment and furnish salary and length of service).

In addition, information may be released to the news media and the public pursuant to 28 CFR 50.2 unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy; Member of Congress or staff acting upon the member's behalf when the member or staff requests the information on behalf of and at the request of the individual who is the subject of the record; and, to the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Information maintained in *BPMS* is stored by disc and magnetic tape.

**RETRIEVABILITY:**

Information is retrieved (1) on-line through intelligent workstations and terminals by keying the name or Social Security Number of the employee and (2) off-line through data base retrievals.

(It is noted the authority to solicit an employee's Social Security Number is based on Title 28, Code of Federal Regulations, Section 31.6011(b)-2(b).)

**SAFEGUARDS:**

Areas housing the system and access terminals are located in secure buildings available to authorized FBI personnel and escorted maintenance and repair personnel only. Access terminals are operational only during normal daytime working hours at which time they are constantly attended.

**RETENTION AND DISPOSAL:**

Electronically stored records for employees and former employees are maintained indefinitely in a vault under the control of a vault supervisor. Pursuant to regulations set forth in the Federal Personnel Manual a copy of the Notification of Personnel Action is made a part of the employees' personnel file.

The automated records are disposable when administrative needs have expired. (Job No. NC1-85-82-4, Part E. 13c. (1)).

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Federal Bureau of Investigation, John Edgar Hoover Building, 10th Street and Pennsylvania Avenue, N.W., Washington, DC 20535.

**NOTIFICATION PROCEDURE:**

Same as the above.

**RECORD ACCESS PROCEDURE:**

A request for access to a record from this system shall be made in writing, with the envelope and the letter clearly marked "Privacy Access Request." Include in the request the name and return address of the requestor. Access requests will be directed to the Director, Federal Bureau of Investigation.

**CONTESTING RECORD PROCEDURES:**

Individuals desiring to contest or amend information maintained in the system should direct their request to the Director, FBI stating clearly and concisely what information is being contested, the reasons for contesting it, and the proposed amendment to the information sought.

**RECORD SOURCE CATEGORIES:**

Sources of information contained in this system are present and former FBI employees and employee personnel files.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

**JUSTICE/FBI-009**

**SYSTEM NAME:**

Identification Division Records System.

**SYSTEM LOCATION:**

Federal Bureau of Investigation: J. Edgar Hoover Bldg., 10th and Pennsylvania Avenue NW., Washington, DC 20537-8700.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

A. Individuals fingerprinted as a result of arrest or incarceration.

B. Persons fingerprinted as a result of Federal employment applications, military service, alien registration and naturalization purposes and individuals desiring to have their fingerprints placed on record with the FBI for personal identification purposes.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

A. Criminal fingerprint cards and related criminal justice information submitted by authorized agencies having criminal justice responsibilities.

B. Civil fingerprint cards submitted by Federal agencies and civil fingerprint cards submitted by persons desiring to have their fingerprints placed on record for personal identification purposes.

C. Identification records sometimes referred to as "rap sheets" which are compilations of criminal history information pertaining to individuals who have criminal fingerprint cards maintained in the system.

D. An alphabetical name index pertaining to all individuals whose fingerprints are maintained in the system.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The system is established, maintained and used under authority granted by 28 U.S.C. 534, 15 U.S.C. 78q, 7 U.S.C. 12a, and Pub. L. 92-544 (86 Stat. 1115), and Pub. L. 99-399. The authority is also codified in 28 CFR 0.85 (b) and (j).

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

The FBI operates the Identification Division Records System to perform identification and criminal history record information functions, for Federal, State, local, and foreign criminal justice agencies, and for noncriminal justice agencies, and other entities where authorized by Federal statute, State statute pursuant to Pub. L.



82-544 (86 Stat. 1115). Presidential executive order, or regulation of the Attorney General of the United States. In addition, identification assistance is provided in disasters and for other humanitarian purposes.

*Information may be released to the news media and the public pursuant to 28 CFR 20.33(a)(4), 20.33(c), and 50.2, unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy; to a Member of Congress or staff acting upon the member's behalf when the member or staff requests the information on behalf of and at the request of the individual who is the subject of the record; and, to the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.*

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Information in the system is stored manually in file cabinets either in its natural state or on microfilm. In addition, some of the information is stored in computerized data storage devices.

**RETRIEVABILITY:**

(1) Information in the system is retrievable by technical fingerprint classification and positive identification is effected only by comparison of unique identifying characteristics appearing in fingerprint impressions submitted for search against the fingerprint cards maintained within the system.

(2) An auxiliary means of retrieval is through alphabetical name indexes which contain names of the individuals, their birth date, other physical descriptors, and the individuals technical fingerprint classification and FBI numbers, if such have been assigned.

**SAFEGUARDS:**

Information in the system is unclassified. Disclosure of information from the system is made only to authorized recipients upon authentication and verification of the right to access the system by such persons and agencies. The physical security and maintenance of information within the system is provided by FBI rules, regulations and procedures.

**RETENTION AND DISPOSAL:**

(1) The Archivist of the United States has approved the destruction of records maintained in the criminal file when the records indicated individuals have reached 80 years of age, and the destruction of records maintained in the civil file when the records indicate individuals have reached 75 years of age. (Job. No. NC1-65-78-1 and NN-171-16)

(2) Fingerprint cards and related arrest data in the system are destroyed seven years following notification of the death of an individual whose records is maintained in the system. (Job No. 351-S190)

(3) Fingerprint cards submitted by State and local criminal justice agencies are removed from the system and destroyed upon the request of the submitting agencies. The destruction of a fingerprint card under this procedure results in the deletion from the system of all arrest information related to that fingerprint card.

(4) Fingerprint cards and related arrest data are removed from the Identification Division Records System upon receipt of Federal court orders for expunctions when accompanied by necessary identifying information. Recognizing lack of jurisdiction of local and State courts over an entity of the Federal Government, the Identification Division Records System, as a matter of comity, destroys fingerprint cards and related arrest data submitted by local and State criminal justice agencies upon receipt of orders of expunction directed to such agencies by local and State courts when accompanied by necessary identifying informations.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Federal Bureau of Investigation, 10th and Pennsylvania Avenue NW., Washington, DC 20535.

**NOTIFICATION PROCEDURE:**

Address inquiries to the System Manager.

**RECORD ACCESS PROCEDURE:**

The Attorney General has exempted the Identification Division Records System from compliance with subsection (d) of the Act. However, pursuant to 28 CFR 18.30-34, and Rules and Regulations promulgated by the Department of Justice on May 20, 1975 at 40 FR 22144 (Section 20.34) for Criminal Justice Information Systems, an individual is permitted access to his identification record maintained in the Identification Division Records System and procedures are furnished for correcting or challenging alleged deficiencies appearing therein.

**CONTESTING RECORD PROCEDURES:**

Same as above.

**RECORD SOURCE CATEGORIES:**

See Categories of Individuals.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

The Attorney General has exempted this system from subsections (c)(3) and (4); (d); (e)(1), (2), (3), (4)(G) and (H), (5) and (8); (f); and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the Federal Register.



**JUSTICE/FBI-015****SYSTEM NAME:**

National Center for the Analysis of Violent Crime (NCAVC).

**SYSTEM LOCATION:**

Federal Bureau of Investigation, Training Division, FBI Academy, Behavioral Science Unit, Quantico, Virginia 22135.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

A. Individuals who relate in any manner to official FBI investigations into violent crimes including, but not limited to, subjects, suspects, victims, witnesses, close relatives, medical personnel, and associates who are relevant to an investigation.

B. Individuals who are the subject of unsolicited information or who offer unsolicited information, and law enforcement personnel who request assistance and/or make inquiries concerning records.

C. Individuals who are the subject of violent crime research studies including, but not limited to, criminal personality profiles, scholarly journals, and news media references.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The National Center for the Analysis of Violent Crime will maintain in both manual and automated formats case investigation reports on all forms of solved and unsolved violent crimes. These violent crimes include, but are not limited to, acts or attempted acts of murder, kidnapping, incendiary arson or bombing, rape, physical torture, sexual trauma, or evidence of violent forms of death. *Less than ten percent of the records which are analyzed may not be directly related to violent activities.*

A. Violent Criminal Apprehension Program (VICAP) case reports submitted to the FBI by a duly constituted Federal, State, county, or municipal law enforcement agency in any violent criminal matter. VICAP reports include but are not limited to, crime scene descriptions, victim and offender descriptive data, laboratory reports,

criminal history records, court records, news media references, crime scene photographs, and statements.

B. Violent crime case reports submitted by FBI headquarters or field offices.

C. Violent crime research studies, scholarly journal articles, textbooks, training materials, and news media references of interest to VCAVC personnel.

D. An index of all detected trends, patterns, profiles and methods of operation of known and unknown violent criminals whose records are maintained in the system.

E. An index of the names, addresses, and contact telephone numbers of professional individuals and organizations who are in a position to furnish assistance to the FBI's NCAVC operation.

F. An index of public record sources for historical, statistical and demographic data collected by the U.S. Bureau of the Census.

G. An alphabetical name index pertaining to all individuals whose records are maintained in the system.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

44 U.S.C. Section 3101; 41 CFR Subpart 101-11.2 and 28 U.S.C. Section 534.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

As currently envisioned, the NCAVC will be administered by the FBI through its Training Division's Behavioral Science Unit Located at the FBI Academy, Quantico, Virginia. Its primary mission is to consolidate research, training, and operational support activities for the express purposes of providing expertise to any legitimate law enforcement agency confronted with unusual, bizarre, and/or particularly vicious or repetitive violent crimes.

Records described above are maintained in this system to permit the FBI to function efficiently as an authorized, responsive component of the Department of Justice. Therefore, the information in this system is disclosed to officials and employees of the Department of Justice, and/or all components thereof, who need the information to perform their official duties.

Information in this system may be disclosed as a routine use to any Federal, State, local, or foreign government agency directly engaged in the criminal justice process where

access is directly related to a law enforcement function of the recipient agency in connection with the tracking identification, and apprehension of persons believed to be engaged in repeated or exceptionally violent acts of criminal behavior.

Information in this system may be disclosed as a routine use in a proceeding before a court or adjudicative body, e.g., the Equal Employment Opportunity Commission and the Merit System Protection Board, before which the FBI is authorized to appear, when (a) the FBI or any employee thereof in his or her official capacity, or (b) any employee in his or her individual capacity where the Department of Justice has agreed to represent the employee, or (c) the United States, where the FBI determines it is likely to be affected by the litigation, is a party to litigation or has an interest in litigation and such records are determined by the FBI to be relevant to the litigation.

Information in this system may be disclosed as a routine use to an organization or individual in both the public or private sector pursuant to an appropriate legal proceeding or, if deemed necessary, to elicit information or cooperation from the recipient for use by the FBI in the performance of an authorized activity. An example could be where the activities of an individual are disclosed to a member of the public to elicit his/her assistance in FBI apprehension or detection efforts.

Information in this system may be disclosed as a routine use to an organization or individual in the public or private sector where there is reason to believe the recipient is or could become the target of a particular criminal activity or conspiracy and to the extent the information is relevant to the protection of life or property.

Relevant information may be disclosed from this system to the news media and general public where there exists a legitimate public interest. Examples would include: to obtain public or media assistance in the tracking, identifying, and apprehending of persons believed to be engaged in repeated acts of violent criminal behavior; to notify the public and/or media of arrests; to protect the public from imminent threat to life or property where necessary; and to disseminate information to the public and/or media to obtain cooperation with violent crime research, evaluation, and statistical programs.

Information in this system may be disclosed as is necessary to appropriately respond to congressional inquiries on behalf of constituents.

A record from a system of records may be disclosed as a routine use to the National Archives and Records Administration (NARA) in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906 to the extent that legislation governing the record permits.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Information in the system is stored manually in locked file cabinets, either in its natural state or on microfilm, at the NCAVC in Quantico, Virginia. The active main files are maintained in hard copy form and some inactive records are maintained on microfilm.

In addition, some of the information is stored in computerized data storage devices at the NCAVC and FBI Computer Center in Washington, DC. Investigative information which is maintained in computerized form may be stored in memory on disk storage on computer tape, or on computer printed listings.

**RETRIEVABILITY:**

On-line computer access to NCAVC files is achieved by using the following search descriptors:

A. A data base which contains the names of individuals, their birth dates, physical descriptions, and other identification numbers such as FBI numbers, if such have been assigned.

B. Summary variables contained on VICAP reports submitted to the NCAVC as previously described.

C. Key words citations to violent crime research studies, scholarly journal articles, textbooks, training materials, and media references.

**SAFEGUARDS:**

Records are maintained in restricted areas and accessed only by FBI employees. All FBI employees receive a complete pre-employment background investigation. All employees are cautioned about divulging confidential information or any information contained in FBI files. Failure to abide by this provision violates Department of Justice regulations and may violate certain statutes providing maximum severe penalties of a ten thousand dollar fine or 10 years' imprisonment or both. Employees who resign or retire are also cautioned about divulging information acquired in the job.

Registered mail is used to transmit routine hard copy records between field offices. Highly classified records are hand carried by Special Agents or personnel of the Armed Forces Courier

Service. Highly classified or sensitive privacy information, which is electronically transmitted between field offices and to and from FBI Headquarters, is transmitted in encrypted form to prevent interception and interpretation.

Information transmitted in teletype form between the NCAVC in Quantico, Virginia and the FBI Computer Center in Washington, DC, is encrypted prior to transmission at both places to ensure confidentiality and security of the data.

FBI field offices involved in certain complicated, investigative matters may be provided with on-line access to the computerized information which is maintained for them on disc storage in the FBI Computer Center in Washington, DC. This computerized data is also transmitted in encrypted form.

**RETENTION AND DISPOSAL:**

Records are proposed for destruction after 50 years or upon termination of the program, whichever is earlier. The disposition schedule is pending with NARA as Job No. N1-65-88-13.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Federal Bureau of Investigation, 10th and Pennsylvania Avenue, NW., Washington, DC 20535.

**NOTIFICATION PROCEDURE:**

Address inquiries to the System Manager.

**RECORDS ACCESS PROCEDURES:**

Requests for access to records in this system shall be made in writing with the envelope and the letter clearly marked "Privacy Access Request." The request must provide the full name, complete address, date of birth, place of birth, and notarized signature of the individual who is the subject of the record requested. The request should also include the general subject matter of the document or its file number—along with any other known information which may assist in making a search of the records. The request must also provide a return addressing for transmitting the information. Access requests should be addressed to the Director, Federal Bureau of Investigation, Washington, D.C. 20535.

**CONTESTING RECORD PROCEDURE:**

Individuals desiring to contest or amend information maintained in the system should also direct their request to the Director, Federal Bureau of Investigation, Washington, D.C. 20535. The request should state clearly and concisely (1) the reasons for contesting the information, and (2) the proposed amendment to the information.

Pages 47248-47249

**JUSTICE/FBI-010**

**SYSTEM NAME:**

Employee Travel Vouchers and Individual Earning Records.

**SYSTEM LOCATION:**

Federal Bureau of Investigation; J. Edgar Hoover Bldg., 10th and Pennsylvania Avenue, NW., Washington, D.C. 20535. Records pending audit are located at Federal Records Centers.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Former and current employees of the FBI.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Payroll, travel and retirement records of current and former employees of the FBI.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The head of each executive agency, or his delegate, is responsible for establishing and maintaining an adequate payroll system, covering pay, leave and allowances, as a part of the system of accounting and internal control of the Budget and Accounting Procedures Act of 1950, as amended, 31 U.S.C. 66, 66a, and 200(a).

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

These records are used by Departmental personnel to prepare and document payment to employees of the FBI and to carry out financial matters related to the payroll or accounting functions.

Release of information to the National Archives and Records Administration (NARA) and the General Services Administration (GSA): A record from a system of records may be disclosed as a routine use to the National Archives and Records NARA and GSA in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Manual on paper files.

**RETRIEVABILITY:**

The records can be retrieved by name; and either social security account number or employee identification number.

**SAFEGUARDS:**

Accessed by Bureau employees at FBI Headquarters and by Field Office employees at Records Centers. Transmittal document contains Bureau statement concerning security, i.e., who may access or view records. Records are maintained in rooms under the control of employees during working hours and maintained in locked file cabinets in locked rooms at other times. Security guards further restrict access to the building to authorized personnel only.

**RETENTION AND DISPOSAL:**

*Employee Travel Vouchers are destroyed 6 years, 3 months, after the period covered by the account (GRS #6, Item 1A2). Individual Earnings Records are destroyed 56 years after date of last entry (GRS #2, Item 1).*

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Federal Bureau of Investigation, 9th and Pennsylvania Avenue, NW., Washington, D.C. 20535.

**NOTIFICATION PROCEDURE:**

Written inquiries, including name, date of birth, and social security number, to determine whether this system contains records about an individual may be addressed to Director, Federal Bureau of Investigation, 9th and Pennsylvania Avenue, NW., Washington, D.C. 20535.

**RECORD ACCESS PROCEDURE:**

**CONTESTING RECORD PROCEDURES:**

Written inquiries, including name, date of birth and social security number, requesting access or contesting the accuracy of records may be addressed to: Director, Federal Bureau of Investigation, 9th and Pennsylvania Avenue, NW., Washington, D.C. 20535.

**RECORD SOURCE CATEGORIES:**

Travel vouchers turned in by individual employees for official business. Pay records—time and attendance records, pay determined by the agency.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

Pages 49175-49176

**JUSTICE/FBI-011**

**SYSTEM NAME:**

Employee Health Records.

**SYSTEM LOCATION:**

Federal Bureau of Investigation, Administrative Services Division, Health Service, J. Edgar Hoover Bldg., 10th and Pennsylvania Avenue, NW., Washington, DC 20535 and the following field offices: New York, Newark, Philadelphia, Chicago, Los Angeles, San Francisco, and FBI Academy, Quantico, Virginia. Addresses for field offices can be found in the appendix of Field Offices for the Federal Bureau of Investigation in System notice Justice/FBI 002.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Current and former employees of the FBI.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Records of visits to health facilities relating to sickness, injuries or accidents.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The head of each agency is responsible, under 5 U.S.C. 7902, for keeping a record of injuries and accidents to its employees and for reducing accidents and health risks. These records are maintained under the general authority of 5 U.S.C. 301 so that the FBI can be kept aware of the health related matters of its employees and more expeditiously identify them.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USERS:**

These records are maintained by the FBI to identify matters relating to the health of its present and former employees. Information is available to employees of the FBI whose job function relates to identifying and resolving

health matters of former and current personnel of the FBI.

*In addition, information may be released to the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.*

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

*A clinical record is created to maintain an employee health record and SF 510, "Nursing Notes". The information is maintained manually in a file folder.*

**RETRIEVABILITY:**

*By name.*

**SAFEGUARDS:**

These records are maintained by FBI personnel during working hours and in locked file cabinets during non-working hours. Security guards further restrict access to the building to authorized personnel.

**RETENTION AND DISPOSAL:**

Remaining index cards will be destroyed 6 years after date of last entry (GRS #1, Item 19). The folder containing the health record and nursing notes will be maintained in the Health Unit for 5 years after the last entry. Thereafter, the contents of the folder will be transferred to the Employee Medical Folder, an appendage of the Official Personnel Folder.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Federal Bureau of Investigation, 9th and Pennsylvania Avenue, NW., Washington, DC 20535.

**NOTIFICATION PROCEDURE:**

Written inquiries, including name, address and social security number, to determine whether this system of records contains records about an individual may be addressed to Director, Federal Bureau of Investigation, 9th and Pennsylvania Avenue, NW., Washington, DC 20535, and/or individually to the field offices which maintain similar records.

**RECORD ACCESS PROCEDURES:**

**CONTESTING RECORD PROCEDURES:**

Written inquiries, including name, date of birth and social security number, requesting access or contesting the accuracy of records may be addressed to: Director, Federal Bureau of Investigation, 9th and Pennsylvania Avenue, NW., Washington, DC 20535,

and the above-mentioned field offices at addresses referred to in system notice Justice/FBI 002.

**RECORD SOURCE CATEGORIES:**

Employees of the Federal Bureau of Investigation originate their own records. Nursing Notes appear on SF 510.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

**AUTHORITY FOR MAINTANANCE OF THE SYSTEM:**

This system of records is maintained under the authority of 31 U.S.C. 66a which requires the head of the Department, or his delegate, to establish a system of accounting and internal control designed to provide full disclosure of the financial results of the FBI's activities; adequate financial information needed for the FBI's management purposes and effective control over and accountability for all funds, property and other assets for which the FBI is responsible.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

For the purpose of producing cost accounting reports reflective of personnel utilization, records may be made available to the General Accounting Office, the Office of Management and Budget and the Treasury Department.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:****STORAGE:**

Information maintained in the system is stored electronically on magnetic tapes and discs for use in a computer environment.

**RETRIEVABILITY:**

Information is retrieved by name and/or social security number.

**SAFEGUARDS:**

Information is safeguarded and protected in accordance with the FBI's Computer Center regulations that permit access and use by authorized personnel only.

**RETENTION AND DISPOSAL:**

*Bi-weekly magnetic tapes are retained for a period of 3 years. Hard copy records are retained in accordance with instructions contained in GRS #8, Items 7 and 8, and GSA Bulletin FPMR-47, "Archives and Records". Hard copy records are destroyed; magnetic tapes are erased and reused. (Job No. NCI-65-82-4, Part E.13c.(1))*

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Federal Bureau of Investigation, 9th and Pennsylvania Avenue, NW, Washington, D.C. 20535.

**NOTIFICATION PROCEDURE:**

Same as above.

**RECORD ACCESS PROCEDURES:****CONTESTING RECORD PROCEDURES:**

Written requests for access to information may be made by an

employee through his supervisor or by former employees by writing to: Federal Bureau of Investigation, 9th and Pennsylvania Avenue, NW, Washington, D.C. 20535 (Attn: Administrative Services Division). Contesting of any information should be set out in written detail and forwarded to the above address. A check of all supportive records will be made to determine the factual data in existence.

**RECORD SOURCE CATEGORIES:**

Source of information is derived from daily time utilization recording made by the employees.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

**JUSTICE/FBI-013****SYSTEM NAME:**

Security access control system (SACS)

**SYSTEM LOCATION:**

Federal Bureau of Investigation, J. Edgar Hoover Building, 10th and Pennsylvania Avenue, NW., Washington, D.C. 20535.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals, both FBI employees and outside visitors, who have been granted access to the J. Edgar Hoover Building.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The system contains computerized information concerning names, badge numbers, and the dates and times of entries of those individuals, including escorted visitors, who have been issued access badges to the J. Edgar Hoover Building.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The maintenance of this system is authorized by Executive Order 12065, the Privacy Act of 1974 (5 U.S.C. 552a(e)(10)) and Pub. L. No. 90-620, as amended (44 U.S.C. Chapters 21 and 33). Each of these two statutes, as well as the Executive Order, is directed toward security of United States Government records maintained by Federal agencies.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Category of users: Federal Bureau of Investigation management officials and security personnel. The information is used to determine the status of individuals entering the building and maintain control of badges issued to

**JUSTICE/FBI-012****SYSTEM NAME:**

Time Utilization Record/Keeping (TURK) System.

**SYSTEM LOCATION:**

Administrative Services Division, Federal Bureau of Investigation, J. Edgar Hoover Building, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Special Agents, Accounting Technicians, Investigative Assistants, and Laboratory Technicians.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

System contains bi-weekly time utilization data of Special Agents, Accounting Technicians, Investigative Assistants and Laboratory Technicians.

individuals requiring access to the J. Edgar Hoover Building.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

The automated portion of the records is maintained on a magnetic tape. Documentary records are maintained in manual file folders.

**RETRIEVABILITY:**

Alphabetically by last name; numerically by access badge number.

**SAFEGUARDS:**

Maintained in a locked room, which is manned 24 hours per day, with access limited to FBI security personnel.

**RETENTION AND DISPOSAL:**

*Computerized records are maintained for one year and hard copy computer listings are maintained for six months. Cards containing badge information are destroyed when administrative needs have expired. Duplicate badges are maintained on individuals granted permanent access to the building until access is no longer required and/or upon separation or transfer. (Job No. NC1-65-82-4, Part B. 66c. (8); Part E. 13 c. (1))*

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Federal Bureau of Investigation, J. Edgar Hoover Building, 10th and Pennsylvania Avenue NW., Washington, D.C. 20535.

**NOTIFICATION PROCEDURE:**

Inquiry concerning this system should be in writing and made to the system manager listed above.

**RECORD ACCESS PROCEDURES:**

Same as above.

**CONTESTING RECORD PROCEDURES:**

Same as above.

**RECORD SOURCE CATEGORIES:**

See categories of individuals.

**SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

JUSTICE/FBI-014

**SYSTEM NAME:**

FBI Alcoholism Program.

**SYSTEM LOCATION:**

FBI Headquarters, Administrative Services Division, 10th and Pennsylvania Avenue NW., Washington, DC 20535; and FBI Field Divisions.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

This system contains information on current and former FBI employees who have been counseled or otherwise treated regarding alcohol abuse or referred to the Alcoholism Program Coordinator or Counselor.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

This system contains correspondence and records regarding employees and/or their families who have been referred to the Alcoholism Program Coordinator or Counselor, the results of any counseling which may have occurred, recommended treatment and results of treatment, in addition to interview appraisals and other notes or records of discussions held with employees relative to this program.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The maintenance of this system is authorized by Pub. L. 91-616 and Pub. L. 92-255, as amended by Pub. L. 93-282, Section 122, and the implementing regulations, 42 CFR Part 2.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USES AND THE PURPOSE OF SUCH USES:**

All disclosures of information pertaining to an individual are made in compliance with Public Law No. 91-616, Section 333, and the Confidentiality of Alcoholism and Drug Abuse Patient Records Regulations, 42 CFR Part 2.2, as amended, for the sole purpose of administering the program.

These records are used to document the nature of an individual's alcohol abuse problem and progress made, and to record an individual's participation in and the results of community or private sector treatment or rehabilitation programs.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records are maintained in file folders.

**RETRIEVABILITY:**

Records are retrieved by employee's name.

**SAFEGUARDS:**

Files are maintained in locked file cabinets, or safes under the immediate control of the Alcoholism Program Coordinator or other authorized individuals. Access is strictly limited to the Coordinator and other authorized personnel.

**RETENTION AND DISPOSAL**

*Files are destroyed 3 years after case is closed. (GRS #1, Item 27 b.; Job No. NC1-65-82-4, Part B. 67d.)*

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, FBI J. Edgar Hoover Building, 10th and Pennsylvania Avenue NW., Washington, DC 20535.

**NOTIFICATION PROCEDURES:**

Inquiry concerning this system should be in writing and made to the system manager listed above.

**RECORD ACCESS PROCEDURES:**

Requests made by employees should be made in writing to the Director, FBI, Washington, D.C. 20535. Requests must contain employee's full name, date and place of birth, and current office of assignment and/or home address where records are to be sent. If the individual making the request is a former employee, he/she must submit a duly notarized signature in order to establish identity. In addition, the requester must specify the location of the system of records sought, i.e., those maintained at FBI headquarters or those maintained in a particular field division.

**CONTESTING RECORD PROCEDURES:**

Requests for correction/amendment of records in this system should be made in writing to the Director, FBI, Washington, D.C. 20535, specifying the information to be amended, and the reasons and justifications for requesting such amendment.

**RECORD SOURCE CATEGORIES:**

See categories of individuals.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

# federal register

FEDERAL BUREAU  
OF  
INVESTIGATION  
PRIVACY ACT  
RECORDS SYSTEMS NOTICES

- 001 - National Crime Information Center (NCIC)
- 002 - Central Records System
- 003 - Bureau Mailing Lists
- 004 - Routine Correspondence Handled by  
Preprinted Form
- 005 - Routine Correspondence Prepared  
Without File Yellow
- 006 - Electronic Surveillance (ELSUR)  
Indices
- 007 - FBI Automated Payroll System
- 008 - Personnel Information Network  
System (PINS)
- 009 - Identification Division Records  
System
- 010 - Employee Travel Vouchers and  
Individual Earning Records
- 011 - Employee Health Records
- 012 - Time Utilization Record-Keeping  
(TURK) System
- 013 - Security Access Control System (SACS)
- 014 - FBI Alcoholism Program
- 015 - National Center for the Analysis  
of Violent Crime (NCAVC)

**JUSTICE/FBI 001****SYSTEM NAME:**

National Crime Information Center (NCIC).

**SYSTEM LOCATIONS:**

Federal Bureau of Investigation; J. Edgar Hoover Bldg., 10th and Pennsylvania Avenue NW., Washington, D.C. 20535.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

A. Wanted Persons: 1. Individuals for whom Federal warrants are outstanding.

2. Individuals who have committed or have been identified with an offense which is classified as a felony or serious misdemeanor under the existing penal statutes of the jurisdictions originating the entry and felony or misdemeanor warrant has been issued for the individual with respect to the offense which was the basis of the entry. Probation and parole violators meeting the foregoing criteria.

3. A "Temporary Felony Want" may be entered when a law enforcement agency has need to take prompt action to establish a "want" entry for the apprehension of a person who has committed, or the officer has reasonable grounds to believe has committed, a felony and who may seek refuge by fleeing across jurisdictional boundaries and circumstances preclude the immediate procurement of a felony warrant. A "Temporary Felony Want" shall be specifically identified as such and subject to verification and support by a proper warrant within 48 hours following the initial entry of a temporary want. The agency originating the "Temporary Felony Want" shall be responsible for subsequent verification or re-entry of a permanent want.

4. Juveniles who have been adjudicated delinquent and who have escaped or absconded from custody, even though no arrest warrants were issued. Juveniles who have been charged with the commission of a delinquent act that would be a crime if committed by an adult, and who have fled from the state where the act was committed.

5. Individuals who have committed or have been identified with an offense committed in a foreign country, which would be a felony if committed in the United States, and for whom a warrant of arrest is outstanding and for which an extradition treaty exists between the United States and that country.

6. Individuals who have committed or have been identified with an offense committed in Canada and for whom a Canada-Wide Warrant has been issued which meets the requirements of the Canada-U.S. Extradition Treaty, 18 U.S.C. 3184.

B. Individuals who have been charged with serious and/or significant offenses.

C. Missing Persons: 1. A person of any age who is missing and who is under proven physical/mental disability or is senile, thereby subjecting himself or others to personal and immediate danger.

2. A person of any age who is missing under circumstances indicating that his disappearance was not voluntary.

3. A person of any age who is missing under circumstances indicating that his physical safety is in danger.

4. A person who is missing and declared unemancipated as defined by the laws of his state of residence and does not meet any of the entry criteria set forth in 1, 2, or 3 above.

D. Individuals designated by the U.S. Secret Service as posing a potential danger to the President and/or other authorized protectees.

E. Unidentified Persons: 1. Any unidentified deceased person. 2. Any person who is living and unable to ascertain his/her identity (e.g., infant, amnesia victim). 3. Any unidentified catastrophe victim. 4. Body parts when a body has been dismembered.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

A. Stolen Vehicle File: 1. Stolen vehicles. 2. Vehicles wanted in conjunction with felonies or serious misdemeanors. 3. Stolen vehicle parts, including certificates of origin or title.

B. Stolen License Plate File: 1. Stolen or missing license plate.

C. Stolen/Missing Gun File: 1. Stolen or missing guns. 2. Recovered guns, when ownership of which has not been established.

D. Stolen Article File.

E. Wanted Persons File: Described in "CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: A. Wanted Persons."

F. Securities File: 1. Serially numbered stolen, embezzled, counterfeited, missing securities.

2. "Securities" for present purposes of this file are currency (e.g., bills, bank notes) and those documents or certificates which generally are considered to be evidence of debt (e.g., bonds, debentures, notes) or ownership of property (e.g., common stock, preferred stock), and documents which represent subscription rights, warrants and which are of those types trades in the securities exchanges in the United

States, except for commodities futures. Also included are warehouse receipts, travelers checks and money orders.

G. Stolen Boat File

H. Computerized Criminal History File: A cooperative Federal-state program for the interstate exchange of criminal history record information for the purpose of facilitating the interstate exchange of such information among criminal justice agencies.

I. Missing Person File: Described in "CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: C. Missing persons."

J. U.S. Secret Service Protective File: Described in "CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: D."

K. Identification records regarding persons enrolled in the United States Marshals Service Witness Security Program who have been charged with serious and/or significant offenses: Described in "CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: B."

L. Foreign Fugitive File: Identification data regarding persons who are fugitives from foreign countries, who are described in "CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: A. Wanted Persons, 5."

M. Canadian Warrant File: Identification data regarding Canadian wanted persons who are described in "CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: A. Wanted Persons, 6."

N. Unidentified Person File: Described in "CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: E. Unidentified Persons."

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The system is established and maintained in accordance with 28 U.S.C. 534; Department of Justice Appropriation Act, 1973, Pub. L. 92-544, 86 Stat. 1115, Securities Acts Amendment of 1975, Pub. L. 94-29, 89 Stat. 97; and Exec. Order No. 10450, 3 CFR (1974).

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Data in NCIC files is exchanged with and for the official use of authorized officials of the Federal Government, the States, cities, penal and other institutions, and certain foreign governments. The data is exchanged through NCIC lines to Federal criminal justice agencies, criminal justice agencies in the 50 States, the District of Columbia, Puerto Rico, U.S. Possessions



and U.S. Territories. Additionally, data contained in the various "want files," i.e., the stolen vehicle file, stolen license plate file, stolen missing gun file, stolen article file, wanted person file, securities file and boat file may be accessed by the Royal Canadian Mounted Police. Criminal history data is disseminated to non-criminal justice agencies for use in connection with licensing for local/state employment or other uses, but only where such dissemination is authorized by Federal or state statutes and approved by the Attorney General of the United States.

Data in NCIC files, other than the Computerized Criminal History File, is disseminated to (1) a nongovernmental agency or subunit thereof which allocates a substantial part of its annual budget to the administration of criminal justice, whose regularly employed peace officers have full police powers pursuant to state law and have complied with the minimum employment standards of governmentally employed police officers as specified by state statute; (2) a noncriminal justice governmental department of motor vehicle or driver's license registry established by a statute, which provides vehicles registration and driver record information to criminal justice agencies; (3) a governmental regional dispatch center, established by a state statute, resolution, ordinance or Executive order, which provides communications services to criminal justice agencies; and (4) the national Automobile Theft Bureau, a nongovernmental nonprofit agency which acts as a national clearinghouse for information on stolen vehicles and offers free assistance to law enforcement agencies concerning automobile thefts, identification and recovery of stolen vehicles.

Disclosures of information from this system, as described above, are for the purpose of providing information to authorized agencies to facilitate the apprehension of fugitives, the location of missing persons, the location and/or return of stolen property, or similar criminal justice objectives.

Information on missing children, missing adults who were reported missing while children, and unidentified living and deceased persons may be disclosed to the National Center for Missing and Exploited Children (NCMEC). The NCMEC is a nongovernmental, nonprofit, federally funded corporation, serving as a national resource and technical assistance clearinghouse focusing on missing and exploited children. Information is disclosed to NCMEC to assist it in its efforts to provide

technical assistance and education to parents and local governments regarding the problems of missing and exploited children, and to operate a nationwide missing children hotline to permit members of the public to telephone the Center from anywhere in the United States with information about a missing child.

*In addition, information may be released to the news media and the public pursuant to 28 CFR 50.2, unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy;*

To a Member of Congress or staff acting upon the member's behalf whom the member or staff requests the information on behalf of and at the request of the individual who is the subject of the record; and,

To the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

#### **POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

##### **STORAGE:**

Information maintained in the NCIC system is stored electronically for use in a computer environment.

##### **RETRIEVABILITY:**

On-line access to data in NCIC is achieved by using the following search descriptors. 1. Vehicle file:

(a) Vehicle identification number;

(b) License plate number;

(c) NCIC number (unique number assigned by the NCIC computer to each NCIC record). 2. License Plate File: (a) License plate number; (b) NCIC number. 3. Gun file: (a) Serial number of gun; (b) NCIC number. 4. Article File: (a) Serial number of article; (b) NCIC number. 5. Wanted Person File, U.S. Secret Service Protective File, Foreign Fugitive File, and Canadian Warrant File: (a) Name and one of the following numerical identifiers, date of birth, FBI Number (number assigned by the Federal Bureau of Investigation to an arrest fingerprint record), Social Security number (it is noted the requirements of the Privacy Act with regard to the solicitation of Social Security numbers have been brought to the attention of the members of the NCIC system). Operator's license number (drivers number), Miscellaneous identifying number (military number or number assigned by Federal, state, or local authorities to an individual's record), Origination agency case number. (b) Vehicle or license plate

known to be in the possession of the wanted person. (c) NCIC number (unique number assigned to each NCIC record). 6. Securities File: (a) Type, serial number, denomination of security; (b) Type of security and name of owner of security; (c) Social Security number of owner of security; (d) NCIC number. 7. Boat File: (a) Registration document number; (b) Hull serial number; (c) NCIC number. 8. Computerized Criminal History File: (a) Name, sex, race and date of birth; (b) FBI number; (c) State identification number; (d) Social Security number; (e) Miscellaneous number. 9. Missing Person File: Same as "Wanted Person" File, plus the age, sex, race, height and weight, eye and hair color, of the missing individual. 10. Unidentified Person File: Age, sex, race, height and weight, eye and hair color, of the unidentified individual.

##### **SAFEGUARDS:**

Data stored in the NCIC is documented criminal justice agency information and access to that data is restricted to duly authorized criminal justice agencies. The following security measures are the minimum to be adopted by all criminal justice agencies having access to the NCIC.

Computerized Criminal History File. These measures are designed to prevent unauthorized access to the system data and/or unauthorized use of data obtained from the computerized file.

1. Computer Center: a. The criminal justice agency computer site must have adequate physical security to protect against any unauthorized personnel gaining access to the computer equipment or to any of the stored data. b. Since personnel at these computer centers can have access data stored in the system, they must be screened thoroughly under the authority and supervision of an NCIC control terminal agency. (This authority and supervision may be delegated to responsible criminal justice agency personnel in the case of a satellite computer center being serviced through a stated control terminal agency.) This screening will also apply to non-criminal justice maintenance or technical personnel. c. All visitors to these computer centers must be accompanied by staff personnel at all times. d. Computers having access to the NCIC must have the proper computer instructions written and other built-in controls to prevent criminal history data from being accessible to any terminals other than authorized terminals. e. Computers having access to the NCIC must maintain a record of all transactions against the criminal history filed in the same manner the NCIC

computer logs all transactions. The NCIC identifies each specific agency entering or receiving information and maintains a record of those transactions. This transaction record must be monitored and reviewed on a regular basis to detect any possible misuse of criminal history data. f. Each State Control terminal shall build its data system around a central computer, through which each inquiry must pass for screening and verification. The configuration and operation of the center shall provide for the integrity of the data base.

2. Communications: a. Lines/channels being used to transmit criminal history information must be dedicated solely to criminal justice, i.e., there must be no terminals belonging to agencies outside the criminal justice system sharing these lines/channels. b. Physical security of the lines/channels must be protected too guard against clandestine devices being utilized to intercept or inject system traffic.

3. Terminal Devices Having Access to NCIC: a. All agencies having terminals on this system must be required to physically place these terminals in secure locations within the authorized agency. b. The agencies having terminals with access to criminal history must have terminal operators screened and restricted access to the terminal to a minimum number of authorized employees. c. Copies of criminal history data obtained from terminal devices must be afforded security to prevent any unauthorized access to or use of the data. d. All remote terminals on NCIC Computerized Criminal History will maintain a hard copy of computerized criminal history inquiries with notations of individual making request for record (90 days).

#### RETENTION AND DISPOSAL:

Unless otherwise removed, records will be retained in files as follows:

1. Vehicle File: a. Unrecovered stolen vehicle records (including snowmobile records) which do not contain vehicle identification numbers (VIN) therein, will be purged from file 90 days after date of entry. Unrecovered stolen vehicle records (including snowmobile records) which contain VIN's will remain in file for the year of entry plus 4.

4. Unrecovered vehicles wanted in conjunction with a felony will remain in file for 90 days after entry. In the event a longer retention period is desired, the vehicle must be reentered. c. Unrecovered stolen VIN plates, certificates of origin or title, and serially numbered stolen vehicles engines or transmissions will remain in file for the year of entry plus 4.

(Job No. NC1-65-82-4, Part E, 13 h.(1))

2. License Plate File: Unrecovered stolen license plates not associated with a vehicle will remain in file for one year after the end of the plate's expiration year as shown in the record.

(Job No. NC1-65-82-4, Part E, 13 h.(2))

3. Gun file: a. Unrecovered weapons will be retained in file for an indefinite period until action is taken by the originating agency to clear the record. b. Weapons entered in file as "recovered" weapons will remain in file for the balance of the year entered plus 2.

(Job No. NC1-65-82-4, Part E, 13 h.(3))

4. Article File: Unrecovered stolen articles will be retained for the balance of the year entered plus one year.

(Job No. NC1-65-82-4, Part E, 13 h.(4))

5. Wanted Person File: Person not located will remain in file indefinitely until action is taken by the originating agency to clear the record (except "Temporary Felony Wants", which will be automatically removed from the file after 48 hours).

(Job No. NC1-65-87-114, Part E, 13 h.(7))

6. Securities File: Unrecovered, stolen, embezzled, counterfeited or missing securities will be retained for the balance of the year entered plus 4, except for travelers checks and money orders, which will be retained for the balance of the year entered plus 2.

(Job No. NC1-65-82-4, Part E, 13h. (5))

7. Boat File: Unrecovered stolen boats will be retained in file for the balance of the year entered plus 4. Unrecovered stolen boat records which do not contain a hull serial number will be purged from file 90 days after date of entry.

(Job No. NC1-65-82-4, Part E, 13h. (6))

8. Missing Persons File: Will remain in the file until the individual is located or, in the case of unemancipated persons, the individual reaches the age of emancipation as defined by law of his state.

(Job No. N 1-65-87-11, Part E, 13h. (8))

9. Computerized Criminal History File: When an individual reaches age of 80. (Job No. NC1-65-78-1)

10. U.S. Secret Service Protective File: Will be retained until names are removed by the U.S. Secret Service.

11. Foreign Fugitive File: Person not located will remain in file indefinitely until action is taken by the originating agency to clear the record.

12. Canadian Warrant File: Person and located will remain in file indefinitely until action is taken by the originating agency to clear the record.

13. Unidentified Person File: Will be retained for the remainder of the year of entry plus 9.

#### SYSTEM MANAGER(S) AND ADDRESS:

Director, Federal Bureau of Investigation, J. Edgar Hoover Building, 10th and Pennsylvania Avenue NW., Washington, DC 20535.

#### NOTIFICATION PROCEDURES:

Same as the above.

#### RECORD ACCESS PROCEDURE:

It is noted the Attorney General is exempting this system from the access and contest procedures of the Privacy Act. However, the following alternative procedures are available to requester. The procedures by which an individual may obtain a copy of his computerized Criminal History are as follows:

If an individual has a criminal record supported by fingerprints and that record has been entered in the NCIC CCH File, it is available to that individual for review, upon presentation of appropriate identification and in accordance with applicable State and Federal administrative and statutory regulations.

Appropriate identification includes being fingerprinted for the purpose of insuring that he is the individual that he purports to be. The record on file will then be verified as his through comparison of fingerprints.

Procedure 1. All requests for review must be made by the subject of his record through a law enforcement agency which has access to the NCIC CCH File. That agency within statutory or regulatory limits can require additional identification to assist in securing a positive identification.

2. If the cooperative law enforcement agency can make an identification with fingerprints previously taken which are on file locally and if the FBI identification number of the individual's record is available to that agency, it can make an on-line inquiry of NCIC to obtain his record on-line or, if it does not have suitable equipment to obtain an on-line response, obtain the record from Washington, DC by mail. The individual will then be afforded the opportunity to see that record.

3. Should the cooperating law enforcement agency not have the individual's fingerprints on file locally, it is necessary for that agency to relate his prints to an existing record by having his identification prints compared with those already on file in the FBI or possibly, in the State's central identification agency.

**CONTESTING RECORD PROCEDURES:**

The subject of the requested record shall request the appropriate arresting agency, court, or correctional agency to initiate action necessary to correct any stated inaccuracy in his record or provide the information needed to make the record complete.

**RECORD SOURCE CATEGORIES:**

Information contained in the NCIC system is obtained from local, State, Federal and international criminal justice agencies.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

The Attorney General has exempted this system from subsection (c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4) (G), (H), (e)(8) (f) and (g) of the Privacy Act pursuant to 5 U.S.C. 552a (j)(2) and (k)(3). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553 (b), (c) and (e) and have been published in the Federal Register.

**JUSTICE/FBI-002****SYSTEM NAME:**

The FBI Central Records System.

**SYSTEM LOCATION:**

a. Federal Bureau of Investigation, J. Edgar Hoover Building, 10th and Pennsylvania Avenue, NW., Washington, DC 20535; b. 56 field divisions (see Appendix); c. 16 Legal Attaché (see Appendix).

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

- a. Individuals who relate in any manner to official FBI investigations including, but not limited to subjects, suspects, victims, witnesses, and close relatives and associates who are relevant to an investigation.
- b. Applicants for and current and former personnel of the FBI and persons related thereto who are considered relevant to an applicant investigation, personnel inquiry, or other personnel matters.
- c. Applicants for and appointees to sensitive positions in the United States Government and persons related thereto who are considered relevant to the investigation.
- d. Individuals who are the subject of unsolicited information, who offer unsolicited information, request assistance, and make inquiries concerning record material, including general correspondence, and contacts with other agencies, businesses, institutions, clubs; the public and the news media.
- e. Individuals associated with administrative operations or services

including pertinent functions, contractors and pertinent persons related thereto.

(All manner of information concerning individuals may be acquired in connection with and relating to the varied investigative responsibilities of the FBI which are further described in "CATEGORIES OF RECORDS IN THE SYSTEM." Depending on the nature and scope of the investigation this information may include, among other things, personal habits and conduct, financial information, travel and organizational affiliation of individuals. The information collected is made a matter of record and placed in FBI files)

**CATEGORIES OF RECORDS IN THE SYSTEM**

The FBI Central Records Systems—The FBI utilizes a central records system of maintaining its investigative, personnel, applicant, administrative, and general files. This system consists of one numerical sequence of subject matter files, an alphabetical index to the files, and a supporting abstract system to facilitate processing and accountability of all important mail placed in files. This abstract system is both a textual and an automated capability for locating mail. Files kept in FBI field offices are also structured in the same manner, except they do not utilize an abstract system.

The FBI 277 classifications used in its basic filing system which pertain primarily to Federal violations over which the FBI has investigative jurisdiction. However, included in the 277 classifications are personnel, applicant, and administrative matters to facilitate the overall filing scheme. These classifications are as follows (the word "obsolete" following the name of the classification indicates the FBI is no longer initiating investigative cases in these matters, although the material is retained for reference purposes):

1. Training Schools; National Academy Matters; FBI National Academy Applicants. Covers general information concerning the FBI National Academy, including background investigations of individual candidates.
2. Neutrality Matters. Title 18, United States Code, Sections 956 and 958 962; Title 22, United States Code, Sections 1934 and 401.
3. Overthrow or Destruction of the Government. Title 18, United States Code, Section 2385.
4. National Firearms Act, Federal Firearms Act; State Firearms Control Assistance Act; Unlawful Possession or Receipt of Firearms. Title 26, United States Code, Sections 5801-5812; Title 18, United States Code, Sections 921-

928; Title 18, United States Code, Sections 1201-1203.

5. Income Tax. Covers violations of Federal income tax laws reported to the FBI. Complaints are forwarded to the Commissioner of the Internal Revenue Service.

6. Interstate Transportation of Strikebreakers. Title 18, United States Code, Section 1231.

7. Kidnapping. Title 28, United States Code, Sections 1201 and 1202.

8. Migratory Bird Act. Title 18, United States Code, Section 43; Title 16, United States Code, Section 703 through 718.

9. Extortion. Title 18, United States Code Sections 876, 877, 875, and 873.

10. Red Cross Act. Title 18, United States Code, Sections 706 and 917.

11. Tax (Other than Income) This classification covers complaints concerning violations of Internal Revenue law as they apply to other than alcohol, social security and income and profits taxes, which are forwarded to the Internal Revenue Service.

12. Narcotics. This classification covers complaints received by the FBI concerning alleged violations of Federal drug laws. Complaints are forwarded to the headquarters of the Drug Enforcement Administration (DEA), or the nearest district office of DEA.

13. Miscellaneous. Section 125, National Defense Act, Prostitution; Selling Whiskey Within Five Miles of An Army Camp. 1920 only. Subjects were alleged violators of abuse of U.S. flag, fraudulent enlistment, selling liquor and operating houses of prostitution within restricted bounds of military reservations. Violations of Section 13 of the Selective Service Act (Conscription Act were enforced by the Department of Justice as a war emergency measure with the Bureau exercising jurisdiction in the detection and prosecution of cases within the purview of that Section.

14. Sedition. Title 18, United States Code, Sections 2387, 2388, and 2391.

15. Theft from Interest Shipment. Title 18, United States Code, Section 859; Title 18, United States Code, Section 660; Title 18 United States Code, Section 2117.

16. Violations of Federal Injunction (obsolete). Consolidated into Classification 69, "Contempt of Court".

17. Fraud Against the Government Department of Veterans Affairs, Department of Veterans Affairs Matters. Title 18, United States Code, Section 287, 289, 290, 371, or 1001, and Title 38, United States Code, Sections 787(a), 787(b), 3405, 3501, and 3502.

18. May Act. Title 18, United States Code, Section 1384.

19. Censorship Matter (obsolete). Pub. L. 77th Congress.

20. Federal Grain Standards Act (obsolete) 1920 only. Subjects were alleged violators of contracts for sale. Shipment of Interstate Commerce, Section 5, U.S. Grain Standards Act.

21. Food and Drugs. This classification covers complaints received concerning alleged violations of the Food, Drug and Cosmetic Act; Tea Act; Import Milk Act; Caustic Poison Act; and Filled Milk Act. These complaints are referred to the Commissioner of the Food and Drug Administration of the field component of that Agency.

22. National Motor Vehicle Traffic Act, 1922-27 (obsolete). Subjects were possible violators of the National Motor Vehicle Theft Act; Automobiles seized by Prohibitions Agents.

23. Prohibition. This classification covers complaints received concerning bootlegging activities and other violations of the alcohol tax laws. Such complaints are referred to the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, or field representatives of the Agency.

24. Profiteering 1920-42. (obsolete). Subject are possible violators of the Lever Act—Profiteering in food and clothing or accused company was subject of file. Bureau conducted investigations to ascertain profits.

25. Selective Service Act; Selective Training and Service Act. Title 50, United States Code, Section 462; Title 50 United States Code, Section 459.

26. Interstate Transportation of Stolen Motor Vehicle; Interstate Transportation of Stolen Aircraft. Title 18, United States Code, Sections 2311 (in part), 2312, and 2313.

27. Patent Matter. Title 35, United States Code, Sections 104 and 105.

28. Copyright Matter. Title 17, United States Code, Sections 104 and 105.

29. Bank Fraud and Embezzlement. Title 18, United States Code, Sections 212, 213, 215, 334, 655-657, 1004-1006, 1008, 1009, 1014, and 1306; Title 12, United States Code, Section 1725(g).

30. Interstate Quarantine Law, 1922-25 (obsolete). Subjects alleged violators of Act of February 15, 1893, as amended, regarding interstate travel of persons afflicted with infectious diseases. Cases also involved unlawful transportation of animals, Act of February 2, 1903. Referrals were made to Public Health Service and the Department of Agriculture.

31. White Slave Traffic Act. Title 18, United States Code, Section 2421-2424.

32. Identification (Fingerprint) Matters. This classification covers general information concerning Identification (fingerprint) matters.

33. Uniform Crime Reporting. This classification covers general information concerning the Uniform Crime Reports, a periodic compilation of statistics of criminal violations throughout the United States.

34. Violation of Lacy Act, 1922-43. (obsolete) Unlawful Transportation and shipment of black bass and fur seal skins.

35. Civil Service. This classification covers complaints received by the FBI concerning Civil Service matters which are referred to the Office of Personnel Management in Washington or regional offices of that Agency.

36. Mail Fraud. Title 18, United States Code, Section 13341.

37. False Claims Against the Government, 1921-22. (obsolete) Subjects submitted claims for allotment, vocational training, compensation as veterans under the Sweet Bill. Letters were generally referred elsewhere (Veterans Bureau). Violators apprehended for violation of Article No. 1, War Risk Insurance Act.

38. Application for Pardon to Restore Civil Rights, 1921-35. (obsolete) Subjects allegedly obtained their naturalization papers by fraudulent means. Cases later referred to Immigration and Naturalization Service.

39. Falsely Claiming Citizenship. (obsolete) Title 18, United States Code, Sections 911 and 1015(a)(b).

40. Passport and Visa Matter. Title 18, United States Code, Sections 1451-1548.

41. Explosives (obsolete). Title 50, United States Code, Sections 121 through 144.

42. Deserter; Harboring. Title 10, United States Code, Sections 808 and 885.

43. Illegal Wearing of Uniforms; False Advertising or Misuse of Names, Words, Emblems or Insignia; Illegal Manufacturer, Use, Possession, or Sale of Emblems and Insignia; Illegal Manufacture, Possession, or Wearing of Civil Defense Insignia; Miscellaneous, Forging or Using Forged Certificate of Discharge from Military or Naval Service; Miscellaneous, Falsely Making or Forging Naval, Military, or Official Pass; Miscellaneous, Forging or Counterfeiting Seal of Department or Agency of the United States, Misuse of the Great Seal of the United States or of the Seals of the President or the Vice President of the United States; Unauthorized Use of "Johnny Horizon" Symbol; Unauthorized Use of Smokey Bear Symbol. Title 18, United States Code, Sections 702, 703, and 704; Title 18, United States Code, Sections 701, 705, 707, and 710; Title 36, United States Code, Section 182; Title 50, Appendix, United States Code, Section 2284; Title

46. United States Code, Section 249; Title 18, United States Code, Sections 498, 499, 506, 709, 711, 711a, 712, 713, and 714; Title 12, United States Code, Sections 1457 and 1723a; Title 22, United States Code, Section 2518.

44. Civil Rights; Civil Rights, Election Laws, Voting Rights Act, 1965, Title 18, United States Code, Sections 241, 242, and 245; Title 42, United States Code, Section 1973; Title 18, United States Code, Section 243; Title 18, United States Code, Section 244, Civil Rights Act—Federally Protected Activities; Civil Rights Act—Overseas Citizens Voting Rights Act of 1975.

45. Crime on the High Seas (Includes stowaways on boats and aircraft). Title 18, United States Code, Sections 7, 13, 1243, and 2199.

46. Fraud Against the Government: (Includes Department of Health, Education and Welfare; Department of Labor (CETA), and Miscellaneous Government Agencies) Anti-Kickback Statute; Department Assistance Act of 1950; False Claims, Civil; Federal-Aid Road Act; Lead and Zinc Act; Public Works and Economic Development Act of 1965; Renegotiation Act, Criminal; Renegotiation Act, Civil; Trade Expansion Act of 1962; Unemployment Compensation Statutes; Economic Opportunity Act, Title 50, United States Code, Section 1211 et seq.; Title 31, United States Code, Section 231; Title 41, United States Code, Section 119; Title 40, United States Code, Section 489.

47. Impersonation. Title 18, United States Code, Section 912, 913, 915, and 916.

48. Postal. Violation (Except Mail Fraud). This classification covers inquiries concerning the Postal Service and complaints pertaining to the theft of mail. Such complaints are either forwarded to the Postmaster General or the nearest Postal Inspector.

49. Bankruptcy Fraud. Title 18, United States Code, Sections 151-155.

50. Involuntary Servitude and Slavery. U.S. Constitution, 13th Amendment; Title 18, United States Code, sections 1581-1588, 241, and 242.

51. Jury Panel Investigations. This classification covers jury panel investigations which are requested by the appropriate Assistant Attorney General as authorized by 28 U.S.C. 533 and AG memorandum #781, dated 11/9/72. These investigations can be conducted only up-on such a request and consist of an indices and arrest check, and only in limited important trials where defendant could have influence over a juror.

52. Theft, Robbery, Embezzlement, Illegal Possession or Destruction of Government Property. Title 18, United States Code, Sections 641, 1024, 1660, 2112, and 2114. Interference With Government Communications, Title 18, U.S.C., Section 1632.

53. Excess Profits On Wool 1918 (obsolete). Subjects possible violator of Government Control of Wool Clip of 1918.

54. Customs Laws and Smuggling. This classification covers complaints received concerning smuggling and other matters involving importation and entry of merchandise into and the exportation of merchandise from the United States. Complaints are referred to the nearest district office of the U.S. Customs Service or the Commissioner of Customs, Washington, DC.

55. Counterfeiting. This classification covers complaints received concerning alleged violations of counterfeiting of U.S. coins, notes, and other obligations and securities of the Government. These complaints are referred to either the Director, U.S. Secret Service, or the nearest office of that Agency.

56. Election Laws. Title 18, United States Code, Sections 241, 242, 245, and 591-607; Title 42, United States Code, Section 1973; Title 26, United States Code, Sections 9012 and 9042; Title 2, United States Code, Sections 431-437, 439, and 441.

57. War Labor Dispute Act (obsolete). Pub. L. 89-77th Congress.

58. Corruption of Federal Public Officials. Title 18, United States Code, Sections 201-203, 205-211; Pub. L. 89-4 and 89-136.

59. World War Adjusted Compensation Act of 1924-44 (obsolete). Bureau of Investigation was charged with the duty of investigating alleged violations of all sections of the World War Adjusted Compensation Act (Pub. L. 472, 69th Congress (H.R. 10277)) with the exception of Section 704.

60. Anti-Trust, Title 15, United States Code, Sections 1-7, 12-27, and 13.

61. Treason or Misprision of Treason. Title 18, United States Code, Sections 2381, 2382, 2389, 2390, 756, and 757.

62. Administrative Inquiries. Misconduct Investigations of Officers and Employees of the Department of Justice and Federal Judiciary: Census Matters (Title 13, United States Code, Sections 211-214, 221-224, 304, and 305) Domestic Police Cooperation; Eight-Hour-Day Law (Title 40, United States Code, Sections 321, 332, 325a, 326); Fair Credit Reporting Act (Title 15, United States Code, Sections 1681q and 1681r); Federal Cigarette Labeling and Advertising Act (Title 15, United States Code, Section 1333); Federal Judiciary

Investigations; Kickback Racket Act (Title 18, United States Code, Section 874); Lands Division Matter, other Violations and/or Matters; Civil Suits—Miscellaneous; Soldiers' and Sailors' Civil Relief Act of 1940 (Title 50, Appendix, United States Code, Sections 510-590); Tariff Act of 1930 (Title 19, United States Code, Section 1304); Unreported Interstate Shipment of Cigarettes (Title 15, United States Code, Sections 375 and 376); Fair Labor Standards Act of 1938 (Wages and Hours Law) (Title 29, United States Code, Sections 201-219); Conspiracy (Title 18, United States Code, Section 371 (formerly Section 88, Title 18, United States Code); effective September 1, 1948).

63. Miscellaneous—Nonsubversive. This classification concerns correspondence from the public which does not relate to matters within FBI jurisdiction.

64. Foreign Miscellaneous. This classification is a control file utilized as a repository for intelligence information of value identified by country. More specific categories are placed in classification 108-113.

65. Espionage. Attorney General Guidelines on Foreign Counterintelligence: Internal Security Act of 1950; Executive Order 11905.

66. Administrative Matters. This classification covers such items as supplies, automobiles, salary matters and vouchers.

67. Personnel Matters. This classification concerns background investigations of applicants for employment with the FBI and folders for current and former employees.

68. Alaskan matters (obsolete). This classification concerns FBI investigations in the Territory of Alaska prior to its becoming a State.

69. Contempt of Court. Title 18, United States Code, Sections 401, 402, 3285, 3691, 3692; Title 10, United States Code, Section 647; and Rule 42, Federal Rules of Criminal Procedure.

70. Crime on Government Reservation. Title 18, United States Code, Sections 7 and 13.

71. Bills of Lading Act. Title 49, United States Code, Section 121.

72. Obstruction of Criminal Investigations: Obstruction of Justice, Obstruction of Court Orders. Title 18, United States Code, Sections 1503 through 1510.

73. Application for Pardon After Completion of Sentence and Application for Executive Clemency. This classification concerns the FBI's background investigation in connection with pardon applications and request for executive clemency.

74. Perjury. Title 18, United States Code, Sections 1621, 1622, and 1623.

75. Bondsmen and Sureties. Title 18, United States Code, Section 1506.

76. Escaped Federal Prisoner. Escape and Rescue; Probation Violator, Parole Violator Parole Violator, Mandatory Release Violator. Title 18, United States Code, Sections 751-757, 1072; Title 18, United States Code, Sections 3651-3656; and Title 18, United States Code, Sections 4202-4207, 5037, and 4161-4166.

77. Applicants (Special Inquiry, Departmental and Other Government Agencies, except those having special classifications). This classification covers the background investigations conducted by the FBI in connection with the aforementioned positions.

78. Illegal Use of Government Transportation Requests. Title 18, United States Code, Section 287, 405, 508, 641, 1001 and 1002.

79. Missing Persons. This classification covers the FBI's Identification Division's assistance in the locating of missing persons.

80. Laboratory Research Matters. At FBI Headquarters this classification is used for Laboratory research matters. In field office files this classification covers the FBI's public affairs matters and involves contact by the FBI with the general public, Federal and State agencies, the Armed Forces, Corporations, the news media and other outside organizations.

81. Gold Hoarding. 1933-45. (obsolete) Gold Hoarding investigations conducted in accordance with an Act of March 9, 1933 and Executive Order issued August 28, 1933. Bureau instructed by Department to conduct no further investigations in 1935 under the Gold Reserve Act of 1934. Thereafter, all correspondence referred to Secret Service.

82. War Risk Insurance (National Life Insurance (obsolete)). This classification covers investigations conducted by the FBI in connection with civil suits filed under this statute.

83. Court of Claims. This classification covers requests for investigations of cases pending in the Court of Claims from the Assistant Attorney General in charge of the Civil Division of the Department of Justice.

84. Reconstruction Finance Corporation Act (obsolete). Title 15, United States Code, Chapter 14.

85. Home Owner Loan Corporation (obsolete). This classification concerned complaints received by the FBI about alleged violations of the Home Owners Loan Act, which were referred to the Home Owners Loan Corporation. Title 12 United States Code, Section 1464.

86. Fraud Against the Government—Small Business Administration. Title 15, United States Code, Section 645; Title 18, United States Code, Sections 212, 213, 215, 216, 217, 657, 658, 1006, 1011, 1013, 1014, 1906, 1907, and 1909.

87. Interstate Transportation of Stolen Property (Heavy Equipment—Commercialized Theft). Title 18, United States Code, Sections 2311, 2314, 2315 and 2318.

88. Unlawful Flight to Avoid Prosecution, Custody, or Confinement; Unlawful Flight to Avoid Giving Testimony. Title 18, United States Code, Sections 1073 and 1074.

89. Assaulting or Killing a Federal Officer, Crimes Against Family Members, Congressional Assassination Statute. Title 18, United States Code, Sections 1111, 1114, 2232.

90. Irregularities in Federal Penal Institutions. Title 18, United States Code, Sections 1791 and 1792.

91. Bank Burglary; Bank Larceny; Bank Robbery. Title 18, United States Code, Section 2113.

92. Racketeer Enterprise Investigations. Title 18, United States Code, Section 2327.

93. Ascertaining Financial Ability. This classification concerns requests by the Department of Justice for the FBI to ascertain a person's ability to pay a claim, fine or judgment obtained against him by the United States Government.

94. Research matters. This classification concerns all general correspondence of the FBI with private individuals which does not involve any substantive violation of Federal law.

95. Laboratory Cases (Examination of Evidence in Other Than Bureau's Cases). The classification concerns non-FBI cases where a duly constituted State, county or a municipal law enforcement agency in a criminal matter has requested an examination of evidence by the FBI Laboratory.

96. Alien Applicant (obsolete). Title 10, United States Code, Section 310.

97. Foreign Agents Registration Act. Title 18, United States Code, Section 951; Title 22, United States Code, Sections 611–621; Title 50, United States Code, Sections 851–857.

98. Sabotage. Title 18, United States Code, Sections 2151–2156; Title 50, United States Code, Section 797.

99. Plant Survey (obsolete). This classification covers a program wherein the FBI inspected industrial plants for the purpose of making suggestions to the operations of those plants to prevent espionage and sabotage.

100. Domestic Security. This classification covers investigations by the FBI in the domestic security field, e.g., Smith Act violations

101. Hatch Act (obsolete). Pub. L. 252, 76th Congress.

102. Voorhis Act, title 18, United States Code, Section 1386.

103. Interstate Transportation of Stolen Livestock. Title 18, United States Code, Sections 667, 2311, 2316 and 2317.

104. Servicemen's Dependents Allowance Act of 1942 (obsolete). Pub. L. 625, 77th Congress, Sections 115–119.

105. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

106. Alien Enemy Control; Escaped Prisoners of War and Internees, 1944–55 (obsolete). Suspects were generally suspected escaped prisoners of war, members of foreign organizations, failed to register under the Alien Registration Act. Cases ordered closed by Attorney General after alien enemies returned to their respective countries upon termination of hostilities.

107. Denaturalization Proceedings (obsolete). This classification covers investigations concerning allegations that an individual fraudulently swore allegiance to the United States or in some other manner illegally obtained citizenship to the U.S., Title 8, United States Code, Section 738.

108. Foreign Travel Control (obsolete). This classification concerns security-type investigations wherein the subject is involved in foreign travel.

109. Foreign Political Matters. This classification is a control file utilized as a repository for intelligence information concerning foreign political matters broken down by country.

110. Foreign Economic Matters. This classification is a control file utilized as a repository for intelligence information concerning foreign economic matters broken down by country.

111. Foreign Social Conditions. This classification is a control file utilized as a repository for intelligence information concerning foreign social conditions broken down by country.

112. Foreign Funds. This classification is a control file utilized as a repository for intelligence information concerning foreign funds broken down by country.

113. Foreign Military and Naval Matters. This classification is a control file utilized as a repository for intelligence information concerning foreign military and naval matters broken down by country.

114. Alien Property Custodian Matter (obsolete). Title 50, United States Code, Sections 1 through 38. This classification covers investigations concerning ownership and control of property subject to claims and litigation under this statute.

115. Bond Default; Bail Jumper. Title 18, United States Code, Sections 3146–3152.

116. Department of Energy Applicant; Department of Energy, Employee. This classification concerns background investigations conducted in connection with employment with the Department of Energy.

117. Department of Energy, Criminal. Title 42, United States Code, Sections 2011–2281; Pub. L. 93–438.

118. Applicant, Intelligence Agency (obsolete). This classification covers applicant background investigations conducted of persons under consideration for employment by the Central Intelligence Group.

119. Federal Regulation of Lobbying Act. Title 2, United States Code, Sections 261–270.

120. Federal Tort Claims Act, Title 28, United States Code, Sections 2671 to 2680. Investigations are conducted pursuant to specific request from the Department of Justice in connection with cases in which the Department of Justice represents agencies sued under the Act.

121. Loyalty of Government Employees (obsolete). Executive Order 9835.

122. Labor Management Relations Act, 1947. Title 29, United States Code, Sections 161, 162, 176–178 and 186.

123. Section inquiry, States Department, Voice of America (U.S. Information Center) (Pub. L. 402, 80th Congress) (obsolete). This classification covers loyalty and security investigations on personnel employed by or under consideration for employment for Voice of America.

124. European Recovery Program Administration, formerly Foreign Operations Administration, Economic Cooperation Administration or E.R.P., European Recovery Programs; A.I.D., Agency for International Development (obsolete). This classification covers security and loyalty investigations of personnel employed by or under consideration for employment with the European Recovery Program. Pub. L. 472, 80th Congress.

125. Railway Labor Act; Railway Labor Act—Employer's Liability Act Title 45, United States Code, Sections 151–163 and 181–188.

126. National Security Resources Board, Special Inquiry (obsolete). This classification covers loyalty investigations on employees and applicants of the National Security Resources Board.

127. Sensitive Positions in the United States Government, Pub. L. 266 (obsolete). Pub. L. 81st Congress.



128. International Development Program (Foreign Operations Administration) (obsolete). This classification covers background investigations conducted on individuals who are to be assigned to duties under the International Development Program.

129. Evacuation Claims (obsolete). Pub. L. 886, 80th Congress.

130. Special Inquiry. Armed Forces Security Act (obsolete). This classification covers applicant-type investigations conducted for the Armed Forces security agencies.

131. Admiralty Matter. Title 48, United States Code, Sections 741-752 and 781-799.

132. Special Inquiry, Office of Defense Mobilization (obsolete). This classification covers applicant-type investigations of individuals associated with the Office of Defense Mobilization.

133. National Science Foundation Act, Applicant (obsolete). Pub. L. 507, 81st Congress.

134. Foreign Counterintelligence Assets. This classification concerns individuals who provide information to the FBI concerning Foreign Counterintelligence matters.

135. PROSAB (Protection of Strategic Air Command Bases of the U.S. Air Force) (obsolete). This classification covered contacts with individuals with the aim to develop information useful to protect bases of the Strategic Air Command.

136. American Legion Contact (obsolete). This classification covered liaison contracts with American Legion offices.

137. Informants. Other than Foreign Counterintelligence Assets. This classification concerns individuals who furnish information to the FBI concerning criminal violations on a continuing and confidential basis.

138. Loyalty of Employees of the United Nations and Other Public International Organizations. This classification concerns FBI investigations based on referrals from the Office of Personnel Management wherein a question or allegation has been received regarding the applicant's loyalty to the U.S. Government as described in Executive Order 10422.

139. Interception of Communications (Formerly, Unauthorized Publication or Use of Communications). Title 47, United States Code, Section 605; Title 47, United States Code, Section 501; Title 18, United States Code, Sections 2510-2513.

140. Security of Government Employees; Fraud Against the Government, Executive Order 10450.

141. False Entries in Records of Interstate Carriers. Title 47, United

States Code, Section 220; Title 49, United States Code, Section 20.

142. Illegal Use of Railroad Pass. Title 49, United States Code, Section 1.

143. Interstate Transport of Gambling Devices. Title 15, United States Code, Sections 1171 through 1180.

144. Interstate Transportation of Lottery Tickets. Title 18, United States Code, Section 1301.

145. Interstate Transportation of Obscene Materials. Title 18, United States Code, Sections 1462, 1464 and 1465.

146. Interstate Transportation of Prison-Made Goods. Title 18, United States Code, Sections 1761 and 1762.

147. Fraud Against the Government—Department of Housing and Urban Development, Matters. Title 18, United States Code, Sections 657, 709, 1006, and 1010; Title 12, United States Code, Sections 1709 and 1715.

148. Interstate Transportation of Fireworks. Title 18, United States Code, Section 836.

149. Destruction of Aircraft or Motor Vehicles. Title 18, United States Code, Sections 31-35.

150. Harboring of Federal Fugitives, Statistics (obsolete).

151. (Referral cases received from the Office of Personnel Management under Pub. L. 298). Agency for International Development; Department of Energy; National Aeronautics and Space Administration; Nation Science Foundation; Peace Corps; Action; U.S. Arms Control and Disarmament Agency; World Health Organization; International Labor Organization; International Communications Agency. This classification covers referrals from the Office of Personnel Management where an allegation has been received regarding an applicant's loyalty to the U.S. Government. These referrals refer to applicants from Peace Corps; Department of Energy, National Aeronautics and Space Administration, Nuclear Regulatory Commission, United States Arms Control and Disarmament Agency and the International Communications Agency.

152. Switchblade Knife Act. Title 15, United States Code, Sections 1241-1244.

153. Automobile Information Disclosure Act. Title 15, United States Code, Sections 1231-1233.

154. Interstate Transportation of Unsafe Refrigerators. Title 15, United States Code, Sections 1211-1214.

155. National Aeronautics and Space Act of 1958. Title 18, United States Code, Section 799.

156. Employee Retirement Income Security Act. Title 29, United States Code, Sections 1021-1029, 1111, 1131,

and 1141; Title 18, United States Code, Sections 644, 1027, and 1954.

157. Civil Unrest. This classification concerns FBI responsibility for reporting information on civil disturbances or demonstrations. The FBI's investigative responsibility is based on the Attorney General's Guidelines for Reporting on Civil Disorders and Demonstrations Involving a Federal Interest which became effective April 5, 1978.

158. Labor-Management Reporting and Disclosure Act of 1959 (Security Matter) (obsolete). Pub. L. 86-257, Section 504.

159. Labor-Management Reporting and Disclosure Act of 1959 (Investigative Matter). Title 29, United States Code, Sections 501, 504, 522, and 530.

160. Federal Train Wreck Statute. Title 18, United States Code, Section 1992.

161. Special Inquiries for White House, Congressional Committee and Other Government Agencies. This classification covers investigations requested by the White House. Congressional committees or other Government agencies.

162. Interstate Gambling Activities. This classification covers information acquired concerning the nature and scope of illegal gambling activities in each field office.

163. Foreign Police Cooperation. This classification covers requests by foreign police for the FBI to render investigative assistance to such agencies.

164. Crime Aboard Aircraft. Title 49, United States Code, Sections 1472 and 1473.

165. Interstate Transmission of Wagering Information. Title 18, United States Code, Section 1065.

166. Interstate Transportation in Aid of Racketeering. Title 18, United States Code, Section 1952.

167. Destruction of Interstate Property. Title 15, United States Code, Sections 1281 and 1282.

168. Interstate Transportation of Wagering Paraphernalia. Title 18, United States Code, Section 1953.

169. Hydraulic Brake Fluid Act (obsolete); 76 Stat. 437, Pub. L. 87-637.

170. Extremist Informants (obsolete). This classification concerns individuals who provided information on a continuing basis on various extremist elements.

171. Motor Vehicle Seat Belt Act (obsolete). Pub. L. 88-201, 80th Congress.

172. Sports Bribery. Title 18, United States Code, Section 244.

173. Public Accommodations, Civil Rights Act of 1964 Public Facilities; Civil Rights Act of 1964 Public Education;

Civil Rights Act of 1964 Employment; Civil Rights Act of 1964. Title 42, United States Code, Section 2000; Title 18, United States Code, Section 245.

174. Explosives and Incendiary Devices; Bomb Threats (Formerly Bombing Matters; Bombing Matters, Threats). Title 18, United States Code, Section 844.

175. Assaulting, Kidnapping or Killing the President (or Vice President) of the United States. Title 18, United States Code, Section 1751.

176. Anti-riot Laws. Title 18, United States Code, Section 245.

177. Discrimination in Housing. Title 42, United States Code, Sections 3601-3619 and 3631.

178. Interstate Obscene or Harassing Telephone Calls. Title 47, United States Code, Section 223.

179. Extortionate Credit Transactions. Title 18, United States Code, Section 891-896.

180. Desecration of the Flag. Title 18, United States Code, Section 700.

181. Consumer Credit Protection Act. Title 15, United States Code, Section 1611.

182. Illegal Gambling Business; Illegal Gambling Business, Obstruction; Illegal Gambling Business Forfeiture. Title 18, United States Code, Section 1955; Title 18, United States Code, Section 1511.

183. Racketeer, Influence and Corrupt Organizations. Title 18, United States Code, Sections 1961-1968.

184. Police Killings. This classification concerns investigations conducted by the FBI upon written request from local Chief of Police or duty constituted head of the local agency to actively participate in the investigation of the killing of a police officer. These investigations are based on a Presidential Directive dated June 3, 1971.

185. Protection of Foreign Officials and Officials Guests of the United States. Title 18, United States Code, Sections 112, 970, 1118, 1117 and 1201.

186. Real Estate Settlement Procedures Act of 1974. Title 12, United States Code, Section 2602; Title 12, United States Code, Section 2606, and Title 12, United States Code, Section 2607.

187. Privacy Act of 1974, Criminal. Title 5, United States Code, Section 552a.

188. Crime Resistance. This classification covers FBI efforts to develop new or improved approaches, techniques, systems, equipment and devices to improve and strengthen law enforcement as mandated by the Omnibus Crime Control and Safe Streets Action of 1968.

189. Equal Credit Opportunity Act. Title 15, United States Code, Section 1691.

190. Freedom of Information/Privacy Acts. This classification covers the creation of a correspondence file to preserve and maintain accurate records concerning the handling of requests for records submitted pursuant to the Freedom of Information-Privacy Acts.

191. False Identity Matters. (obsolete) This classification covers the FBI's study and examination of criminal elements' efforts to create false identities.

192. Hobbs Act—Financial Institutions; Commercial Institutions; Armored Carrier. Title 18, United States Code, Section 1951.

193. Hobbs Act—Commercial Institutions (obsolete). Title 18, United States Code, Section 1951; Title 47, United States Code, Section 506.

194. Hobbs Act—Corruption of Public Officials. Title 18, United States Code, Section 1951.

195. Hobbs Act—Labor Related. Title 18, United States Code, Section 1951.

196. Fraud by Wire. Title 18, United States Code, Section 1343.

197. Civil Actions or Claims Against the Government. This classification covers all civil suits involving FBI matters and most administrative claims filed under the Federal Tort Claims Act arising from FBI activities.

198. Crime on Indian Reservations. Title 18, United States Code, Sections 1151, 1152, and 1153.

199. Foreign Counterintelligence—Terrorism. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

200. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

201. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

202. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

203. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

204. Federal Revenue Sharing. This classification covers FBI investigations conducted where the Attorney General has been authorized to bring civil action whenever he has reason to believe that a pattern or practice of discrimination in disbursement of funds under the Federal Revenue Sharing status exists.

205. Foreign Corrupt Practices Act of 1977. Title 15, United States Code, Section 78.

206. Fraud Against the Government—Department of Defense, Department of Agriculture, Department of Commerce, Community Services Organization, Department of Transportation. (See classification 46 (supra) for a statutory authority for this and the four following classifications.)

207. Fraud Against the Government—Environmental Protection Agency, National Aeronautics and Space Administration, Department of Energy, Department of Transportation.

208. Fraud Against the Government—General Services Administration.

209. Fraud Against the Government—Department of Health, and Human Services (Formerly, Department of Health, Education, and Welfare).

210. Fraud Against the Government—Department of Labor.

211. Ethics in Government Act of 1978, Title VI (Title 28, Sections 591-596).

212. Foreign Counterintelligence—Intelligence Community Support. This is an administrative classification for the FBI's operational and technical support to other Intelligence Community agencies.

213. Fraud Against the Government—Department of Education.

214. Civil Rights of Institutionalized Persons Act (Title 42, United States Code, Section 1997).

215. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

216. thru 229. Foreign Counterintelligence Matters. (Same authority as 215)

230. thru 240. FBI Training Matters.

241. DEA Applicant Investigations.

242. Automation Matters.

243. Intelligence Identities Protection Act of 1982.

244. Hostage Rescue Team.

245. Drug Investigative task Force.

246 thru 248. Foreign Counterintelligence Matters. (Same authority as 215)

249. Environmental Crimes—Investigations involving toxic or hazardous waste violations.

250. Tampering With Consumer Products (Title 18, U.S. Code, Section 1395)

251. Controlled Substance—Robbery;—Burglary (Title 18, U.S. Code, Section 2118)

252. Violent Crime Apprehension Program (VICAP). Case folders containing records relevant to the VICAP Program, in conjunction with the National Center for the Analysis of Violent Crime Record System at the FBI Academy; Quantico, Virginia.



253. False Identification Crime Control Act of 1982 (Title 18, U.S. Code, Section 1028—Fraud and Related Activity in Connection With Identification Documents, and Section 1738—Mailing Private Identification Documents Without a Disclaimer)

254. Destruction of Energy Facilities (Title 18, U.S. Code, Section 1365) relates to the destruction of property of nonnuclear energy facilities.

255. Counterfeiting of State and Corporate Securities (Title 18, U.S. Code, Section 511) covers counterfeiting and forgery of all forms of what is loosely interpreted as securities.

256. Hostage Taking—Terrorism (Title 18, U.S. Code, Section 1203) prohibits taking of hostage(s) to compel third party to do or refrain from doing any act.

257. Trademark Counterfeiting Act (Title 18, United States Code, Section 2320) covers the international trafficking in goods which bear a counterfeited trademark.

258. Credit Card Fraud Act of 1984 (Title 18, United States Code, Section 1029) covers fraud and related activities in connection with access devices (credit and debit cards).

259. Security Clearance Investigations Program. (Same authority as 215)

260. Industrial Security Program. (Same authority as 215)

261. Security Officer Matters. (Same authority as 215)

262. Overseas Homicide (Attempted Homicide—International Terrorism. Title 18, United States Code, Section 2331.

263. Office of Professional Responsibility Matters

264. Computer Fraud and Abuse Act of 1986. Electronic Communications Privacy Act of 1986. Title 18, United States Code, Section 1030; Title 18, United States Code, Section 2701.

265. Acts of Terrorism in the United States—International Terrorist (Followed by predicate offense from other classification.)

266. Acts of Terrorism in the United States—Domestic Terrorist. (Followed by predicate offense from other classification.)

267. Drug-Related Homicide. Title 21, U.S. Code, Section 848(e).

268. Engineering Technical Matters—FCI.

269. Engineering Technical Matters—Non-FCI.

270. Cooperative Witnesses.

271. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

272. Money Laundering. Title 18, U.S. Code, Sections 1956 and 1957.

273. Adoptive Forfeiture Matter—Drug. Forfeiture based on seizure of property by state, local or other Federal authority.

274. Adoptive Forfeiture Matter—Organized Crime. (Same explanation as 273.)

275. Adoptive Forfeiture Matter—White Collar Crime. (Same explanation as 273.)

276. Adoptive Forfeiture Matter—Violent Crime/Major Offenders Program. (Same explanation as 273.)

277. Adoptive Forfeiture Matter—Counterterrorism Program. (Same explanation as 273.)

Records Maintained in FBI Field Divisions—FBI field divisions maintain for limited periods of time investigative, administrative and correspondence records, including files, index cards and related material, some of which are duplicated copies of reports and similar documents forwarded to FBI Headquarters. Most investigative activities conducted by FBI field divisions are reported to FBI Headquarters at one or more stages of the investigation. There are, however, investigative activities wherein no reporting was made to FBI Headquarters, e.g., pending cases not as yet reported and cases which were closed in the field division for any of a number of reasons without reporting to FBI Headquarters.

Duplicate records and records which extract information reported in the main files are also kept in the various divisions of the FBI to assist them in their day-to-day operation. These records are lists of individuals which contain certain biographic data, including physical description and photograph. They may also contain information concerning activities of the individual as reported to FBIHQ by the various field offices. The establishment of these lists is necessitated by the needs of the Division to have immediate access to pertinent information duplicative of data found in the central records without the delay caused by a time-consuming manual search of central indices. The manner of segregating these individuals varies depending on the particular needs of the FBI Division. The information pertaining to individuals who are a part of the list is derivative of information contained in the Central Records System. These duplicative records fall into the following categories:

(1) Listings of individuals used to assist in the location and apprehension of individuals for whom legal process is outstanding (fugitives);

(2) Listings of individuals used in the identification of particular offenders in

cases where the FBI has jurisdiction. These listings include various photograph albums and background data concerning persons who have been formerly charged with a particular crime and who may be suspect in similar criminal activities; and photographs of individuals who are unknown but suspected of involvement in a particular criminal activity, for example, bank surveillance photographs;

(3) Listings of individuals as part of an overall criminal intelligence effort by the FBI. This would include photograph albums, lists of individuals known to be involved in criminal activity, including theft from interstate shipment, interstate transportation of stolen property, and individuals in the upper echelon of organized crime;

(4) Listings of individuals in connection with the FBI's mandate to carry out Presidential directives on January 8, 1943, July 24, 1950, December 15, 1953, and February 18, 1976, which designated the FBI to carry out investigative work in matters relating to espionage, sabotage, and foreign counterintelligence. These listings may include photograph albums and other listings containing biographic data regarding individuals. This would include lists of identified and suspected foreign intelligence agents and informants;

(5) Special indices duplicative of the central indices used to access the Central Records System have been created from time to time in conjunction with the administration and investigation of major cases. This duplication and segregation facilitates access to documents prepared in connection with major cases.

In recent years, as the emphasis on the investigation of white collar crime, organized crime, and hostile foreign intelligence operations has increased, the FBI has been confronted with increasingly complicated cases, which require more intricate information processing capabilities. Since these complicated investigations frequently involve massive volumes of evidence and other investigative information, the FBI uses its computers, when necessary to collate, analyze, and retrieve investigative information in the most accurate and expeditious manner possible. *It should be noted that this computerized investigative information, which is extracted from the main files or other commercial or governmental sources, is only maintained as necessary to support the FBI's investigative activities.* Information from these internal computerized subsystems of the "Central Records

**RECORD SOURCE CATEGORIES:**

The FBI, by the very nature of its responsibilities to investigate violations of law within its investigative jurisdiction and ensure the internal security of the United States, collects information from a wide variety of sources. Basically, information is obtained, as a result of investigative efforts, from other Government agencies, law enforcement agencies, the general public, informants, witnesses, and public source material.

**SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

The Attorney General has exempted this system from subsections (c)(3), (d), (e)(1), (e)(4)(C) and (H), (f) and (g) of the Privacy Act pursuant to 5 U.S.C. 552a (j)(2) and (k)(2). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553 (b), (c), and (e).



FEDERAL BUREAU OF INVESTIGATION

**FREEDOM OF  
INFORMATION AND  
PRIVACY ACTS  
REFERENCE MANUAL**

**PART 4 OF 9**

# **FEDERAL REGISTER SYSTEMS NOTICES**

# code of federal regulations

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Judicial  
Administration

28

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PART 43 TO END

Revised as of July 1, 1994

CONTAINING  
A CODIFICATION OF DOCUMENTS  
OF GENERAL APPLICABILITY  
AND FUTURE EFFECT

AS OF JULY 1, 1994

*With Ancillaries*

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**§ 50.8 Policy with regard to criteria for discretionary access to investigatory records of historical interest.**

(a) The Department of Justice recognizes that portions of certain investigatory files compiled by the Department for law enforcement purposes, although of significant historical interest, are nevertheless exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552, as amended. In responding to requests pursuant to that Act, it is the general policy of the Department that such files that are more than fifteen years old and that are no longer substantially related to current law enforcement activities will be processed for disclosure subject to deletions to the minimum extent necessary to protect law enforcement efficiency, personal privacy, or other legitimate interests that would be implicated by the disclosure of such files.

(b) The policy set forth in this section shall not be deemed to constitute a waiver of any applicable exemption under the Freedom of Information Act. By providing for exemptions in the Act, Congress conferred upon agencies the discretion to grant access to exempt materials, unless otherwise prohibited. All disclosures pursuant to the policy set forth in this section are at the sole discretion of the Attorney

General and of those persons to whom authority therefor may be delegated.

(c) This policy is intended to further the public's knowledge of matters of historical interest and, at the same time, to preserve the Department's law enforcement efficiency and to protect personal privacy and other legitimate interests.

[Order No. 1055-84, 49 FR 12263, Mar. 29, 1984]



existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations and duties.

(6) From subsection (e)(3) because to comply with the requirements of this subsection during the course of an investigation could impede the information gathering process, thus hampering the investigation.

(7) From subsections (e)(4) (G) and (H) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(8) From subsection (g) because this system is exempt from the access and amendment provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(g) The following system of records is exempt from 5 U.S.C. 552a (c)(3) and (4); (d); (e)(1), (2) and (3), (e)(4)(G) and (H), (e)(5); and (g):

(1) *Declassification Review System (JUSTICE/OLP-004).*

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552(j)(2), (k)(1), (k)(2), and (k)(5).

(h) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her would reveal investigative interest on the part of the Department of Justice as well as the recipient agency. This would permit record subjects to impede the investigation e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel.

(2) From subsection (c)(4) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(3) From subsection (d) to the extent that information in this record system relates to official Federal investigations and matters of law enforcement and/or is properly classified pursuant to E.O. 12356. Individual access to these records might compromise ongoing investigations, reveal confidential

sources or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation, or jeopardize national security or foreign policy interests. Amendment of the records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4) From subsections (e) (1) and (5) because in the course of law enforcement investigations, information may occasionally be obtained or introduced the accuracy of which is unclear or which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information which may aid in establishing patterns of criminal activity. Moreover, it would impede the specific investigative process if it were necessary to assure the relevance, accuracy, timeliness, and completeness of all information obtained.

(5) From subsection (e)(2) because in a law enforcement investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be informed of the existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations or duties.

(6) From subsection (e)(3) because to comply with the requirements of this subsection during the course of an investigation could impede the information gathering process, thus hampering the investigation.

(7) From subsections (e)(4) (G) and (H), and (g) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

[Order No. 34-85, 51 FR 754, Jan. 8, 1986. Redesignated by Order No. 6-86, 51 FR 15476, Apr. 24, 1986 and further redesignated and amended by Order No. 19-86, 51 FR 39373, Oct. 28, 1986]

**§ 16.74 Exemption of Office of Intelligence Policy and Review Systems—limited access.**

(a) The following systems of records is exempt from 5 U.S.C. 552a (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(8), (f) and (g);

- (1) Policy and Operational Records System (JUSTICE/OIPR-001);
- (2) Foreign Intelligence Surveillance Act Records System (JUSTICE/OIPR-002);
- (3) Litigation Records System (JUSTICE/OIPR-003); and
- (4) Domestic Security/Terrorism Investigations Records System (JUSTICE/OIPR-004).

These exemptions apply only to the extent that information in those systems is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1) and (k)(2).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because release of the disclosure accounting would put the target of a surveillance or investigation on notice of the investigation or surveillance and would thereby seriously hinder authorized United States intelligence activities.

(2) From subsections (c)(4), (d), (e)(4)(G), (e)(4)(H), (f) and (g) because these provisions contemplate individual access to records and such access would compromise ongoing surveillances or investigations and reveal the sources and methods of an investigation.

(3) From subsection (e)(2) because, although this office does not conduct investigations, the collection efforts of agencies that supply information to this office would be thwarted if the agency were required to collect information with the subject's knowledge.

(4) From subsections (e)(3) and (e)(8) because disclosure and notice would provide the subject with substantial information which could impede or compromise an investigation. For example, an investigatory subject could, once made aware that an investigation was ongoing, alter his manner of engaging in intelligence or terrorist activities in order to avoid detection.

[Order No. 19-86, 51 FR 39374, Oct. 28, 1986]

**§ 16.75 Exemption of the Office of the Inspector General Systems/Limited Access.**

(a) The following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c)(3) and (4), (d), (e)(1), (2), (3), (5), and (8), and (g) of 5 U.S.C. 552a. In addition, the following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(k)(1) and (k)(2) from subsections (c)(3), (d), and (e)(1) of 5 U.S.C. 552a:

- (1) Office of the Inspector General Investigative Records (JUSTICE/OIG-001).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(1) and (k)(2). Where compliance would not appear to interfere with or adversely affect the law enforcement process, and/or where it may be appropriate to permit individuals to contest the accuracy of the information collected, e.g., public source materials, the applicable exemption may be waived, either partially or totally, by the Office of the Inspector General (OIG).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because release of disclosure accounting could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation and the fact that they are subjects of the investigation, and reveal investigative interest by not only the OIG, but also by the recipient agency. Since release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation, release could result in the destruction of documentary evidence, improper influencing of witnesses, endangerment of the physical safety of confidential sources, witnesses, and law enforcement personnel, the fabrication of testimony, flight of the subject from the area, and other activities that could impede or compromise the investigation. In addition, accounting for each disclosure could result in the release of properly classified information which would com-

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promise the national defense or disrupt foreign policy.

(2) From subsection (c)(4) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(3) From the access and amendment provisions of subsection (d) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, of the existence of that investigation; of the nature and scope of the information and evidence obtained as to his activities; of the identity of confidential sources, witnesses, and law enforcement personnel, and of information that may enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement where they prevent the successful completion of the investigation, endanger the physical safety of confidential sources, witnesses, and law enforcement personnel, and/or lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. In addition, granting access to such information could disclose security-sensitive or confidential business information or information that would constitute an unwarranted invasion of the personal privacy of third parties. Finally, access to the records could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy. Amendment of the records would interfere with ongoing investigations and law enforcement activities and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated.

(4) From subsection (e)(1) because the application of this provision could impair investigations and interfere with the law enforcement responsibilities of the OIG for the following reasons:

(i) It is not possible to detect relevance or necessity of specific information in the early stages of a civil, criminal or other law enforcement investigation, case, or matter, including investigations in which use is made of properly classified information. Rel-

evance and necessity are judgment and timing, and after the information is obtained the relevance and necessity of the information can be established.

(ii) During the course of an investigation, the OIG may obtain information concerning actual or potential violations of laws other than the scope of its jurisdiction. In the interest of effective law enforcement, the OIG should retain this information if it may aid in establishing criminal activity, and if a reliable lead for Federal law enforcement agencies.

(iii) In interviewing a subject, obtaining other forms of information during an investigation, information may be supplied to an investigator that relates to matters incidental to the primary purpose of the investigation which may relate also to the investigative jurisdiction of another agency. Such information should be readily segregated.

(5) From subsection (e) because in some instances, the application of this provision would present an impediment to law enforcement for the following reasons:

(i) The subject of an investigation would be placed on notice of the existence of an investigation and therefore be able to avoid detection, to avoid apprehension, to improperly influence witnesses, to destroy evidence, or to fabricate testimony.

(ii) In certain circumstances, the subject of an investigation is required to provide information regarding his activities, his illegal acts, his rules of conduct, or a list of contacts. Such information must be obtained from confidential sources.

(iii) In any investigation, it is necessary to obtain evidence from a variety of sources other than the subject of the investigation in order to obtain the evidence necessary for the investigation.

(6) From subsection (e) because the application of this provision to the subject of an investigation with substantial information could impede or compromise the investigation. Providing such information to the subject of an investigation

fere with an undercover investigation by revealing its existence, and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

(7) From subsection (e)(5) because the application of this provision would prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment it is collected. In the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Material which may seem unrelated, irrelevant, or incomplete when collected may take on added meaning or significance as an investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigative report, and thereby impede effective law enforcement.

(8) From subsection (e)(8) because the application of this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation, and could reveal investigative techniques, procedures, or evidence.

(9) From subsection (g) to the extent that this system is exempt from the access and amendment provisions of subsection (d) pursuant to subsections (j)(2) and (k)(1) and (k)(2) of the Privacy Act.

(c) The following system of records is exempted from 5 U.S.C. 552a(d).

(1) Office of the Inspector General, Freedom of Information/Privacy Acts (FOI/PA) Records (JUSTICE/OIG-003).

This exemption applies only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(1), and (k)(2). To the extent that information in a record pertaining to an individual does not relate to official Federal investigations and law enforcement matters, the exemption does not apply. In addition, where compliance would not appear to interfere with or adversely affect the overall law enforcement process, the applicable exemption may be waived by the Office of the Inspector General (OIG).

(d) Exemption from subsection (d) is justified for the following reasons:

(1) From the access and amendment provisions of subsection (d) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation of the existence of that investigation; of the nature and scope of the information and evidence obtained as to his activities; of the identity of confidential sources, witnesses, and law enforcement personnel; and of information that may enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement where they prevent the successful completion of the investigation, endanger the physical safety of confidential sources, witnesses, and law enforcement personnel, and/or lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. In addition, granting access to such information could disclose security-sensitive or confidential business information or information that would constitute an unwarranted invasion of the personal privacy of third parties. Finally, access to the records could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy. Amendment of the records would interfere with ongoing investigations and law enforcement activities and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated.

[Order No. 63-92, 57 FR 8263, Mar. 9, 1992, as amended by Order No. 64-92, 57 FR 8263, Mar. 9, 1992]

#### § 16.76 Exemption of Justice Management Division.

(a) The following system of records is exempt from 5 U.S.C. 552a(d):

(1) Controlled Substances Act Nonpublic Records (JUSTICE/JMD-002).

This exemption applies only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(b) Exemption from subsection (d) is justified for the following reasons:

(1) Public Law 91-513 (Controlled Substances Act), section 404(b) states that

the nonpublic record "shall be retained by the Department of Justice solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection."

(2) Information in this system consists of arrest records, including those of co-defendants. The records include reports of informants and investigations. Therefore, access could disclose investigative techniques, reveal the identity of confidential sources, and invade the privacy of third parties.

(c) The following system of records is exempt from 5 U.S.C. 552a(d):

(1) Security Clearance Information System (SCIS) (JUSTICE/JMD-008)—Limited access. This exemption applies only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(5).

(d) Exemption from subsection (d) is justified for the following reason:

(1) Access to records in the system would reveal the identity(ies) of the source(s) of information collected in the course of a background investigation. Such knowledge might be harmful to the source who provided the information as well as violate the explicit or implicit promise of confidentiality made to the source during the investigation. Access may also reveal information relating to actual or potential criminal investigations.

(e) Consistent with the legislative purpose of the Privacy Act of 1974, the Justice Management Division will grant access to nonexempt material in SCIS records which are maintained by the Security Programs Staff. Disclosure will be governed by the Department's Privacy regulations, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered; the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the requested documents and the balance made available. The control-

ling principle behind this limited access is to allow disclosures except those indicated above. The decisions to release information from this system will be made on a case-by-case basis.

(f) The following system of records is exempt from 5 U.S.C. 552a(d):

(1) Freedom of Information/Privacy Act Records System (JUSTICE/JMD-019).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k)(2).

(g) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (d) because of the need to safeguard the identity of confidential informants and avoid interference with ongoing investigations or law enforcement activities by preventing premature disclosure of information relating to those efforts.

(h) Consistent with the legislative purpose of the Privacy Act of 1974, the Justice Management Division will grant access to non-exempt material in FOIA/PA records. Exemptions will apply only to the extent that other correspondence or internal memoranda retained with the request file contain investigatory material for law enforcement purposes.

[Order No. 645-76, 41 FR 12640, Mar. 26, 1976, as amended by Order No. 688-77, 42 FR 9999, Feb. 18, 1977; Order No. 899-80, 45 FR 43703, June 30, 1980; Order No. 6-86, 51 FR 15476, Apr. 24, 1986]

#### § 16.77 Exemption of U.S. Trustee Program System—limited access.

(a) The following system of records is exempt from 5 U.S.C. 552a (c) (3) and (4); (d); (e) (1), (2) and (3), (e)(4) (G) and (H), (e) (5) and (8); (f) and (g):

(1) U.S. Trustee Program Case Referral System, JUSTICE/UST-004.

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2) and (k)(2).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of an investigation to obtain valuable information

concerning the nature of that investigation. This would permit record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel.

(2) From subsection (c)(4) since an exemption being claimed for subsection (d) makes this subsection inapplicable.

(3) From subsection (d) because access to the records contained in this system might compromise ongoing investigations, reveal confidential informants, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation. Amendment of the records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4) From subsections (e)(1) and (e)(5) because in the course of law enforcement investigations, information may occasionally be obtained or introduced the accuracy of which is unclear or which is not strictly relevant or necessary to a specific investigation. In the interest of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of criminal activity. Moreover, it would impede the specific investigative process if it were necessary to assure the relevance, accuracy, timeliness, and completeness of all information obtained.

(5) From subsection (e)(2) because in a criminal investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement because the subject of the investigation would be placed on notice as to the existence of the investigation and would therefore be able to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

(6) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it

would compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(7) From subsections (e)(4) (G) and (H) because this system of records is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k).

(8) From subsection (e)(8) because the individual notice requirement of this subsection could present a serious impediment to law enforcement in that this could interfere with the U.S. Attorney's ability to issue subpoenas.

(9) From subsections (f) and (g) because this system has been exempted from the access provisions of subsection (d).

[Order No. 1-87, 52 FR 3631, Feb. 5, 1987]

#### **§ 16.78 Exemption of the Special Counsel for Immigration-Related, Unfair Employment Practices Systems.**

(a) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (d).

(1) Central Index File and Associated Records, JUSTICE/OSC-001.

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k)(2).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of an investigation to obtain valuable information concerning the nature of that investigation. This would permit record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries.

(2) From subsection (d) because access to the records might compromise ongoing investigations, reveal confidential informants, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation.

[Order No. 10-88, 53 FR 7735, Mar. 10, 1988]

#### **§ 16.79 Exemption of Pardon Attorney Systems.**

(a) The following systems of records are exempt from 5 U.S.C. 552a(d):

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(1) Executive Clemency Files (JUSTICE/OPA-001).

(2) Freedom of Information/Privacy Acts (FOI/PA) Request File (JUSTICE/OPA-003).

These exemptions apply only to the extent that information in these systems is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(b) Exemption from subsection (d) is justified for the following reasons:

(1) Executive Clemency Files contain investigatory and evaluative reports relating to applicants for Executive clemency. The FOI/PA Request File contains copies of documents from the Executive Clemency Files which have not been released either in whole or in part pursuant to certain provisions of the FOI/PA. Release of such information to the subject would jeopardize the integrity of the investigative process, invade the right of candid and confidential communications among officials concerned with recommending clemency decisions to the President, and disclose the identity of persons who furnished information to the Government under an express or implied promise that their identities would be held in confidence.

(2) The purpose of the creation and maintenance of the Executive Clemency Files is to enable the Pardon Attorney to prepare for the President's ultimate decisions on matters which are within the President's exclusive jurisdiction by reason of Article II, Section 2, Clause 1 of the Constitution, which commits pardons to the exclusive discretion of the President.

[Order No. 26-88, 53 FR 51542, Dec. 22, 1988]

### § 16.80 Exemption of Office of Professional Responsibility System—limited access.

(a) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1), (2) and (3), (e)(4)(G) and (H), (e)(5) and (8), (f) and (g):

(1) Office of Professional Responsibility Record Index (JUSTICE/OPR-001).

These exemptions apply only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), and (k)(5).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because release of the disclosure accounting would enable the subject of an investigation to gain information concerning the existence, nature and scope of the investigation and seriously hamper law enforcement efforts.

(2) From subsections (c)(4), (d), (e)(4)(G) and (H), (f) and (g) because these provisions concern individual access to records and such access might compromise ongoing investigations, reveal confidential informants and constitute unwarranted invasions of the personal privacy of third persons who provide information in connection with a particular investigation.

(3) From subsections (e)(1) and (5) because the collection of information during an investigation necessarily involves material pertaining to other persons or events which is appropriate in a thorough investigation, even though portions thereof are not ultimately connected to the person or event subject to the final action or recommendation of the Office of Professional Responsibility.

(4) From subsection (e)(2) because collecting the information from the subject would thwart the investigation by placing the subject on notice of the investigation.

(5) From subsections (e)(3) and (e)(8) because disclosure and notice would provide the subject with substantial information which could impede or compromise the investigation. For example, an investigatory subject occupying a supervisory position could, once made aware that a misconduct investigation was ongoing, put undue pressure on subordinates so as to preclude their cooperation with investigators.

[Order No. 58-81, 46 FR 3509, Jan. 15, 1981]

### § 16.81 Exemption of United States Attorneys Systems—limited access.

(a) The following systems of records are exempt from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1), (2) and (3), (e)(4)(G) and (H), (e)(5) and (8), (f), and (g):

(1) Citizen Complaint Files (JUSTICE/USA-003).

(2) Civil Case Files (JUSTICE/USA-005).

(3) Consumer Complaints (JUSTICE/USA-006).

(4) Criminal Case Files (JUSTICE/USA-007).

(5) Kline-District of Columbia and Maryland-Stock and Land Fraud Interrelationship Filing System (JUSTICE/USA-009).

(6) Major Crimes Division Investigative Files (JUSTICE/USA-010).

(7) Prosecutor's Management Information System (PROMIS) (JUSTICE/USA-011).

(8) United States Attorney, District of Columbia Superior Court Division, Criminal Files (JUSTICE/USA-013).

(9) Pre-trial Diversion Program Files (JUSTICE/USA-014).

These exemptions apply to the extent that information in these systems is subject to exemption pursuant to U.S.C. 552a(j)(2), (k)(1) and (k)(2).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the disclosure accounting, for disclosures pursuant to the routine uses published for these systems, would permit the subject of a criminal investigation and/or civil case or matter under investigation, litigation, regulatory or administrative review or action, to obtain valuable information concerning the nature of that investigation, case or matter and present a serious impediment to law enforcement or civil legal activities.

(2) From subsection (c)(4) since an exemption is being claimed for subsection (d), this subsection will not be applicable.

(3) From subsection (d) because access to the records contained in these systems would inform the subject of criminal investigation and/or civil investigation, matter or case of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection, apprehension or legal obligations, and present a serious impediment to law enforcement and other civil remedies.

(4) From subsection (e)(1) because in the course of criminal investigations and/or civil investigations, cases or matters, the U.S. Attorneys often obtain information concerning the violation of laws or civil obligations other than those relating to an active case or matter. In the interests of effective law enforcement and civil litigation, it is

necessary that the U.S. Attorney obtain this information since in establishing patterns of activity provide valuable leads for ongoing cases and future cases that brought within the U.S. Attorney's files.

(5) From subsection (e)(2) a criminal investigation that information be obtained to the greatest extent possible the subject individual would present a serious impediment to law enforcement that the subject of the investigation would be placed on notice of the existence of the investigation and therefore be able to avoid apprehension or legal obligations.

(6) From subsection (e)(3) the requirement that individual information be provided without stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement could compromise the existing confidential investigation, identity of confidential sources and endanger the physical safety of confidential informants.

(7) From subsections (e)(4) and (H) because these systems are exempt from individual information pursuant to subsections (j) and (k) of the Privacy Act of 1974.

(8) From subsection (e)(5) the collection of information for law enforcement purposes it is to determine in advance whether information is accurate, relevant, complete. With the passage of time seemingly irrelevant or untimely information may acquire new significance as further investigation brings details to light and the accurate information can only be determined by a court of law. The restriction of subsection (e)(5) would restrict the use of trained investigators and intelligence analysts to exercise discretion in reporting on information and impede the development of intelligence necessary for effective law enforcement.

(9) From subsection (e)(8) the individual notice requirement of subsection (e)(8) could present a serious impediment to law enforcement.



could interfere with the United States Attorneys' ability to issue subpoenas and could reveal investigative techniques and procedures.

(10) From subsection (f) because these systems of records have been exempted from the access provisions of subsection (d).

(11) From subsection (g) because these systems of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(c) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4) (G) and (H), (e) (5) and (8), (f), and (g):

(1) Freedom of Information Act/Privacy Act Files (JUSTICE/USA-008)

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1) and (k)(2).

(d) Because this system contains Department of Justice civil and criminal law enforcement, investigatory records, exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation and/or civil case or matter under investigation, in litigation, or under regulatory or administrative review or action to obtain valuable information concerning the nature of that investigation, case or matter, and present a serious impediment to law enforcement or civil legal activities.

(2) From subsection (c)(4) because an exemption is being claimed for subsection (d) of the Act (Access to Records), rendering this subsection inapplicable to the extent that this system of records is exempted from subsection (d).

(3) From subsection (d) because access to the records contained in these systems would inform the subject of a criminal or civil investigation, matter or case of the existence of such, and provide the subject with information that might enable him to avoid detection, apprehension or legal obligations, and present a serious impediment to law enforcement and other civil remedies. Amendment of the records would

interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4) From subsection (e)(1) because in the course of criminal investigations and/or civil investigations, cases or matters, the U.S. Attorneys often obtain information concerning the violation of laws or civil obligations other than those relating to an active case or matter. In the interests of effective law enforcement and civil litigation, it is necessary that the U.S. Attorneys retain this information since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought within the U.S. Attorneys' offices.

(5) From subsection (e)(2) because to collect information to the greatest extent possible from the subject individual of a criminal investigation or prosecution would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations and duties.

(6) From subsection (e)(3) because to provide individuals supplying information with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information, and endanger the life and physical safety of confidential informants.

(7) From subsections (e)(4) (G) and (H) because this system of records is exempt from the individual access provisions of subsection (d) and the rules provisions of subsection (f).

(8) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in

a court of law. The restrictions of subsection (e)(5) would inhibit the ability of trained investigator and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(9) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the U.S. Attorneys' ability to issue subpoenas and could reveal investigative techniques and procedures.

(10) From subsection (f) because this system has been exempted from the individual access provisions of subsection (d).

(11) From subsection (g) because the records in this system are generally compiled for law enforcement purposes and are exempt from the access provisions of subsections (d) and (f), rendering subsection (g) inapplicable.

(e) The following systems of records are exempt from 5 U.S.C. 552a(d)(1) and (e)(1):

(1) Assistant U.S. Attorneys Applicant Records System (JUSTICE/USA-016).

(2) Appointed Assistant U.S. Attorneys Personnel System (JUSTICE/USA-017).

These exemptions apply only to the extent that information in these systems is subject to exemption pursuant to 5 U.S.C. 552a(k)(5).

(f) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (d)(1) because many persons are contacted who, without an assurance of anonymity, refuse to provide information concerning a candidate for an Assistant U.S. Attorney position. Access could reveal the identity of the source of the information and constitute a breach of the promise of confidentiality on the part of the Department of Justice. Such breaches ultimately would restrict the free flow of information vital to a determination of a candidate's qualifications and suitability.

(2) From subsection (e)(1) because in the collection of information for investigative and evaluative purposes, it is impossible to determine in advance what exact information may be of assistance in determining the qualifications and suitability of a candidate. In-

formation which may appear irrelevant, when combined with other seemingly irrelevant information, can on occasion provide a composite picture of a candidate for a position which assists in determining whether that candidate should be nominated for appointment.

(g) Consistent with the legislative purpose of the Privacy Act of 1974, the Executive Office for United States Attorneys will grant access to nonexempt material in records which are maintained by the U.S. Attorneys. Disclosure will be governed by the Department's Privacy regulations, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal, civil or regulatory violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered, the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the request; documents and the balance made available. The controlling principle behind this limited access is to allow disclosures except those indicated above. The decisions to release information from these systems will be made on a case-by-case basis.

[Order No. 645-76, 41 FR 12640, Mar. 26, 1976, as amended by Order No. 716-77, 42 FR 23506, May 9, 1977; Order No. 738-77, 42 FR 38177, July 27, 1977; Order No. 6-86, 51 FR 15476, Apr. 24, 1986; Order No. 57-91, 56 FR 58306, Nov. 19, 1991]

#### **§ 16.82 Exemption of the National Drug Intelligence Center Data Base—limited access.**

(a) The following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4); (d); (e) (1), (2), and (3); (e)(4)(I); (e) (5) and (8); and (g) of 5 U.S.C. 552a. In addition, the following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a (k)(1) and (k)(2) from subsections (c)(3), (d), and (e)(1) and (e)(4)(I) of 5 U.S.C. .

(1) National Drug Intelligence Center Data Base (JUSTICE/NDIC-001).

(2) [Reserved]

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(b) These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2). Where compliance would not appear to interfere with or adversely affect the law enforcement process, and/or where it may be appropriate to permit individuals to contest the accuracy of the information collected, e.g., public source materials, the applicable exemption may be waived, either partially or totally, by the National Drug Intelligence Center (NDIC). Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) for the same reasons that the system is exempted from the provisions of subsection (d).

(2) From subsection (c)(4) because this system is exempt from the access provisions of subsection (d) pursuant to subsection (j)(2) of the Privacy Act.

(3) From subsection (d) because disclosure to the subject could alert the subject of an investigation pertaining to narcotic trafficking or related activity of the fact and nature of the investigation, and/or of the investigative interest of NDIC and other intelligence or law enforcement agencies (including those responsible for civil proceedings related to laws against drug trafficking); lead to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; reveal the details of a sensitive investigative or intelligence technique, or the identity of a confidential source; or otherwise impede, compromise, or interfere with investigative efforts and other related law enforcement and/or intelligence activities. In addition, disclosure could invade the privacy of third parties and/or endanger the life and safety of law enforcement personnel, confidential informants, witnesses, and potential crime victims. Finally, access to records could result in the release of properly classified information that could compromise the national defense or foreign policy. Amendment of the records would interfere with ongoing investigations and law enforcement activities and impose an impossible administrative burden by requiring investigations, analyses, and reports to be

continuously reinvestigated.

(4) From subsection (c)(1) the course of its acquisition and analysis of information need to retain information directly shown to be counterdrug law enforcement patterns of activity; other agencies charged with enforcement of laws and regarding drug trafficking with the acquisition of information related to international drug trafficking. This consideration equally to information acquired or collated or analyzed by enforcement agencies and the U.S. foreign intelligence.

(5) From subsection (e)(2) application of this provision present a serious impediment to law enforcement in that it would subject of an investigation analysis on notice of the investigation, study, or analysis by permitting the subject conduct intended to frustrate; because, in some cases the subject of an investigation be required to provide to certain information; and enough analysis and investigation require seeking information from a number of different sources.

(6) From subsection (e)(3) (if applicable) because amendment that individuals sumation be provided a for requirements of subsection constitute a serious impediment to law enforcement in that it promise the existence of investigation and reveal the confidential informants their lives and safety.

(7) From subsection (e)(4) to the extent that this subsection is interpreted to require more disclosure of the record sources in this system have been published in the REGISTER. Should the subsection be interpreted, exemption from disclosure is necessary to protect confidentiality of the source and other law enforcement activities and to protect the privacy and safety of witnesses and

Furthermore, greater specificity concerning the sources of properly classified records could compromise national defense or foreign policy.

(8) From subsection (e)(5) because the acquisition, collation, and analysis of information for law enforcement purposes does not permit advance determination whether such information is accurate or relevant, nor can such information be limited to that which is complete or apparently timely. Information of this type often requires further analysis and investigation to develop into a comprehensive whole that which is otherwise incomplete or even fragmentary. Moreover, its accuracy is continually subject to analysis and review, and, upon careful examination, seemingly irrelevant or untimely information may acquire added significance as additional information brings new details to light. The restrictions imposed by subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment in collating and analyzing information and would impede the development of criminal intelligence necessary for effective law enforcement.

(9) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement by revealing investigative techniques, procedures, or evidence.

(10) From subsection (g) to the extent that the system is exempt from subsection (d).

[Order No. 78-93, 58 FR 41038, Aug. 2, 1993]

**§ 16.83 Exemption of the Executive Office for Immigration Review System—limited access.**

(a) The following system of records is exempt from 5 U.S.C. 552a(d):

(1) The Executive Office for Immigration Review's Records and Management Information System (JUSTICE/EOIR-001).

This exemption applies only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(k) (1) and (2).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (d) because access to information which has been properly classified pursuant to an Executive Order could have an adverse effect on the national security. In addition, from subsection (d) because unauthorized access to certain investigatory material could compromise ongoing or potential investigations; reveal the identity of confidential informants; or constitute unwarranted invasions of the personal privacy of third parties.

(2) From subsection (d) (2), (3), and (4) because the record of proceeding constitutes an official record which includes transcripts of quasi-judicial administrative proceedings, investigatory materials, evidentiary materials such as exhibits, decisional memoranda, and other case-related papers. Administrative due process could not be achieved by the ex parte "correction" of such materials by the individual who is the subject thereof.

[Order No. 18-86, 51 FR 32305, Sept. 11, 1986]

**§ 16.84 Exemption of Immigration Appeals System.**

(a) The following system of records is exempt from 5 U.S.C. 552a(d) (2), (3) and (4):

(1) Decisions of the Board of Immigration Appeals (JUSTICE/BIA-001).

This exemption applies only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsections (d) (2), (3) and (4) because the decisions reflected constitute official records of opinions rendered in quasi-judicial proceedings. Administrative due process could not be achieved by the ex parte "correction" of such opinions by the subject of the opinion.

**§ 16.85 Exemption of U.S. Parole Commission—limited access.**

(a) The following systems of records are exempt from 5 U.S.C. 552a (c) (3) and (4), (d), (e) (2) and (3), (e)(4) (G) ar (H), (e)(8), (f) and (g):

(1) Docket Scheduling and Control System (JUSTICE/PRC-001).

(2) Inmate and Supervision Files System (JUSTICE/PRC-003).

(3) Labor and Pension Case, Legal File, and General Correspondence System (JUSTICE/PRC-004).

(4) Statistical, Educational and Developmental System (JUSTICE/PRC-006).

(5) Workload Record, Decision Result, and Annual Report System (JUSTICE/PRC-007).

These exemptions apply only to the extent that information in these systems is subject to exemptions pursuant to 5 U.S.C. 552a(j)(2).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because revealing disclosure of accountings to inmates and persons on supervision could compromise legitimate law enforcement activities and U.S. Parole Commission responsibilities.

(2) From subsection (c)(4) because the exemption from subsection (d) will make notification of disputes inapplicable.

(3) From subsection (d) because this is essential to protect internal processes by which Commission personnel are able to formulate decisions and policies with regard to federal prisoners and persons under supervision, to prevent disclosures of information to federal inmates or persons on supervision that would jeopardize legitimate correctional interests of security, custody, supervision, or rehabilitation, to permit receipt of relevant information from other federal agencies, state and local law enforcement agencies, and federal and state probation and judicial offices, to allow private citizens to express freely their opinions for or against parole, to allow relevant criminal history type information of co-defendants to be kept in files, to allow medical, psychiatric and sociological material to be available to professional staff, and to allow a candid process of fact selection, opinion formulation, evaluation and recommendation to be continued by professional staff. The legal files contain case development material and, in addition to other reasons, should be exempt under the attorney-client privilege. Each labor or pension applicant has had served upon him the material in his file which he did

not prepare and may see his own file at any time.

(4) From subsection (e)(2) because primary collection of information directly from federal inmates or persons on supervision about criminal sentence, criminal records, institutional performance, readiness for release from custody, or need to be returned to custody is highly impractical and inappropriate.

(5) From subsection (e)(3) because application of this provision to the operations and collection of information by the Commission which is primarily from sources other than the individual, is inappropriate.

(6) From subsections (e)(4) (G) and (H) because exemption from the access provisions of (d) makes publication of agency procedures under (d) inapplicable.

(7) From subsection (e)(8) because the nature of the Commission's activities renders notice of compliance with compulsory legal process impractical.

(8) From subsection (f) because exemption from the provisions of subsection (d) will render compliance with provisions of this subsection inapplicable.

(9) From subsection (g) because exemption from the provisions of subsection (d) will render the provisions on suits to enforce (d) inapplicable.

(c) Consistent with the legislative purpose of the Privacy Act of 1974 the U.S. Parole Commission will initiate a procedure whereby present and former prisoners and parolees may obtain copies of material in files relating to them that are maintained by the U.S. Parole Commission. Disclosure of the contents will be affected by providing copies of documents to requesters through the mails. Disclosure will be made to the same extent as would be made under the substantive exemptions of the Parole Commission and Reorganization Act of 1976 (18 U.S.C. 4208) and Rule 32 of the Federal Rules of Criminal Procedure. The procedure relating to disclosure of documents may be changed generally in the interest of improving the Commission's system of disclosure or when required by pending or future de-

cisions and directions of the Department of Justice.

[Order No. 645-76, 41 FR 12640, Mar. 26, 1976, as amended by Order No. 14-78, 43 FR 45993, Oct. 5, 1978; Order No. 899-80, 45 FR 43703, June 30, 1980; Order No. 6-86, 51 FR 15477, Apr. 24, 1986]

**§ 16.88 Exemption of Antitrust Division Systems—limited access.**

(a) The following system of records is exempt from 5 U.S.C. 552a (c)(3), (d), (e)(4) (G) and (H), and (f):

(1) Antitrust Caseload Evaluation System (ACES)—Monthly Report (JUSTICE/ATR-006).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (k)(2).

(b) Exemption from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because information in this system is maintained in aid of ongoing antitrust enforcement investigations and proceedings. The release of the accounting of disclosures made under subsection (b) of the Act would permit the subject of an investigation of an actual or potential criminal or civil violation to determine whether he is the subject of an investigation. Disclosure of the accounting would therefore present a serious impediment to antitrust law enforcement efforts.

(2) From subsection (d) because access to the information retrievable from this system and compiled for law enforcement purposes could result in the premature disclosure of the identity of the subject of an investigation of an actual or potential criminal or civil violation and information concerning the nature of that investigation. This information could enable the subject to avoid detection or apprehension. This would present a serious impediment to effective law enforcement since the subject could hinder or prevent the successful completion of the investigation. Further, confidential business and financial information, the identities of confidential sources of information, third party privacy information, and statutorily confidential information such as grand jury infor-

mation must be protected from disclosure.

(3) From subsections (e)(4)(G) and (H), and (f) because this system is exempt from the individual access provisions of subsection (d).

(c) The following system of records is exempt from 5 U.S.C. 552a (c)(3), (d), (e)(4)(G) and (H), and (f):

(1) Freedom of Information/Privacy—Requester/Subject Index File (JUSTICE/ATR-008).

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (k)(2).

(d) Because this system contains Department of Justice civil and criminal law enforcement, investigatory records, exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the accounting of disclosures made under subsection (b) of the Act would permit the subject of an investigation of an actual or potent criminal or civil violation to determine whether he is the subject of an investigation. Disclosure of accounting would therefore present a serious impediment to antitrust law enforcement efforts.

(2) From subsection (d) because access to information in this system could result in the premature disclosure of the identity of the subject of an investigation of an actual or potential criminal or civil violation and information concerning the nature of the investigation. This information could enable the subject to avoid detection or apprehension. This would present a serious impediment to effective law enforcement since the subject could hinder or prevent the successful completion of the investigation. Further, confidential business and financial information, the identities of confidential sources of information, third party privacy information, and statutorily confidential information such as grand jury information must be protected from disclosure.

(3) From subsections (e)(4)(G) and (H), and (f) because this system is ex-

empt from the individual access provisions of subsection (d).

[Order No. 2-86, 51 FR 884, Jan. 9, 1986]

**§ 16.89 Exemption of Civil Division Systems—limited access.**

(a) The following systems of records are exempted pursuant to 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4), (d), (e)(1), (e)(2), (e)(3), (e)(4) (G) and (H), (e)(5), (e)(8), and (g); in addition, the following systems of records are exempted pursuant to 5 U.S.C. 552a (k)(1) and (k)(2) from subsections (c)(3), (d), (e)(1), (e)(4) (G) and (H):

(1) Civil Division Case File System, JUSTICE/CIV-001.

(2) Freedom of Information/Privacy Acts File System, JUSTICE/CIV-005.

These exemptions apply only to the extent that information in these systems is subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(1) and (k)(2).

(b) Only that information which relates to the investigation, prosecution, or defense of actual or potential criminal or civil litigation, or which has been properly classified in the interest of national defense and foreign policy is exempted for the reasons set forth from the following subsections:

(1) *Subsection (c)(3)*. To provide the subject of a criminal or civil matter or case under investigation with an accounting of disclosures of records concerning him or her would inform that individual (and others to whom the subject might disclose the records) of the existence, nature, or scope of that investigation and thereby seriously impede law enforcement efforts by permitting the record subject and others to avoid criminal penalties and civil remedies.

(2) *Subsections (c)(4), (e)(4) (G) and (H), and (g)*. These provisions are inapplicable to the extent that these systems of records are exempted from subsection (d).

(3) *Subsection (d)*. To the extent that information contained in these systems has been properly classified, relates to the investigation and/or prosecution of grand jury, civil fraud, and other law enforcement matters, disclosure could compromise matters which should be kept secret in the interest of national security or foreign policy; compromise confidential investigations or proceed-

ings; hamper sensitive civil or criminal investigations; impede affirmative enforcement actions based upon alleged violations of regulations or of civil or criminal laws; reveal the identity of confidential sources; and result in unwarranted invasions of the privacy of others. Amendment of the records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4) *Subsection (e)(1)*. In the course of criminal or civil investigations, cases, or matters, the Civil Division may obtain information concerning the actual or potential violation of laws which are not strictly within its statutory authority. In the interest of effective law enforcement, it is necessary to retain such information since it may establish patterns of criminal activity or avoidance of other civil obligations and provide leads for Federal and other law enforcement agencies.

(5) *Subsection (e)(2)*. To collect information from the subject of a criminal investigation or prosecution would present a serious impediment to law enforcement in that the subject (and others to whom the subject might be in contact) would be informed of the existence of the investigation and would therefore be able to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

(6) *Subsection (e)(3)*. To comply with this requirement during the course of a criminal investigation or prosecution could jeopardize the investigation by disclosing the existence of a confidential investigation, revealing the identity of witnesses or confidential informants, or impeding the information gathering process.

(7) *Subsection (e)(5)*. In compiling information for criminal law enforcement purposes, the accuracy, completeness, timeliness and relevancy of the information obtained cannot always be immediately determined. As new details of an investigation come to light, seemingly irrelevant or untimely information may acquire new significance and the accuracy of such information can often only be determined in

a court of law. Compliance with this requirement would therefore restrict the ability of government attorneys in exercising their judgment in developing information necessary for effective law enforcement.

(8) *Subsection (e)(8)*. To serve notice would give persons sufficient warning to evade law enforcement efforts.

(c) The following system of records is exempted pursuant to 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4), (d), (e)(1) and (e)(5); in addition, this system is also exempted pursuant to 5 U.S.C. 552a(k)(2) from subsections (c)(3), (d), and (e)(1).

Consumer Inquiry/Investigatory System, JUSTICE/CIV-006.

These exemptions apply only to the extent that information in this system of records is subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

(d) Only that information compiled for criminal or civil law enforcement purposes is exempted for the reasons set forth from the following subsections:

(1) *Subsections (c)(3)*. This system occasionally contains investigatory material based on complaints of actual or alleged criminal or civil violations. To provide the subject of a criminal or civil matter or case under investigation with an accounting of disclosures of records concerning him/her would inform that individual of the existence, nature, or scope of that investigation, and thereby seriously impede law enforcement efforts by permitting the record subject and other persons to whom he might disclose the records to avoid criminal penalties and civil remedies.

(2) *Subsections (c)(4)*. This subsection is inapplicable to the extent that an exemption is being claimed for subsection (d).

(3) *Subsection (d)*. Disclosure of information relating to the investigation of complaints of alleged violation of criminal or civil law could interfere with the investigation, reveal the identity of confidential sources, and result in an unwarranted invasion of the privacy of others. Amendment of the records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal in-

vestigations to be continuous, reinvestigated.

(4) *Subsection (e)(1)*. In the course of criminal or civil investigations, cases, or matters, the Civil Division may obtain information concerning the actual or potential violation of laws which are not strictly within its statutory authority. In the interest of effective law enforcement, it is necessary to retain such information since it may establish patterns of criminal activity or avoidance of other civil obligations and provide leads for Federal and other law enforcement agencies.

(5) *Subsection (e)(5)*. In compiling information for criminal law enforcement purposes, the accuracy, completeness, timeliness and relevancy of the information obtained cannot always be immediately determined. As new details of an investigation come to light, seemingly irrelevant or untimely information may acquire new significance and the accuracy of such information can often only be determined in a court of law. Compliance with this requirement would therefore restrict the ability of government attorneys exercising their judgment in developing information necessary for effective law enforcement.

(e) The following system of records is exempt pursuant to 5 U.S.C. 552a (j)(2) and (k)(2) from subsection (d):

Congressional and Citizen Correspondence File, JUSTICE/CIV-007.

This exemption applies only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

(f) Only that portion of the Congressional and Citizen Correspondence File maintained by the Communications Office which consists of criminal or civil investigatory information is exempted for the reasons set forth from the following subsection:

(1) *Subsection (d)*. Disclosure of investigatory information would jeopardize the integrity of the investigative process, disclose the identity of individuals who furnished information to the government under an express or implied promise that their identities would be held in confidence, and result in an unwarranted invasion of the privacy of others. Amendment of the records would interfere with ongoing criminal



law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

[Order No. 27-88, 54 FR 113, Jan. 4, 1989]

**§ 16.90 Exemption of Civil Rights Division Systems.**

(a) The following system of records is exempt from 5 U.S.C. 552a(d):

(1) Files on Employment Civil Rights Matters Referred by the Equal Employment Opportunity Commission (JUSTICE/CRT-007).

This exemption applies to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k)(2).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (d) because this system contains investigatory material compiled by the Equal Opportunity Commission pursuant to its authority under 42 U.S.C. 2000e-8, 42 U.S.C. 2000e-5(b), 42 U.S.C. 2000e-8(e), and 44 U.S.C. 3508 make it unlawful to make public in any manner whatsoever any information obtained by the Commission pursuant to the authority.

(c) The following system of records is exempt from 5 U.S.C. 552a(c)(3), (d) and (g):

(1) Central Civil Rights Division Index File and Associated Records (JUSTICE/CRT-001).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

(d) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the disclosure accounting for disclosure pursuant to the routine uses published for this system may enable the subject of an investigation to gain valuable information concerning the nature and scope of the investigation and seriously hamper law enforcement efforts.

(2) From subsection (d) because free-ly permitting access to records in this system would compromise ongoing investigations and reveal investigatory techniques. In addition, these records may be subject to protective orders en-

tered by federal courts to protect their confidentiality. Many of the records contained in this system are copies of documents which are the property of state agencies and were obtained under express or implied promises to strictly protect their confidentiality.

(3) From subsection (g) because exemption from the provision of subsection (d) will render the provisions on suits to enforce (d) inapplicable.

(e) The following system of records is exempt from 5 U.S.C. 552a (c)(3), (d), and (g):

(1) Freedom of Information/Privacy Act Records (JUSTICE/CRT-010).

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

(f) Because this system contains Department of Justice civil and criminal law enforcement, investigatory records, exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the disclosure accounting may enable the subject of an investigation to gain valuable information concerning the nature and scope of the investigation and seriously hamper law enforcement efforts.

(2) From subsection (d) because access to records in this system would compromise ongoing investigations and reveal investigative techniques. In addition, certain of these records may be subject to protective orders entered by Federal courts to protect their confidentiality, and many are copies of documents which are the property of State agencies and were obtained under express or implied promises to strictly protect their confidentiality. This system also contains investigatory material compiled by the Equal Opportunity Commission pursuant to its authority under 42 U.S.C. 2000e-8. Provisions of 42 U.S.C. 2000e-5(b), 42 U.S.C. 2000e-8(e), and 44 U.S.C. 3508 make it unlawful to make public in any manner whatsoever any information obtained by the Commission pursuant to the authority. Amendment of the records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by re-

quiring criminal investigations to be continuously reinvestigated.

(3) From subsection (g) because exemption from subsection (d) will render the provisions on suits to enforce subsection (d) inapplicable.

[Order No. 645-76, 41 FR 12640, Mar. 26, 1976, as amended by Order No. 688-77, 42 FR 10000, Feb. 18, 1977; Order No. 8-82, 47 FR 44256, Oct. 7, 1982; Order No. 6-86, 51 FR 15477, Apr. 24, 1986]

**§16.91 Exemption of Criminal Division Systems—limited access, as indicated.**

(a) The following systems of records are exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4) (G), (H) and (I), (e) (5) and (8), (f) and (g) of 5 U.S.C. 552a; in addition, the following systems of records are exempted pursuant to the provisions of 5 U.S.C. 552a (k)(1) and (k)(2) from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) of 5 U.S.C. 552a:

(1) Central Criminal Division, Index File and Associated Records System of Records (JUSTICE/CRM-001)—Limited Access.

(2) General Crimes Section, Criminal Division, Central Index File and Associated Records System of Records (JUSTICE/CRM-004)—Limited Access.

These exemptions apply to the extent that information in those systems are subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(1) and (k)(2).

(b) The systems of records listed under paragraphs (b)(1) and (b)(2) of this section are exempted, for the reasons set forth, from the following provisions of 5 U.S.C. 552a:

(1). (c)(3). The release of the disclosure accounting for disclosures made pursuant to subsection (b) of the Act, including those permitted under the routine uses published for these systems of records, would permit the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to determine whether he is the subject of investigation, or to obtain valuable information concerning the nature of that investigation, and the information obtained, or the identity of witnesses and informants and would therefore present a serious impediment to law enforcement. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record; such notice requirement under subsection (f)(1) is specifically exempted for these systems of records.

(2). (c)(4). Since an exemption is being claimed for subsection (d) of the Act (Access to Records) this subsection is inapplicable to the extent that these systems of records are exempted from subsection (d).

(3). (d). Access to the records contained in these systems would inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation of the existence of that investigation, or the nature and scope of the information and evidence obtained as to his activities, of the identity of witnesses and informants, or would provide information that could enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement because they could prevent the successful completion of the investigation, endanger the physical safety of witnesses or informants, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(4). (e)(1). The notices of these systems of records published in the FEDERAL REGISTER set forth the basic statutory or related authority for maintenance of this system. However, in the course of criminal or other law enforcement investigations, cases, and matters, the Criminal Division or its components will occasionally obtain information concerning actual or potential violations of law that are not strictly within its statutory or other authority or may compile information in the course of an investigation which may not be relevant to a specific prosecution. In the interests of effective law enforcement, it is necessary to retain such information in these systems of records since it can aid in establishing patterns of criminal activity and can provide valuable leads for federal and other law enforcement agencies.

(5). (e)(2). In a criminal investigation or prosecution, the requirement that information be collected to the greatest extent practicable from the subject individual would present a serious impediment to law enforcement because the subject of the investigation or prosecution would be placed on notice as to the existence of the investigation and would therefore be able to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

(6). (e)(3). The requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(7). (e)(4) (G) and (H). Since an exemption is being claimed for subsections (f) (Access to Records) and (d) (Access to Records) of the Act these subsections are inapplicable to the ex-

tent that these systems of records are exempted from subsections (f) and (d).

(8). (e)(4)(I). The categories of sources of the records in these systems have been published in the FEDERAL REGISTER in broad generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires. In the event, however, that this subsection should be interpreted to require more detail as to the identity of sources of the records in these systems, exemption from this provision is necessary in order to protect the confidentiality of the sources of criminal and other law enforcement information. Such exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(9). (e)(5). In the collection of information for criminal law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can often only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators, intelligence analysts, and government attorneys in exercising their judgment in reporting on information and investigations and impede the development of criminal or other intelligence necessary for effective law enforcement.

(10). (e)(8). The individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue warrants or subpoenas and could reveal investigative techniques, procedures, or evidence.

(11). (f). Procedures for notice to an individual pursuant to subsection (f)(1) as to the existence of records pertaining to him dealing with an actual or potential criminal, civil, or regulatory investigation or prosecution must be exempted because such notice to an individual would be detrimental to the successful conduct and/or completion of an investigation or prosecution pending or future. In addition, mere notice of the fact of an investigation could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

Since an exemption is being claimed for subsection (d) of the Act (Access to Records) the rules require pursuant to subsection (f) (2) through (5) are inapplicable to these systems of records to the extent that these systems of records are exempted from subsection (d).

(12). (g). Since an exemption is being claimed for subsections (d) (Access to Rec-

ords) and (f) (Agency Rules) this section is inapplicable, and is exempted for the reasons set forth for those subsections, to the extent that these systems of records are exempted from subsections (d) and (f).

(13). In addition, exemption is claimed for these systems of records from compliance with the following provisions of the Privacy Act of 1974 (5 U.S.C. 552a) pursuant to the provisions of 5 U.S.C. 552a(k)(1): Subsections (c)(3), (d), (e)(1), (e)(4) (G), (H) and (I) and (f) to the extent that the records contained in these systems are specifically authorized to be kept secret in the interests of national defense and foreign policy.

(c) The following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(j) (2) from subsection (c) (3) and (4), (d), (e) (1), (2) and (3), (e) (4) (G), (H) and (I), (e) (5) and (8), (f) and (g) of 5 U.S.C. 552a:

Criminal Division Witness Security File System of Records (JUSTICE/CRM-002).

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(d) The system of records listed under paragraph (c) of this section is exempted, for the reasons set forth, from the following provisions of 5 U.S.C. 552a:

(1). (c)(3) The release of the disclosure accounting for disclosures made pursuant to subsection (b) of the Act, including those permitted under the routine uses published for these systems of records, would permit the subject of an investigation of an actual or potential criminal violation, which may include those protected under the Witness Security Program, to determine whether he is the subject of a criminal investigation, to obtain valuable information concerning the nature of that investigation and the information obtained, or the identity of witnesses and informants and the nature of their reports, and would therefore present a serious impediment to law enforcement. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record; such notice requirement under subsection (f)(1) is specifically exempted for these systems of records. Moreover, disclosure of the disclosure accounting to an individual protected under the Witness Security Program could jeopardize the effectiveness and security of the Program by revealing the methods and techniques utilized in relocating witnesses and could therefore jeopardize the ability to obtain, and to protect the confidentiality of, information compiled for purposes of a criminal investigation.

(2). (c)(4) Since an exemption is being claimed for subsection (d) of the Act (Access to Records) this section is inapplicable.

(3). (d) Access to the records contained in these systems would inform the subject of an investigation of an actual or potential criminal violation, which may include those protected under the Witness Security Program, of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identity of witnesses and informants, or would provide information that could enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement because they could prevent the successful completion of the investigation, endanger the physical safety of witnesses or informants, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. In addition, access to the records in these systems to an individual protected under the Witness Security Program could jeopardize the effectiveness and security of the Program by revealing the methods and techniques utilized in relocating witnesses and could therefore jeopardize the ability to obtain, and to protect the confidentiality of, information compiled for purposes of a criminal investigation.

(4). Exemption is claimed from subsection (e)(1) for the reasons stated in subsection (b)(4) of this section.

(5). (e)(2) In the course of preparing a Witness Security Program for an individual, much of the information is collected from the subject. However, the requirement that the information be collected to the greatest extent practicable from the subject individual would present a serious impediment to criminal law enforcement because the individual himself may be the subject of a criminal investigation or have been a participant in, or observer of, criminal activity. As a result, it is necessary to seek information from other sources. In addition, the failure to verify the information provided from the individual when necessary and to seek other information could jeopardize the confidentiality of the Witness Security Program and lead to the obtaining and maintenance of incorrect and uninvestigated information on criminal matters.

(6). (e)(3) The requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise or reveal the identity of witnesses and informants protected under the Witness Security Program.

(7). (e)(4) (G) and (H). Since an exemption is being claimed for subsections (f) (Agency Rules) and (d) (Access to Records) of the Act these subsections are inapplicable.

(8). (e)(4)(I). The categories of sources the records in these systems have been published in the FEDERAL REGISTER in broad generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires. In the event, however, that this subsection should be interpreted to require more detail as to the identity of sources of the records in the system, exemption from this provision is necessary in order to protect the confidentiality of the sources of criminal law, enforcement information and of witnesses and informants protected under the Witness Security Program.

(9). Exemption is claimed from subsections (e)(5) and (e)(8) for the reasons stated in subsection (b)(9) and (b)(10) of this section.

(10). Procedures for notice to an individual pursuant to subsection (f)(1) as to the existence of records contained in these systems pertaining to him would inform the subject of an investigation of an actual or potential criminal violation, which may include those protected under the Witness Security Program, of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identity of witnesses and informants, or would provide information that could enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement because they could prevent the successful conduct and/or completion of an investigation pending or future, endanger the physical safety of witnesses or informants, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. In addition, notices as to the existence of records contained in these systems to an individual protected under the Witness Security Program could jeopardize the effectiveness and security of the Program by revealing the methods and techniques utilized in relocating witnesses and could therefore jeopardize the ability to obtain, and to protect the confidentiality of, information compiled for purposes of a criminal investigation.

Since an exemption is being claimed for subsection (d) of the Act (Access to Records) the rules required pursuant to subsection (f) (2) through (5) are inapplicable.

(11). (g) Since an exemption is being claimed for subsections (d) (Access to Records) and (f) (Agency Rules) this section is inapplicable and is exempted for the reasons set forth for those subsections.

(e) The following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4), (d), (e) (4) (G), (H) and (f), and (g) of 5 U.S.C. 552a:

Organized Crime and Racketeering Section, Intelligence and Special Services Unit,

Information Request System of Records (JUSTICE/CRM-014).

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(f) The system of records listed under paragraph (e) of this section is exempted for the reasons set forth, from the following provisions of 5 U.S.C. 552a:

(1). (c)(3). The release of the disclosure accounting for disclosures made pursuant to subsection (b) of the Act, including those permitted under the routine uses published for these systems of records, would permit the subject of an investigation of an actual or potential criminal violation to determine whether he is the subject of a criminal investigation and would therefore present a serious impediment to law enforcement. The records in these systems contain the names of the subjects of the files in question and the system is accessible by name of the person checking out the file and by name of the subject of the file. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record; such notice requirement under subsection (f)(1) is specifically exempted for these systems of records.

(2). (c)(4). Since an exemption is being claimed for subsection (d) of the Act (Access to Records) this section is inapplicable.

(3). (d). Access to the records contained in these systems would inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation. This would present a serious impediment to effective law enforcement because it could prevent the successful completion of the investigation, endanger the physical safety of witnesses or informants, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(4). Exemption is claimed from subsections (e)(4) (G), (H) and (I) for the reasons stated in subsections (b)(7) and (b)(8) of this section.

(5). (f). These systems may be accessed by the name of the person who is the subject of the file and who may also be the subject of a criminal investigation. Procedures for notice to an individual pursuant to subsection (f)(1) as to the existence of records pertaining to him, which may deal with an actual or potential criminal investigation or prosecution, must be exempted because such notice to an individual would be detrimental to the successful conduct and/or completion of the investigation or prosecution pending or future. In addition mere notice of the fact of an investigation could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection

or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

Since an exemption is being claimed for subsection (d) of the Act (Access to Records) the rules required pursuant to subsection (f) (2) through (5) are inapplicable.

(6). (g). Since an exemption is being claimed for subsections (d) (Access to Records) and (f) (Agency Rules) of the Act this section is inapplicable and is exempted for the reasons set forth for those subsections.

(g) The following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c)(4), (d), (e)(4) (G), (H) and (I), (f) and (g) of 5 U.S.C. 552a.

File of Names Checked to Determine If Those Individuals Have Been the Subject of an Electronic Surveillance System of Records (JUSTICE/CRM-003).

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(h) The system of records listed under paragraph (g) of this section is exempted, for the reasons set forth, from the following provisions of 5 U.S.C. 552a:

(1). (c)(4). Since an exemption is being claimed for subsection (d) of the Act (Access to Records) this section is inapplicable to the extent that this system of records is exempted from subsection (d).

(2). (d). The records contained in this system of records generally consist of information filed with the court in response to the request and made available to the requestor. To the extent that these records have been so filed, no exemption is sought from the provisions of this subsection. Occasionally, the records contain pertinent logs of intercepted communications and other investigative reports not filed with the court. These records must be exempted because access to such records could inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation and of the nature of the information and evidence obtained by the government. This would present a serious impediment to effective law enforcement because it could prevent the successful completion of the investigation, endanger the physical safety of witnesses or informants, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(3). Exemption is claimed from subsections (e)(4) (G), (H) and (I) for the reasons stated in subsections (b)(7) and (b)(8) of this section.

(4). (f). The records contained in this system of records generally consist of information filed with the court and made available to the requestor. To the extent that these records have been so filed, no exemption is sought from the provisions of this subsection. Occasionally, the records contain pertinent logs of intercepted communications and other investigative reports not filed with the court. These records must be exempted from a requirement of notification as to their existence because such notice to an individual would be detrimental to the successful conduct and/or completion of a criminal investigation or prosecution pending or future. In addition, mere notice of the existence of such logs or investigative reports could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since an exemption is being claimed for subsection (d) of the Act (Access to Records) the rules required pursuant to subsection (f) (2) through (5) are inapplicable to the extent that this system of records is exempted for subsection (d).

(6). (g). Since an exemption is being claimed for subsections (d) (Access to Records) and (f) (Agency Rules) this section is inapplicable, and is exempted for the reasons set forth for those subsections, to the extent that this system of records is exempted from subsections (d) and (f).

(i) The following systems of records are exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4), (d), (e) (1), (2), and (3), (e)(4) (G), (H), and (I), (e) (5) and (8), (f) and (g) of 5 U.S.C. 552a:

(1) Information File on Individuals and Commercial Entities Known or Suspected of Being Involved in Fraudulent Activities System of Records (JUSTICE/CRM-006).

(2) The Stocks and Bonds Intelligence Control Card File System of Records (JUSTICE/CRM-021).

(3) Tax Disclosure Index File and Associated Records (JUSTICE/CRM-025).

These exemptions apply only to the extent that information in these systems is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(j) The systems of records listed in paragraphs (i)(1), (i)(2), and (i)(3) of this section are exempted, for the reasons set forth, from the following provisions of 5 U.S.C. 552a:

(1)(c)(3) The release of the disclosure accounting for disclosures made pursuant to

subsection (b) of the act, including those permitted under the routine uses published for these systems of records, would permit the subject of an investigation of an actual or potential criminal violation to determine whether he is the subject of a criminal investigation, to obtain valuable information concerning the nature of that investigation, and the information obtained, or the identity of witnesses and informants, and would therefore present a serious impediment to law enforcement. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record; such notice requirement under subsection (f)(1) is specifically exempted for this system of records.

(2)(c)(4) Since an exemption is being claimed for subsection (d) of the act (access to records), this section is inapplicable to the extent that these systems of records are exempted from subsection (d).

(3)(d) Access to the records contained in these systems would inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identity of witnesses and informants, or would provide information that could enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement because they could prevent the successful completion of the investigation, endanger the physical safety of witnesses or informants, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(4) Exemption is claimed from subsections (e) (1), (2), and (3), (e)(4) (G), (H), and (I), (e)(5) and (e)(8) for the reasons stated in subsections (b)(4), (b)(5), (b)(6), (b)(7), (b)(8), (b)(9), and (b)(10) of this section.

(5)(f) Procedures for notice to an individual pursuant to subsection (f)(1) as to the existence of records pertaining to him dealing with an actual or potential criminal investigation or prosecution must be exempted because such notice to an individual would be detrimental to the successful conduct and/or completion of an investigation or prosecution pending or future. In addition, mere notice of the fact of an investigation could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since an exemption is being claimed for subsection (d) of the act (access to records), the rules required pursuant to subsection (f) (2) through (5) are inapplicable to these systems of records.

(6)(g) Since an exemption is being claimed for subsections (d) (access to records) and (f

(Agency rules), this section is inapplicable and is exempted for the reasons set forth for those subsections.

(k) The following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4) (G), (H) and (I), (e) (5) and (8), (f) and (g) of 5 U.S.C. 552a; in addition, the following systems of records are exempted pursuant to the provisions of 5 U.S.C. 552a(k)(1) from subsections (c) (3), (d), (e)(1), (e)(4) (G), (H) and (I) and (f) of 5 U.S.C. 552a:

Organized Crime and Racketeering Section, Criminal Division, General Index File and Associated Records System of Records (JUSTICE/CRM-012).

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2) and (k)(1).

(1) The system of records listed under paragraph (m)<sup>1</sup> of this section is exempted, for the reasons set forth, from the following provisions of 5 U.S.C. 552a:

(1). Exemption is claimed from subsections (c) (3) and (4) and (d) for the reasons stated in subsections (j)(1), (j)(2) and (j)(3) of this section.

(2). (e)(1). The notice for this system of records published in the FEDERAL REGISTER sets forth the basic statutory or related authority for maintenance of this system. However, in the course of criminal investigations, cases, and matters, the Organized Crime and Racketeering Section will occasionally obtain information concerning actual or potential violations of law that are not strictly within its statutory or other authority, or may compile information in the course of an investigation which may not be relevant to a specific prosecution. In the interests of effective law enforcement, it is necessary to retain such information in this system of records since it can aid in establishing patterns of criminal activity and can provide valuable leads for federal and other law enforcement agencies.

(3). Exemption is claimed from subsections (e) (2) and (3), (e)(4) (G), (H) and (I), (e) (5) and (8), (f) and (g) for the reasons stated in subsections (b)(5), (b)(6), (b)(7), (b)(8), (b)(9), (b)(10), (b)(11) and (b)(12) of this section.

(4). In addition, exemption is claimed for this system of records from compliance with the following provisions of the Privacy Act of 1974 (5 U.S.C. 552a) pursuant to the provisions of 5 U.S.C. 552a(k)(1): Subsections (c)(3), (d), (e)(1), (e)(4) (G), (H) and (I) and (f) to the extent that the records contained in this system are specifically authorized to be kept secret in the interests of national defense and foreign policy.

(m) The following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4), (d), (e) (2) and (3), (e) (4) (G), (H) and (I), (e) (8), (f) and (g) of 5 U.S.C. 552a:

Requests to the Attorney General For Approval of Applications to Federal Judges For Electronic Interceptions System of Records (JUSTICE/CRM-019).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(n) The system of records listed in paragraph (m) of this section is exempted for the reasons set forth, from the following provisions of 5 U.S.C. 552a:

(1). (c)(3). The release of the disclosure accounting for disclosures made pursuant to subsection (b) of the Act, including those permitted under the routine uses published for these systems of records, would permit the subject of an electronic interception to obtain valuable information concerning the interception, including information as to whether he is the subject of a criminal investigation, by means other than those provided for by statute. Such information could interfere with the successful conduct and/or completion of a criminal investigation, and would therefore present a serious impediment to law enforcement. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record; such notice requirement under subsection (f)(1) is specifically exempted for these systems of records.

(2). (c)(4). Since an exemption is being claimed for subsection (d) of the Act (Access to Records) this section is inapplicable.

(3). (d). Access to the records contained in these systems would inform the subject of an electronic interception of the existence of such surveillance including information as to whether he is the subject of a criminal investigation by means other than those provided for by statute. This could interfere with the successful conduct and/or completion of a criminal investigation and therefore present a serious impediment to law enforcement.

(4). (e)(2). In the context of an electronic interception, the requirement that information be collected to the greatest extent practicable from the subject individual would

<sup>1</sup> Paragraph (m) was redesignated as paragraph (k) at 44 FR 54046, Sept. 18, 1979.

present a serious impediment to law enforcement because the subject of the investigation or prosecution would be placed on notice as to the existence of the investigation and this would therefore destroy the efficacy of the interception.

(5). (e)(3). The requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential electronic interception or reveal the identity of witnesses or confidential informants.

(6). (e)(4) (G) and (H). Since an exemption is being claimed for subsections (f) (Agency Rules) and (d) (Access to Records) of the Act these subsections are inapplicable.

(7). Exemption is claimed from subsections (e)(4)(I) and (e)(8) for the reasons stated in subsections (b)(8) and (b)(10) of this section.

(8). (f). Procedures for notice to an individual pursuant to subsection (f)(1) as to the existence of records pertaining to him dealing with an electronic interception other than pursuant to statute must be exempted because such notice to an individual would be detrimental to the successful conduct and/or completion of an investigation pending or future. In addition, mere notice of the fact of an electronic interception could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

Since an exemption is being claimed for subsection (d) of the Act (Access to Records) the rules required pursuant to subsection (f)(2) through (5) are inapplicable to these systems of records to the extent that these systems of records are exempted from subsection (d).

(9). (g). Since an exemption is being claimed for subsection (d) (Access to Records) and (f) (Agency Rules) this section is inapplicable, and is exempted for the reasons set forth for those subsections, to the extent that these systems of records are exempted from subsection (d) and (f).

(o) The following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4), (d), (e) (2) and (3), (e) (4) (G), (H), and (I), (e)(8), (f) and (g) of 5 U.S.C. 552a; in addition the following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(k)(1) and (k)(2) from subsections (c)(3), (d), (e)(4) (G), (H) and (I), and (f) of 5 U.S.C. 552a:

Witness Immunity Records System of Records (JUSTICE/CRM-022).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(1) and (k)(2).

(p) The system of records listed under paragraph (q)<sup>2</sup> of this section is exempted, for the reasons set forth, from the following provisions of 5 U.S.C. 552a:

(1). (c)(3). Release of the accounting of disclosures made pursuant to subsection (b) of the Act, including those permitted under the routine uses published for this system of records, (a) as to a witness for whom immunity has been proposed, would inform the individual of the existence of the proposed immunity prematurely, thus creating a serious impediment to effective law enforcement in that the witness could flee, destroy evidence, or fabricate testimony; and (b) as to a witness to whom immunity has been granted, or for whom it has been denied, would reveal the nature and scope of the activities, if any, of the witness known to the government, which would also create a serious impediment to effective law enforcement.

(2). (c)(4). Since an exemption is being claimed for subsection (d) of the Act (Access to Records) this section is inapplicable to the extent that this system of records is exempted from subsection (d).

(3). (d). Access to the records contained in this system (a) as to a witness for whom immunity has been proposed, would inform the individual of the existence of the proposed immunity prematurely, thus presenting a serious impediment to effective law enforcement in that the witness could flee, destroy evidence, or fabricate testimony; and (b) as to a witness to whom immunity has been granted, or for whom it has been denied, would reveal the nature and scope of the activities, if any, of the witness known to the government, which would also create a serious impediment to effective law enforcement.

(4). (e)(2). In a witness immunity request matter, the requirement that information be collected to the greatest extent practicable from the subject individual would present a serious impediment to law enforcement because the subject of the immunity request and often the subject of the underlying investigation or prosecution would be placed on notice as to the existence of the investigation and would therefore be able to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

(5). Exemption is claimed from subsection (e)(3), (e)(4)(G), (H) and (I), and (e)(8) for

<sup>2</sup> Paragraph (q) was redesignated as paragraph (o) at 44 FR 54046, Sept. 18, 1979.



reasons stated in subsections (b)(6), (b)(7), (b)(8) and (b)(10) of this section.

(6). (f). Procedures for notice to an individual pursuant to subsection (f)(1) as to the existence of records pertaining to him (a) as to a witness for whom immunity has been proposed, would inform the individual of the existence of the proposed immunity prematurely, thus presenting a serious impediment to effective law enforcement in that the witness could flee, destroy evidence, or fabricate testimony; and (b) as to a witness to whom immunity has been granted, or for whom it has been denied, would reveal the nature and scope of the activity, if any, of the witness known to the government, which would also create a serious impediment to effective law enforcement.

Since an exemption is being claimed for subsection (d) of the Act (Access to Records) the rules required pursuant to subsection (f)(2) through (5) are inapplicable to this system of records to the extent that this system of records is exempted from subsection (d).

(7). (g). Since an exemption is being claimed for subsections (d) (Access to Records) and (f) (Agency Rules) this section is inapplicable, and is exempted for the reasons set forth for those subsections, to the extent that this system of records is exempted for subsections (d) and (f).

(8). In addition, exemption is claimed for this system of records from compliance with the following provisions of the Privacy Act of 1974 (5 U.S.C. 552a) pursuant to the provisions of 5 U.S.C. 552a(k)(1): subsections (c)(3), (d), (e)(1), (e)(4) (G), (H) and (I) and (f) to the extent that the records contained in this system are specifically authorized to be kept secret in the interests of national defense and foreign policy.

(q) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4) (G), (H) and (I), (e) (5) and (8), (f), and (g):

(1) Freedom of Information/Privacy Act Records (JUSTICE/CRM-024)

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1) and (k)(2).

(r) Because this system contains Department of Justice civil and criminal law enforcement, investigatory records, it is exempted for the reasons set forth from the following provisions of 5 U.S.C. 552a:

(1)(c)(3). The release of the disclosure accounting would present a serious impediment to law enforcement by permitting the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to determine whether he is the subject

of investigation, or to obtain valuable information concerning the nature of that investigation and the information obtained, or to identify witnesses and informants.

(2)(c)(4). Since an exemption is being claimed for subsection (d) of the Act (Access to Records), this subsection is inapplicable to the extent that this system of records is exempted from subsection (d).

(3)(d). Access to records contained in this system would enable the subject of an investigation of an actual or potential criminal or civil case or regulatory violation to determine whether he or she is the subject of investigation, to obtain valuable information concerning the nature and scope of the investigation, and information or evidence obtained as to his/her activities, to identify witnesses and informants, or to avoid detection or apprehension. Such results could prevent the successful completion of the investigation, endanger the physical safety of witnesses or informants, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony, and thereby present a serious impediment to effective law enforcement. Amendment of the records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4)(e)(1). In the course of criminal or other law enforcement investigations, cases, and matters, the Criminal Division will occasionally obtain information concerning actual or potential violations of law that are not strictly within its statutory or other authority, or it may compile information in the course of an investigation which may not be relevant to a specific prosecution. In the interests of effective law enforcement, it is necessary to retain such information since it can aid in establishing patterns of criminal activity and can provide valuable leads for Federal and other law enforcement agencies.

(5)(e)(2). To collect information to the greatest extent practicable from the subject individual of a criminal investigation or prosecution would present a serious impediment to law enforcement. The nature of criminal and other investigative activities is such that vital information about an individual can only be obtained from other persons who are familiar with such individual and his/her activities. In such investigations it is not feasible to rely upon information furnished by the individual concerning his own activities.

(6) (e)(3). To provide individuals supplying information with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(7)(e)(4) (G) and (H). These subsections are inapplicable to the extent that this system is exempt from the access provisions of subsection (d) and the rules provisions of subsection (f).

(8)(e)(4)(I). The categories of sources of the records in this system have been published in the FEDERAL REGISTER in broad generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires. In the event, however, that this subsection should be interpreted to require more detail as to the identity of sources of the records in this system, exemption from this provision is necessary to protect the confidentiality of the sources of criminal and other law enforcement information. Such exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(9) (e)(5). In the collection of information for criminal law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can often only be determined in a court of law. The restrictions of subsection (e)(5) would inhibit the ability of trained investigators, intelligence analysts, and government attorneys in exercising their judgment in reporting on information and investigations and impede the development of criminal or other intelligence necessary for effective law enforcement.

(10)(e)(8). The individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue warrants or subpoenas and could reveal investigative techniques, procedures, or evidence.

(11)(f). This subsection is inapplicable to the extent that this system is exempt from the access provisions of subsection (d).

(12)(g). Because some of the records in this system contain information which was compiled for law enforcement purposes and have been exempted from the access provisions of subsection (d), subsection (g) is inapplicable.

(s) The following system of records is exempted from 5 U.S.C. 552a(d).

Office of Special Investigations Displaced Persons Listings (JUSTICE/CRM-027).

This exemption applies to the extent that the records in this system are subject to exemption pursuant to 5 U.S.C. 552a(k)(2).

(t) Exemption from subsection (d) is justified for the following reasons:

(1) Access to records contained in this system could inform the subject of the identity of witnesses or inform-

ants. The release of such information could present a serious impediment to effective law enforcement by endangering the physical safety of witnesses or informants; by leading to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony; or by otherwise preventing the successful completion of an investigation.

[Order No. 645-76, 41 FR 12640, Mar. 26, 1976, as amended by Order No. 659-76, 41 FR 32423, Aug. 3, 1976; Order No. 11-78, 43 FR 38386, Aug. 28, 1978; Order No. 30-79, 44 FR 54046, Sept. 18, 1979; Order Nos. 6-86, 7-86, 51 FR 15475, 15477, Apr. 24, 1986]

# **§ 16.92 Exemption of Land and Natural Resources Division System—limited access, as indicated.**

(a) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (d):

(1) Docket Card System (JUSTICE/LDN-003).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k)(2).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because that portion of the Docket Card System relating to enforcement of criminal provisions of the Refuse Act of 1899 (33 U.S.C. 407), section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403), section 5 of the Outer Continental Shelf Act (43 U.S.C. 1151 et seq.), the Clean Air Act (42 U.S.C. 1857 et seq.) and the Noise Control Act of 1972 (42 U.S.C. 4901), is being exempted from access and contest; the provisions for disclosure of accounting is not applicable.

(2) From subsection (d) because of the need to safeguard the identity of confidential informants and to facilitate the enforcement of the criminal provisions of the above statutes.

(c) The following system of records is exempt from 5 U.S.C. 552a (c)(3) and (d):

(1) Freedom of Information/Privacy Act Records System. (Justice/LDN-005).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k)(2).

(d) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c) (3) because that portion of the Freedom of Information/Privacy Act Records System that consists of investigatory materials compiled for law enforcement purposes is being exempted from access and contest; the provision for disclosure of accounting is not applicable.

(2) From subsection (d) because of the need to safeguard the identity of confidential informants and avoid interference with ongoing investigations or law enforcement activities by preventing premature disclosure of information relating to those efforts.

[Order No. 688-77, 42 FR 10000, Feb. 18, 1977]

#### § 16.93 Exemption of Tax Division Systems—limited access.

(a) The following systems of records are exempted pursuant to the provisions of 5 U.S.C. 552a (j)(2) from subsections (c)(3), (c)(4), (d)(1), (d)(2), (d)(3), (d)(4), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f) and (g) of 5 U.S.C. 552a:

(1) Tax Division Central Classification Cards, Index Docket Cards, and Associated Records—Criminal Tax Cases (JUSTICE/TAX-001)—Limited Access.

(2) Tax Division Special Projects Files (JUSTICE/TAX-005)—Limited Access.

These exemptions apply to the extent that information in these systems is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(b) The systems of records listed under paragraphs (a)(1) and (a)(2) of this section are exempted for the reasons set forth below, from the following provisions of 5 U.S.C. 552a:

(1)(c)(3). The release of the disclosure accounting, for disclosures made pursuant to subsection (b) of the Act, including those permitted under the routine uses published for those systems of records, would enable the subject of an investigation of an actual or potential criminal tax case to determine whether he or she is the subject of investigation, to obtain valuable information concerning the nature of that investigation and the information obtained, and to determine the identity of witnesses or informants. Such access to investigative information would, accordingly, present a serious impediment to law enforcement. In addition, disclosure of the accounting would constitute notice to

the individual of the existence of a record even though such notice requirement under subsection (f)(1) is specifically exempted for these systems of records.

(2)(c)(4). Since an exemption is being claimed for subsection (d) of the Act (Access to Records) this subsection is inapplicable to the extent that these systems of records are exempted from subsection (d).

(3) (d)(1); (d)(2); (d)(3); (d)(4). Access to the records contained in these systems would inform the subject of an actual or potential criminal tax investigation of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his or her activities, and of the identity of witnesses or informants. Such access would, accordingly, provide information that could enable the subject to avoid detection, apprehension and prosecution. This result, therefore, would constitute a serious impediment to effective law enforcement not only because it would prevent the successful completion of the investigation but also because it could endanger the physical safety of witnesses or informants, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(4)(e)(1). The notices for these systems of records published in the FEDERAL REGISTER, set forth the basic statutory or related authority for maintenance of these systems. However, in the course of criminal tax and related law enforcement investigations, cases, and matters, the Tax Division will occasionally obtain information concerning actual or potential violations of law that may not be technically within its statutory or other authority or may compile information in the course of an investigation which may not be relevant to a specific prosecution. In the interests of effective law enforcement, it is necessary to retain some or all of such information in these systems of records since it can aid in establishing patterns of criminal activity and can provide valuable leads for Federal and other law enforcement agencies.

(5)(e)(2). In a criminal tax investigation or prosecution, the requirement that information be collected to the greatest extent practicable from the subject individual would present a serious impediment to law enforcement because the subject of the investigation or prosecution would be placed on notice as to the existence of the investigation and would therefore be able to avoid detection or apprehension, influence witnesses improperly, destroy evidence, or fabricate testimony.

(6)(e)(3). The requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential inves-

tigation or reveal the identity of witnesses or confidential informants.

(7)(e)(4) (G) and (H). Since an exemption is being claimed for subsections (f) (Agency Rules) and (d) (Access to Records) of the Act these subsections are inapplicable to the extent that these systems of records are exempted from subsection (f) and (d).

(8)(e)(4)(I). The categories of sources of the records in the systems have been published in the FEDERAL REGISTER in broad generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires. In the event, however, that this subsection should be interpreted to require more detail as to the identity of sources of the records in these systems, exemption from this provision is necessary in order to protect the confidentiality of the sources of criminal tax and related law enforcement information. Such exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(9)(e)(5). In the collection of information for criminal tax enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light. Furthermore, the accuracy of such information can often only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of government attorneys in exercising their judgment in reporting on information and investigations and impede the development of criminal tax information and related data necessary for effective law enforcement.

(10)(e)(8). The individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue warrants or subpoenas and could reveal investigative techniques, procedures, or evidence.

(11)(f). Procedures for notice to an individual pursuant to subsection (f)(1) as to the existence of records pertaining to him dealing with an actual or potential criminal tax, civil tax, or regulatory investigation or prosecution must be exempted because such notice to an individual would be detrimental to the successful conduct and/or completion or an investigation or prosecution pending or future. In addition, mere notice of the fact of an investigation could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

Since an exemption is being claimed for subsection (d) of the Act (Access to Records) the rules required pursuant to subsection (f) (2) through (5) are inapplicable to these sys-

tems of records to the extent that these systems of records are exempted from subsection (d).

(12)(g). Since an exemption is being claimed for subsections (d) (Access to Records) and (f) (Agency Rules) this section is inapplicable, and is exempted for the reasons set forth for those subsections, to the extent that these systems of records are exempted from subsections (d) and (f).

(c) The following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(k)(2) from subsections (c)(3), (d)(1), (d)(2), (d)(3), (d)(4), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f) of 5 U.S.C. 552a:

(1) Tax Division Central Classification Cards, Index Docket Cards, and Associated Records—Civil Tax Cases (JUSTICE/TAX-002)—Limited Access.

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k)(2).

(d) The system of records listed under paragraph (c)(1) is exempted for the reasons set forth below, from the following provisions of 5 U.S.C. 552a:

(1)(c)(3). The release of the disclosure counting, for disclosures made pursuant to subsection (b) of the Act, including those permitted under the routine uses published for this system of records, would enable the subject of an investigation of an actual or potential civil tax case to determine whether he or she is the subject of investigation, to obtain valuable information concerning the nature of that investigation and the information obtained, and to determine the identity of witnesses or informants. Such access to investigative information would, accordingly, present a serious impediment to law enforcement. In addition, disclosure of the accounting would constitute notice to the individual of the existence of a record even though such notice requirement under subsection (f)(1) is specifically exempted for this system of records.

(2) (d)(1); (d)(2); (d)(3); (d)(4). Access to the records contained in this system would inform the subject of an actual or potential civil tax investigation of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his or her activities and of the identity of witnesses or informants. Such access would, accordingly, provide information that could enable the subject to avoid detection. This result, therefore, would constitute a serious impediment to effective law enforcement only because it would prevent the successful completion of the investigation but also because it could endanger the physical safety

of witnesses or informants, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(3)(e)(1). The notices for this system of records published in the FEDERAL REGISTER set forth the basic statutory or related authority for maintenance of this system. However, in the course of civil tax and related law enforcement investigations, cases and matters, the Tax Division will occasionally obtain information concerning actual or potential violations of law that are not strictly or technically within its statutory or other authority or may compile information in the course of an investigation which may not be relevant to a specific case. In the interests of effective law enforcement, it is necessary to retain some or all of such information in this system of records since it can aid in establishing patterns of tax compliance and can provide valuable leads for Federal and other law enforcement agencies.

(4)(e)(4) (G) and (H). Since an exemption is being claimed for subsections (f) (Agency Rules) and (d) (Access to Records) of the Act these subsections are inapplicable to the extent that this system of records is exempted from subsection (f) and (d).

(5)(e)(4)(I). The categories of sources of the records in this system have been published in the FEDERAL REGISTER in broad generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires. In the event, however, that this subsection should be interpreted to require more detail as to the identity of sources of the records in this system, exemption from this provision is necessary in order to protect the confidentiality of the sources of civil tax and related law enforcement information. Such exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(6)(f). Procedures for notice to an individual pursuant to subsection (f)(1) as to existence of records pertaining to the individual dealing with an actual or potential criminal tax, civil tax, or regulatory investigation or prosecution must be exempted because such notice to an individual would be detrimental to the successful conduct and/or completion of an investigation or case, pending or future. In addition, mere notice of the fact of an investigation could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

Since an exemption is being claimed for subsection (d) of the Act (Access to Records) the rules required pursuant to subsection (f) (2) through (5) are inapplicable to this system of records to

the extent that this system of records is exempted from subsection (d).

(e) The following system of records is exempt from 5 U.S.C. 552a (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4), (G), (e)(4)(H), (e)(4)(I), (e) (5) and (8), (f), and (g).

(1) Freedom of Information—Privacy Act Request Files (JUSTICE/TAX-004)

These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2) and (k)(2).

(f) Because this system contains Department of Justice civil and criminal law enforcement, investigatory records, it is exempted for the reasons set forth from the following provisions of 5 U.S.C. 552a:

(1)(c)(3). The release of the disclosure accounting would present a serious impediment to law enforcement by permitting the subject of a investigation of an actual or potential criminal, civil, or regulatory violation to determine whether he is the subject of investigation, or to obtain valuable information concerning the nature of that investigation and the information obtained, or to identify witnesses and informants.

(2)(c)(4). Since an exemption is being claimed for subsection (d) of the Act (Access to Records), this subsection is inapplicable to the extent that this system of records is exempted from subsection (d).

(3)(d). Access to records contained in this system would inform the subject of an actual or potential criminal tax investigation of the existence of that investigation, of the nature and scope of the investigation, of the information and evidence obtained as to his or her activities, and of the identity of witnesses or informants. Such access would, accordingly, provide information that could enable the subject to avoid detection, apprehension, and prosecution. This result, therefore, would constitute a serious impediment to effective law enforcement not only because it would prevent the successful completion of the investigation but also because it could endanger the physical safety of witnesses or informants, lead to the improper influencing of witnesses, the destruction of evidence, of the fabrication of testimony. Amendment of the records would interfere with ongoing criminal law enforcement proceedings and imposes an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4)(e)(1). In the course of criminal tax and related law enforcement investigations, cases, and matters, the Tax Division will occasionally obtain information concerning actual or potential violations of law that may

not be technically within its statutory or other authority, or it may compile information in the course of an investigation which may not be relevant to a specific prosecution. In the interests of effective law enforcement, it is necessary to retain some or all of such information since it can aid in establishing patterns of criminal activity and can provide valuable leads for Federal and other law enforcement agencies.

(5)(e)(2). To collect information to the greatest extent practicable from the subject individual of a criminal investigation or prosecution would present a serious impediment to law enforcement because the subject of the investigation or prosecution would be placed on notice as to the existence of the investigation and would therefore be able to avoid detection or apprehension, improperly influence witnesses, destroy evidence, or fabricate testimony.

(6)(e)(3). To provide individuals supplying information with a form which includes the information required by subsection (e)(3) would constitute a serious impediment to law enforcement, i.e., it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(7)(e)(4) (G) and (H). These subsections are inapplicable to the extent that this system is exempt from the access provisions of subsection (d) and the rules provisions of subsection (f).

(8)(e)(4)(I). The categories of sources of the records in this system have been published in the FEDERAL REGISTER in broad generic terms in the belief that this is all that subsection (e) (4) (I) of the Act requires. In the event, however, that this subsection should be interpreted to require more detail as to the identity of sources of the records in this system, exemption from this provision is necessary to protect the confidentiality of the sources of criminal tax and related law enforcement information. Such exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(9)(e)(5). In the collection of information for criminal tax enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light. Furthermore, the accuracy of such information can often only be determined in a court of law. The restrictions of subsection (e)(5) would inhibit the ability of government attorneys in exercising their judgement in reporting on information and investigations and impede the development of criminal tax information and related data necessary for effective law enforcement.

(10)(e)(8). The individual notice requirements of subsection (e)(8) could present a se-

rious impediment to law enforcement as this could interfere with the ability to issue warrants or subpoenas and could reveal investigative techniques, procedures, or evidence.

(11)(f). This subsection is inapplicable to the extent that this system is exempt from the access provisions of subsection (d).

(12)(g). Because the records in this system are generally compiled for law enforcement purposes and are exempt from the access provisions of subsection (d), subsection (g) is inapplicable.

[Order No. 742-77, 42 FR 40906, Aug. 12, 1977, as amended by Order No. 6-86, 51 FR 15478, Apr. 24, 1986]

### § 16.96 Exemption of Federal Bureau of Investigation Systems—limited access.

(a) The following system of records is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (2), and (3), (e)(4)(G) and (H), (e)(8), (f) and (g).

(1) Central Records System (CRS) (JUSTICE/FBI-002).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552(j) and (k). Where compliance would not appear to interfere with or adversely affect the overall law enforcement process, the applicable exemption may be waived by the FBI.

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her would reveal investigative interest by not only the FBI, but also by the recipient agency. This would permit the record subject to take appropriate measures to impede the investigation, e.g., destroy evidence, intimidate potential witnesses or flee the area to avoid the thrust of the investigation.

(2)(i) From subsections (d), (e)(4) (G) and (H), (f) and (g) because these provisions concern individual access to investigative records, compliance with which could compromise sensitive information classified in the interest of national security, interfere with the overall law enforcement process by revealing a pending sensitive investigation, possibly identify a confidential source or disclose information which would constitute an unwarranted inva-

sion of another individual's personal privacy, reveal a sensitive investigative technique, or constitute a potential danger to the health or safety to law enforcement personnel.

(ii) Also, individual access to non-criminal investigative records, e.g., civil investigations and administrative inquiries, as described in subsection (k) of the Privacy Act, could also compromise classified information related to national security, interfere with a pending investigation or internal inquiry, constitute an unwarranted invasion of privacy, reveal a confidential source or sensitive investigative technique, or pose a potential threat to law enforcement personnel. In addition, disclosure of information collected pursuant to an employment suitability or similar inquiry could reveal the identity of a source who provided information under an express promise of confidentiality, or could compromise the objectivity or fairness of a testing or examination process.

(iii) In addition, from paragraph (d)(2) of this section, because to require the FBI to amend information thought to be incorrect, irrelevant or untimely, because of the nature of the information collected and the essential length of time it is maintained, would create an impossible administrative and investigative burden by forcing the agency to continuously retrograde its investigations attempting to resolve questions of accuracy, etc.

(3) From subsection (e)(1) because:

(i) It is not possible in all instances to determine relevancy or necessity of specific information in the early stages of a criminal or other investigation.

(ii) Relevance and necessity are questions of judgment and timing; what appears relevant and necessary when collected ultimately may be deemed unnecessary. It is only after the information is assessed that its relevancy and necessity in a specific investigative activity can be established.

(iii) In any investigation the FBI might obtain information concerning violations of law not under its jurisdiction, but in the interest of effective law enforcement, dissemination will be made to the agency charged with enforcing such law.

(iv) In interviewing individuals or obtaining other forms of evidence during an investigation, information could be obtained, the nature of which would leave in doubt its relevancy and necessity. Such information, however, could be relevant to another investigation or to an investigative activity under the jurisdiction of another agency.

(4) From subsection (e)(2) because the nature of criminal and other investigative activities is such that vital information about an individual can only be obtained from other persons who are familiar with such individual and his/her activities. In such investigations it is not feasible to rely upon information furnished by the individual concerning his own activities.

(5) From subsection (e)(3) because disclosure would provide the subject with substantial information which could impede or compromise the investigation. The individual could seriously interfere with undercover investigative activities and could take appropriate steps to evade the investigation or flee a specific area.

(6) From subsection (e)(8) because the notice requirements of this provision could seriously interfere with a law enforcement activity by alerting the subject of a criminal or other investigation of existing investigative interest.

(c) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4) (G) and (H), (e) (5) and (8), (f), (g) and (m):

(1) Electronic Surveillance (Elsur) Indices (JUSTICE/FBI-006).

These exemptions apply only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j).

(d) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of accounting disclosures would place the subject of an investigation on notice that he is under investigation and provide him with significant information concerning the nature of the investigation, resulting in a serious impediment to law enforcement.

(2) From subsections (c)(4), (d), (e)(4) (G) and (H), and (g) because these provisions concern an individual's access to records which concern him and such

access to records in this system would compromise ongoing investigations, reveal investigatory techniques and confidential informants, and invade the privacy of private citizens who provide information in connection with a particular investigation.

(3) From subsection (e)(1) because these indices must be maintained in order to provide the information as described in the "routine uses" of this particular system.

(4) From subsections (e)(2) and (3) because compliance is not feasible given the subject matter of the indices.

(5) From subsection (e)(5) because this provision is not applicable to the indices in view of the "routine uses" of the indices. For example, it is impossible to predict when it will be necessary to utilize information in the system and, accordingly it is not possible to determine when the records are timely.

(6) From subsection (e)(8) because the notice requirement could present a serious impediment to law enforcement by revealing investigative techniques, procedures and the existence of confidential investigations.

(7) From subsection (m) for the reasons stated in subsection (b)(7) of this section.

(e) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1), (2) and (3), (e)(4)(G) and (H), (e)(5) and (8), (f), and (g):

(1) Identification Division Records System (JUSTICE/FBI-009).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j).

(f) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) for the reasons stated in subsection (d)(1) of this section.

(2) From subsections (c)(4), (d), (e)(4)(G) and (H), (f) and (g) because these provisions concern an individual's access to records which concern him. Such access is directed at allowing the subject of a record to correct inaccuracies in it. Although an alternate system of access has been provided in 28 CFR 16.30 to 34 and 28 CFR 20.34, the vast majority of records in this system

concern local arrests which it would be inappropriate for the FBI to undertake to correct.

(3) From subsection (e)(1) because it is impossible to state with any degree of certainty that all information on these records is relevant to accomplish a purpose of the FBI, even though acquisition of the records from state and local law enforcement agencies is based on a statutory requirement. In view of the number of records in the system it is impossible to review them for relevancy.

(4) From subsection (e)(2) because the records in the system are necessarily furnished by criminal justice agencies due to their very nature.

(5) From subsection (e)(3) because compliance is not feasible due to the nature of the records.

(6) From subsection (e)(5) because the vast majority of these records come from local criminal justice agencies and it is administratively impossible to ensure that the records comply with this provision. Submitting agencies are, however, urged on a continuing basis to ensure that their records are accurate and include all dispositions.

(7) From subsection (e)(8) because the FBI has no logical manner to ascertain whether process has been made public and compliance with this provision would in any case, provide an impediment to law enforcement by interfering with the ability to issue warrants or subpoenas and by revealing investigative techniques, procedures or evidence.

(g) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1), (2) and (3), (e)(4)(G) and (H), (e)(8), (f), and (g):

National Crime Information Center (NCIC) (JUSTICE/FBI-001).

This exemption applies only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2) and (k)(3).

(h) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) for the reasons stated in subsection (d)(1) of this section.

(2) From subsections (c)(4), (d), (e)(G) and (H), and (g) for the reasons stated in subsection (d)(2) of this sec-



tion. When records are properly subject to access by the individual, an alternate means of access is provided in subsection (i) of this section.

(3) From subsection (e)(1) because information contained in this system is primarily from state and local records, and it is for the official use of agencies outside the Federal Government in accordance with 28 U.S.C. 534.

(4) From subsections (e) (2) and (3) because it is not feasible to comply with these provisions given the nature of this system.

(5) From subsection (e)(8) for the reasons stated in subsection (d)(6) of this section.

(i) Access to computerized criminal history records in the National Crime Information Center is available to the individual who is the subject of the record pursuant to procedures and requirements specified in the Notice of Systems of Records compiled by the National Archives and Records Service and published under the designation:

(j) The following system of records is exempt from 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4) (G) and (H), (f) and (g):

(1) National Center for the Analysis of Violent Crime (NCAVC) (JUSTICE/FBI-015).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

(k) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because providing the accounting of disclosures to the subject could prematurely reveal investigative interest by the FBI and other law enforcement agencies, thereby providing the individual an opportunity to impede an active investigation, destroy or alter evidence, and possibly render harm to violent crime victims and/or witnesses.

(2) From subsections (d), (e)(4) (G) and (H), and (f) because disclosure to the subject could interfere with enforcement proceedings of a criminal justice agency, reveal the identity of a confidential source, result in an unwarranted invasion of another's privacy, reveal the details of a sensitive investigative technique, or endanger the life and safety of law enforcement personnel, potential violent crime victims,

and witnesses. Disclosure also could prevent the future apprehension of a violent or exceptionally dangerous criminal fugitive should he or she modify his or her method of operation in order to evade law enforcement. Also, specifically from subsection (d)(2), which permits an individual to request amendment of a record, because the nature of the information in the system is such that an individual criminal offender would frequently demand amendment of derogatory information, forcing the FBI to continuously retrograde its criminal investigations in an attempt to resolve questions of accuracy, etc.

(3) From subsection (g) because the system is exempt from the access and amendment provisions of subsection (d).

(4) From subsection (e)(1) because it is not always possible to establish relevance and necessity of the information at the time it is obtained or developed. Information, the relevance and necessity of which may not be readily apparent, frequently can prove to be of investigative value at a later date and time.

National Crime Information Center (NOIC) (JUSTICE/FBI-001)).

Information on access is also published in the appendix to part 20 of the Code of Federal Regulations in relation to 28 CFR 20.34.

[Order No. 40-80, 45 FR 5301, Jan. 23, 1980, as amended by Order No. 64-81, 46 FR 20540, Apr. 6, 1981; Order No. 63-81, 46 FR 22362, Apr. 17, 1981; Order No. 67-81, 46 FR 30495, June 9, 1981; Order No. 15-85, 50 FR 31361, Aug. 2, 1985; Order No. 6-86, 51 FR 15479, Apr. 24, 1986]

#### § 16.97 Exemption of Bureau of Prisons Systems—limited access.

(a) The following systems of records are exempt from 5 U.S.C. 552a (c) (3) and (4), (d), (e) (2) and (3), (e)(4) (H), (e)(8), (f) and (g):

(1) Custodial and Security Record System (JUSTICE/BOP-001).

(2) Industrial Inmate Employment Record System (JUSTICE/BOP-003).

(3) Inmate Administrative Remedy Record System (JUSTICE/BOP-004).

(4) Inmate Central Record System (JUSTICE/BOP-005).

(5) Inmate Commissary Accounts Record System (JUSTICE/BOP-006).

(6) Inmate Physical and Mental Health Record System (JUSTICE/BOP-007).

(7) Inmate Safety and Accident Compensation Record System (JUSTICE/BOP-008).

(8) Federal Tort Claims Act Record System (JUSTICE/BOP-009).

These exemptions apply only to the extent that information in these systems is subject to exemption pursuant to 5 U.S.C. 552a(j).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because inmates will not be permitted to gain access or to contest contents of these record systems under the provisions of subsection (d) of 5 U.S.C. 552a. Revealing disclosure accountings can compromise legitimate law enforcement activities and Bureau of Prisons responsibilities.

(2) From subsection (c)(4) because exemption from provisions of subsection (d) will make notification of formal disputes inapplicable.

(3) From subsection (d) because exemption from this subsection is essential to protect internal processes by which Bureau personnel are able to formulate decisions and policies with regard to federal prisoners, to prevent disclosure of information to federal inmates that would jeopardize legitimate correctional interests of security, custody, or rehabilitation, and to permit receipt of relevant information from other federal agencies, state and local law enforcement agencies, and federal and state probation and judicial offices.

(4) From subsection (e)(2) because primary collection of information directly from federal inmates about criminal sentences or criminal records is highly impractical and inappropriate.

(5) From subsection (e)(3) because in view of the Bureau of Prisons' responsibilities, application of this provision to its operations and collection of information is inappropriate.

(6) From subsection (e)(4)(H) because exemption from provisions of subsection (d) will make publication of agency procedures under this subsection inapplicable.

(7) From subsection (e)(8) because the nature of Bureau of Prisons law enforcement activities renders notice of

compliance with compulsory legal process impractical.

(8) From subsection (f) because exemption from provisions of subsection (d) will render compliance with provisions of this subsection inapplicable.

(9) From subsection (g) because exemption from provisions of subsection (d) will render provisions of this subsection inapplicable.

(c) Consistent with the legislative purpose of the Privacy Act of 1974 (Pub. L. 93-579) the Bureau of Prisons will initiate a procedure whereby federal inmates in custody may gain access and review their individual prison files maintained at the institution of incarceration. Access to these files will be limited only to the extent that the disclosure of records to the inmate would jeopardize internal decision-making or policy determinations essential to the effective operation of the Bureau of Prisons; to the extent that disclosure of the records to the inmate would jeopardize privacy rights of others, or a legitimate correctional interest of security, custody, or rehabilitation; and to the extent information is furnished with a legitimate expectation of confidentiality. The Bureau of Prisons will continue to provide access to former inmates under existing regulations as is consistent with the interests listed above. Under present Bureau of Prisons regulations, inmates in federal institutions may file administrative complaints on any subject under the control of the Bureau. This would include complaints pertaining to information contained in these systems of records.

[Order No. 645-76, 41 FR 12640, Mar. 26, 1976, as amended by Order No. 6-86, 51 FR 15479, Apr. 24, 1986]

**§ 16.98 Exemption of the Drug Enforcement Administration (DEA)—limited access.**

(a) The following systems of records are exempt from 5 U.S.C. 552a(c)(3) and (d):

(1) Automated Records and Consolidated Orders System/Diversion Analysis and Detection System (ARCOS/DADS) (Justice/DEA-003)

(2) Controlled Substances Act Registration Records (Justice/DEA-005)

(3) Registration Status/Investigatory Records (Justice/DEA-012)

(b) These exemptions apply only to the extent that information in these systems is subject to exemption pursuant to 5 U.S.C. 552a(k)(2). Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because release of the disclosure accounting would enable the subject of an investigation to gain valuable information concerning the nature and scope of the investigation and seriously hamper the regulatory functions of the DEA.

(2) From subsection (d) because access to records contained in these systems may provide the subject of an investigation information that could enable him to avoid compliance with the Drug Abuse Prevention and Control Act of 1970 (Pub. L. 91-513).

(c) Systems of records identified in paragraphs (c)(1) through (c)(6) below are exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c)(3) and (4), (d), (e)(1), (2) and (3), (e)(5), (e)(8) and (g) of 5 U.S.C. 552a. In addition, systems of records identified in paragraphs (c)(1), (c)(3), (c)(4), and (c)(5) below are also exempted pursuant to the provisions of 5 U.S.C. 552a(k)(2) from subsections (c)(3), (d) and (e)(1). Finally, systems of records identified in paragraphs (c)(1), (c)(2), (c)(3) and (c)(5) below are also exempted pursuant to the provisions of 5 U.S.C. 552a(k)(1) from subsections (c)(3), (d) and (e)(1):

(1) Air Intelligence Program (Justice/DEA-001)

(2) Investigative Reporting and Filing System (Justice/DEA-008)

(3) Planning and Inspection Division Records (Justice/DEA-010)

(4) Operations Files (Justice/DEA-011)

(5) Security Files (Justice/DEA-013)

(6) System to Retrieve Information from Drug Evidence (Stride/Ballistics) (Justice/DEA-014)

(d) Exemptions apply to the following systems of records only to the extent that information in the systems is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2): Air Intelligence Program (Justice/DEA-001); Planning and Inspection Division Records (Justice/DEA-010); and Security Files (Justice/DEA-013). Exemptions apply to the Investigative Re-

porting and Filing System (Justice/DEA-008) only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2) and (k)(1). Exemptions apply to the Operations Files (Justice/DEA-011) only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2) and (k)(2). Exemptions apply to the System to Retrieve Information from Drug Evidence (STRIDE/Ballistics) (Justice/DEA-014) only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2). Exemption from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because release of disclosure accounting would provide to the subjects of an investigation significant information concerning the nature of the investigation and thus would present the same impediments to law enforcement as those enumerated in paragraph (d)(3) regarding exemption from subsection (d).

(2) From subsection (c)(4) to the extent that it is not applicable because an exemption is being claimed from subsection (d).

(3) From the access provisions of subsection (d) because access to records in this system of records would present a serious impediment to law enforcement. Specifically, it could inform the record subject of an actual or potential criminal, civil, or regulatory investigation of the existence of that investigation; of the nature and scope of the information and evidence obtained as to his activities; of the identity of confidential sources, witnesses, and law enforcement personnel; and of information that may enable the subject to avoid detection or apprehension. Similarly, it may alert collateral suspects yet unprosecuted in closed cases. It could prevent the successful completion of the investigation; endanger the life, health, or physical safety of confidential sources, witnesses, and law enforcement personnel, and/or lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony; or it may simply reveal a sensitive investigative technique. In addition, granting access to such information could result in the disclosure of confidential/security-sen-

sitive or other information that would constitute an unwarranted invasion of the personal privacy of third parties. Finally, access to the records could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy. From the amendment provisions of subsection (d) because amendment of the records would interfere with ongoing investigations and law enforcement activities and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated.

(4) From subsection (e)(1) because the application of this provision could impair investigations and interfere with the law enforcement responsibilities of the DEA for the following reasons:

(i) It is not possible to detect relevance or necessity of specific information in the early stages of a civil, criminal or other law enforcement investigation, case, or matter, including investigations during which DEA may obtain properly classified information. Relevance and necessity are questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established.

(ii) During the DEA's investigative activities DEA may detect the violation of either drug-related or non-drug related laws. In the interests of effective law enforcement, it is necessary that DEA retain all information obtained because it can aid in establishing patterns of activity and provide valuable leads for Federal and other law enforcement agencies or otherwise assist such agencies in discharging their law enforcement responsibilities. Such information may include properly classified information, the retention of which could be in the interests of national defense and/or foreign policy.

(5) From subsection (e)(2) because, in some instances, the application of this provision would present a serious impediment to law enforcement for the following reasons:

(i) The subject of an investigation would be placed on notice as to the existence of an investigation and would therefore be able to avoid detection or apprehension, to improperly influence

witnesses, to destroy evidence, or to fabricate testimony.

(ii) In certain circumstances the subject of an investigation cannot be required to provide information to investigators, and information relating to a subject's illegal acts must be obtained from other sources.

(iii) In any investigation it is necessary to obtain evidence from a variety of sources other than the subject of the investigation in order to verify the evidence necessary for successful prosecution.

(6) From subsection (e)(3) because the requirement that individuals supplying information be provided a form stating the requirements of subsection (3)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of an actual or potential confidential investigation, reveal the identity of confidential sources of information and endanger the life, health or physical safety of confidential informants, witnesses, and investigators/law enforcement personnel.

(7) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions imposed by subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of criminal intelligence necessary for effective law enforcement.

(8) From subsection (e)(8) because the application of this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation, and could reveal investigative techniques, procedures, or evidence.

(9) From subsection (g) to the extent that this system is exempt from the access and amendment provisions of subsection (d) pursuant to subsections

(j)(2), (k)(1) and (k)(2) of the Privacy Act.

(e) The following systems of records are exempt from 5 U.S.C. 552a (d)(1) and (e)(1):

(1) Grants of Confidentiality Files (GCF) (Justice/DEA-017), and

(2) DEA Applicant Investigations (Justice/DEA-018).

(f) These exemptions apply only to the extent that information in these systems is subject to exception pursuant to 5 U.S.C. 552a(k)(5). Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (d)(1) because many persons are contacted who, without an assurance of anonymity, refuse to provide information concerning an applicant for a grant of confidentiality with DEA. By permitting access to information which may reveal the identity of the source of that information—after a promise of confidentiality has been given—DEA would breach the promised confidentiality. Ultimately, such breaches would restrict the free flow of information which is vital to a determination of an applicant's qualifications for a grant.

(2) From subsection (e)(1) because in the collection of information for investigative and evaluation purposes, it is impossible to determine in advance what exact information may be of assistance in determining the qualifications and suitability of a candidate. Information which may appear irrelevant, when combined with other apparently irrelevant information, can on occasion provide a composite picture of an applicant which assists in determining whether a grant of confidentiality is warranted.

(g) The following system of records is exempted pursuant to the provisions of 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4), (d), (e) (1), (2) and (3), (e)(5), (e)(8) and (g) of 5 U.S.C. 552a. In addition, this system of records is exempted pursuant to the provisions of 5 U.S.C. 552a (k)(1) and (k)(2) from subsections (c)(3), (d), and (e)(1):

Freedom of Information/Privacy Act Records (Justice/DEA-006)

(h) These exemptions apply only to the extent that information in this system is subject to exemption pursuant

to 5 U.S.C. 552a (j)(2), (k)(1), and (k)(2). Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) for the reasons given in paragraphs (b)(1) and (d)(1).

(2) From subsection (c)(4) to the extent that is not applicable because an exemption is being claimed from subsection (d).

(3) From subsection (d) for the reasons given in paragraphs (b)(2), (d)(3), and (f)(1).

(4) From subsection (e)(1) for reasons given in paragraphs (d)(4) and (f)(2).

(5) From subsection (e)(2) for reasons given in paragraph (d)(5).

(6) From subsection (e)(3) for reasons given in paragraph (d)(6).

(7) From subsection (e)(5) for reasons given in paragraph (d)(7).

(8) From subsection (e)(8) for the reasons given in paragraph (d)(8).

(9) From subsection (g) to the extent that this system is exempt from the access and amendment provisions of subsection (d) pursuant to subsections (j)(2), (k)(1) and (k)(2) of the Privacy Act.

[Order No. 88-94, 59 FR 29717, June 9, 1994]

#### § 16.99 Exemption of Immigration and Naturalization Service System—limited access.

(a) The following systems of records of the Immigration and Naturalization Service are exempt from 5 U.S.C. 552a (c) (3) and (4), (d), (e) (1), (2) and (3), (e) (4)(G) and (H), (e) (5) and (8), and (g):

(1) The Immigration and Naturalization Service Alien File (A-File) and Central Index System (CIS), JUSTICE/INS-001A.

(2) The Immigration and Naturalization Service Index System, JUSTICE/INS-001 which consists of the following subsystems:

(i) Agency Information Control Record Index.

(ii) Alien Enemy Index.

(iii) Congressional Mail Unit Index.

(iv) Air Detail Office Index.

(v) Anti-smuggling Index (general).

(vi) Anti-smuggling Information Centers Systems for Canadian and Mexican Borders.

(vii) Border Patrol Sectors General Index System.

- (viii) Contact Index.
- (ix) Criminal, Narcotic, Racketeer and Subversive Indexes.
- (x) Enforcement Correspondence Control Index System.
- (xi) Document Vendors and Alterers Index.
- (xii) Informant Index.
- (xiii) Suspect Third Party Index.
- (xiv) Examination Correspondence Control Index.
- (xv) Extension Training Enrollee Index.
- (xvi) Intelligence Index.
- (xvii) Naturalization and Citizenship Indexes.
- (xviii) Personnel Investigations Unit Indexes.
- (xix) Service Look-Out Subsystem.
- (xx) White House and Attorney General Correspondence Control Index.
- (xxi) Fraudulent Document Center Index.
- (xxii) Emergency Reassignment Index.
- (xxiii) Alien Documentation, Identification, and Telecommunication (ADIT) System.

The exemptions apply to the extent that information in these subsystems is subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the disclosure accounting for disclosure pursuant to the routine uses published for these subsystems would permit the subject of a criminal or civil investigation to obtain valuable information concerning the nature of that investigation and present a serious impediment to law enforcement.

(2) From subsection (c)(4) since an exemption is being claimed for subsection (d), this subsection will not be applicable.

(3) From subsection (d) because access to the records contained in these subsystems would inform the subject of a criminal or civil investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and present a serious impediment to law enforcement.

(4) From subsection (e)(1) because in the course of criminal or civil investigations, the Immigration and Naturalization Service often obtains information concerning the violation of laws other than those relating to violations over which INS has investigative jurisdiction. In the interests of effective law enforcement, it is necessary that INS retain this information since it can aid in establishing patterns of criminal activity and provide valuable leads for those law enforcement agencies that are charged with enforcing other segments of the criminal law.

(5) From subsection (e)(2) because in a criminal or civil investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection or apprehension.

(6) From subsection (e)(3) because the requirement that individuals supply information be provided with a for, stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life or physical safety of confidential informants.

(7) From subsections (e)(4) (G) and (H) because these subsystems of records are exempt from individual access pursuant to subsection (j) of the Privacy Act of 1974.

(8) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations

and impede the development of criminal intelligence necessary for effective law enforcement.

(9) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the Immigration and Naturalization Service's ability to issue administrative subpoenas and could reveal investigative techniques and procedures.

(10) From subsection (g) because these subsystems of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(11) In addition, these systems of records are exempt from subsections (c)(3), (d), (e)(1), (e)(4) (G) and (H) to the extent they are subject to exemption pursuant to 5 U.S.C. 552a(k)(1). To permit access to records classified pursuant to Executive Order would violate the Executive Order protecting classified information.

(c) The Border Patrol Academy Index Subsystem is exempt from 5 U.S.C. 552a (d) and (f).

This exemption applies only to the extent that information in this subsystem is subject to exemption pursuant to 5 U.S.C. 552a(k).

(d) Exemptions for the particular subsections are justified for the following reasons.

(1) From subsection (d) because exemption is claimed only for those testing and examination materials used to determine an individual's qualifications for retention and promotion in the Immigration and Naturalization Service. This is necessary to protect the integrity of testing materials and to insure fair and uniform examinations.

(2) From subsection (f) because the subsystem of records has been exempted from the access provisions of subsection (d).

(e) The Orphan Petitioner Index and Files (Justice/INS-007) system of records is exempt from 5 U.S.C. 552a(d). This exemption applies only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k)(1).

(f) Exemption from paragraph (d) of this section is claimed solely because

of the possibility of receipt of classified information during the course of INS investigation of prospective adoptive parents.

Although it would be rare, prospective adoptive parents may originally be from foreign countries (for example) and information received on them from their native countries may require classification under Executive Order 12356 which safeguards national security information. If such information is relevant to the INS determination with respect to adoption, the information would be kept in the file and would be classified accordingly. Therefore, access could not be granted to the record subject under the Privacy Act without violating E.O. 12356.

[Order No. 645-76, 41 FR 12640, Mar. 26, 1976, as amended by Order No. 688-77, 42 FR 10001, Feb. 18, 1977; Order No. 6-84, 49 FR 20812, May 17, 1984; Order No. 25-88, 53 FR 41161, Oct. 20, 1988]

#### § 16.100 Exemption of Office of Justice Programs—limited access.

(a) The following system of records is exempt from 5 U.S.C. 552a(d):

(1) The Civil Rights Investigative System (JUSTICE/OJP-008).

This exemption applies only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k)(2).

(b) Exemption from subsection (d) is claimed since access to information in the Civil Rights Investigative System prior to final administrative resolution will deter conciliation and compliance efforts. Consistent with the legislative purpose of the Privacy Act of 1974, decisions to release information from the system will be made on a case-by-case basis and information will be made available where it does not compromise the complaint and compliance process. In addition, where explicit promises of confidentiality must be made to a source during an investigation, disclosure will be limited to the extent that the identity of such confidential sources will not be compromised.

[Order No. 645-76, 41 FR 12640, Mar. 26, 1976, as amended by Order No. 5-78, 43 FR 36439, Aug. 17, 1978; Order No. 43-80, 45 FR 6780, Jan. 30, 1980; Order No. 6-86, 51 FR 15479, Apr. 24, 1986]

**§ 16.101 Exemption of U.S. Marshals Service Systems—limited access, as indicated.**

(a) The following system of records is exempt from 5 U.S.C. 552(a)(c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4) (G) and (H), (e)(5), (e)(8), (f) and (g):

(1) Warrant Information System (JUSTICE/USM-007).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of disclosure accounting for disclosure made pursuant to subsection (b) of the Act, including those permitted under routine uses published for this system of records would permit a person to determine whether he is the subject of a criminal investigation, and to determine whether a warrant has been issued against him, and therefore present a serious impediment to law enforcement.

(2) From subsection (c)(4) since an exemption is being claimed for subsection (d) of the Act, this section is inapplicable.

(3) From subsection (d) because access to records would inform a person for whom a federal warrant has been issued of the nature and scope of information obtained as to his activities, of the identity of informants, and afford the person sufficient information to enable the subject to avoid apprehension. These factors would present a serious impediment to law enforcement in that they would thwart the warrant process and endanger lives of informants etc.

(4) From subsections (e)(1) and (e)(5) because the requirements of these subsections would present a serious impediment to law enforcement in that it is impossible to determine in advance what information collected during an investigation will be important or crucial to the apprehension of Federal fugitives. In the interest of effective law enforcement, it is appropriate in a thorough investigation to retain seemingly irrelevant, untimely, or inaccurate information which, with the passage of time, would aid in establish-

ing patterns of activity and provide investigative leads toward fugitive apprehension and assist in law enforcement activities of other agencies.

(5) From subsection (e)(2) because the requirement that information be collected to the greatest extent practical from the subject individual would present a serious impediment to law enforcement because the subject of the investigation or prosecution would be placed on notice as to the existence of the warrant and would therefore be able to avoid detection or apprehension.

(6) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal identity of confidential informants.

(7) From subsections (e)(4) (G) and (H) since an exemption is being claimed for subsections (f) and (d) of the Act, these subsections are inapplicable.

(8) From subsection (e)(8) because the individual notice requirement of this subsection would present a serious impediment to law enforcement in that it would give persons sufficient warning to avoid warrants, subpoena, etc.

(9) From subsection (f) because procedures for notice to an individual pursuant to subsection (f)(1) as to existence of records pertaining to him dealing with warrants must be exempted because such notice to individuals would be detrimental to the successful service of a warrant. Since an exemption is being claimed for subsection (d) of the Act the rules required pursuant to subsections (f) (2) through (5) are inapplicable to this system of records.

(10) From subsection (g) since an exemption is being claimed for subsection (d) and (f) this section is inapplicable and is exempted for the reasons set forth for these subsections.

(c) The following system of records is exempt from 5 U.S.C. 552a (c) (3) and (4), (d), (e) (2) and (3), (e)(4) (G) and (e)(8), (f)(2) and (g):

(1) Witness Security System (JUSTICE/USM-008).



These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(d) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the disclosure accounting for disclosures made pursuant to subsection (b) of the Act including those permitted under routine uses published for this system of records would hamper the effective functioning of the Witness Security Program which by its very nature requires strict confidentiality vis-a-vis the records.

(2) From subsection (c)(4) for the reason stated in (b)(2) of this section.

(3) From subsection (d) because the U.S. Marshals Service Witness Security Program aids efforts of law enforcement officials to prevent, control or reduce crime. Access to records would present a serious impediment to effective law enforcement through revelation of confidential sources and through disclosure of operating procedures of the program, and through increased exposure of the program to the public.

(4) From subsection (e)(2) because in the Witness Security Program the requirement that information be collected to the greatest extent possible from the subject individual would constitute an impediment to the program, which is sometimes dependent on sources other than the subject witness for verification of information pertaining to the witness.

(5) From subsection (e)(3) for the reason stated in (b)(6) of this section.

(6) From subsection (e)(4) (G) and (H) for the reason stated in (b)(7) of this section.

(7) From subsection (e)(8) for the reason stated in (b)(8) of this section.

(8) From subsection (f)(2) since an exemption is being claimed for subsection (d) of the Act the rules required pursuant to subsection (f) (2) through (5) are inapplicable to this system of records.

(9) From subsection (g) for the reason stated in (b)(10) of this section.

(e) The following system of records is exempt from 5 U.S.C. 552a (c) (3) and (4), (d), (e) (2) and (3), (e)(4) (G) and (H),

(f) and (g) and may be additionally exempt from subsection (e)(8):

(1) Internal Investigations System (JUS-TICE/USM-002)—Limited access.

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(k)(5) or (j)(2).

(f) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) where the release of the disclosure accounting for disclosures made pursuant to subsection (b) of the Act would reveal a source who furnished information to the Government in confidence.

(2) From subsection (c)(4) for the reason stated in (b)(2) of this section.

(3) From subsection (d) because access to information in this system which was obtained from a confidential source would impede the effective investigation into employee conduct for purposes of determining suitability, eligibility, or qualifications for Federal employment in that it would inhibit furnishing of information by sources which desire to remain confidential.

(4) From subsection (e)(2) because the requirement that information be collected to the greatest extent practicable from the subject individual would present a serious impediment to law enforcement because the subject of the investigation or prosecution would be placed on notice as to the existence of the investigation and would therefore be able to compromise the investigation and avoid detection or apprehension.

(5) From subsection (e)(3) for the reason stated in (b)(6) of this section.

(6) From subsections (e)(4) (G) and (H) for the reason stated in (b)(7) of this section.

(7) From subsection (e)(8) because the individual notice requirement of this subsection would present a serious impediment to law enforcement in that the subject of the investigation would be alerted as to the existence of the investigation and therefore be able to compromise the investigation and avoid detection, subpoena, etc.

(8) From subsection (f) because procedures for notice to an individual pursuant to subsection (f)(1) as to the existence of records dealing with investiga-

tions of criminal or civil law violations would enable the individual to compromise the investigation and evade detection or apprehension. Since an exemption is being claimed for subsection (d) of the Act, the rules required pursuant to subsections (f)(2) through (f)(5) are not applicable to this system.

(9) From subsection (g) for the reason stated in (b)(10) of this section.

(g) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e)(1), (2) and (3), (e)(4) (G) and (H), (e)(5), (e)(8), (f) and (g):

(1) U.S. Marshals Service Threat Analysis Information System (JUSTICE/USM-009).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(h) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because to release the disclosure accounting would permit a person to determine whether he or she has been identified as a specific threat to USMS protectees and to determine the need for countermeasures to USMS protective activities and thereby present a serious impediment to law enforcement.

(2) From subsection (c)(4) because it is inapplicable since an exemption is being claimed for subsection (d).

(3) From subsection (d) because to permit access to records would inform a person of the nature and scope of information obtained as to his or her threat-related activities and of the identity of confidential sources, and afford the person sufficient information to develop countermeasures to thwart protective arrangements and endanger lives of USMS protectees, informants, etc. To permit amendment of the records would interfere with ongoing criminal law enforcement and impose an impossible administrative burden requiring criminal investigations to be continuously reinvestigated.

(4) From subsections (e) (1) and (5) because the collection of investigatory information used to assess the existence, extent and likelihood of a threat situation necessarily includes material from which it is impossible to identify and segregate information which may

not be important to the conduct of a thorough assessment. It is often impossible to determine in advance if all information collected is accurate, relevant, timely and complete but, in the interests of developing effective protective measures, it is necessary that the U.S. Marshals Service retain this information in order to establish patterns of activity to aid in accurately assessing threat situations. The restrictions of subsections (e) (1) and (5) would impede the protective responsibilities of the Service and could result in death or serious injury to Marshals Service protectees.

(5) From subsection (e)(2) because to collect information from the subject individual would serve notice that he or she is identified as a specific threat to USMS protectees and would enable the subject individual to develop countermeasures to protective activities and thereby present a serious impediment to law enforcement.

(6) From subsection (e)(3) because to inform individuals as required by this subsection would enable the subject individual to develop countermeasures to USMS protective arrangements or identify confidential sources and thereby present a serious impediment to law enforcement.

(7) From subsections (e)(4) (G) and (H) because they are inapplicable since an exemption is being claimed for subsections (d) and (f) of the Act.

(8) From subsection (e)(8) because to serve notice would give persons sufficient warning to develop countermeasures to protective arrangements and thereby present a serious impediment to law enforcement through compromise of protective procedures, etc.

(9) From subsection (f) because this system of records is exempt from the provisions of subsection (d).

(10) From subsection (g) because it is inapplicable since an exemption is being claimed for subsections (d) and (f).

(i) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (d):

(1) Judicial Facility Security Index System (JUSTICE/USM-010)

These exemptions apply only to the extent that information in this system is exempt pursuant to 5 U.S.C. 552a(k)(5).

(j) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) only to the extent that release of the disclosure accounting would reveal the identity of a confidential source.

(2) From subsection (d) only to the extent that access to information would reveal the identity of a confidential source.

(k) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e)(1), (2) and (3), (e)(4) (G) and (H), (e)(5), (e)(8), (f) and (g):

(1) U.S. Marshals Service Freedom of Information/Privacy Act (FOIA/PA) Files (JUSTICE/USM-012)

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(2) and (k)(5).

(l) Because this system contains Department of Justice civil and criminal law enforcement, investigatory records, exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because to release the disclosure accounting would permit the subject of an investigation to obtain valuable information concerning the existence and nature of the investigation and present a serious impediment to law enforcement.

(2) From subsection (c)(4) because that portion of this system which consists of investigatory records compiled for law enforcement purposes is being exempted from the provisions of subsection (d), rendering this provision not applicable.

(3) From subsection (d) because to permit access to investigatory records would reveal the identity of confidential sources and impede ongoing investigative or law enforcement activities by the premature disclosure of information related to those efforts. To permit amendment of the records would interfere with ongoing criminal law enforcement and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(4) From subsections (e) (1) and (5) because it is often impossible to determine in advance if investigatory records contained in this system are

accurate, relevant, timely and complete but, in the interests of effective law enforcement, it is necessary to retain this information to aid in establishing patterns of activity and provide leads in criminal investigations.

(5) From subsection (e)(2) because to collect information from the subject individual would serve notice that he or she is the subject of criminal investigative or law enforcement activity and thereby present a serious impediment to law enforcement.

(6) From subsection (e)(3) because to inform individuals as required by this subsection would enable the subject individual to identify confidential sources, reveal the existence of an investigation, and compromise law enforcement efforts.

(7) From subsections (e)(4) (G) and (H) because they are inapplicable since an exemption is being claimed for subsections (d) and (f) for investigatory records contained in this system.

(8) From subsection (e)(8) because to serve notice would give persons sufficient warning to evade law enforcement efforts.

(9) From subsection (f) because investigatory records contained in this system are exempt from the provisions of subsection (d).

(10) From subsection (g) because it is inapplicable since an exemption is being claimed for subsections (d) and (f).

(m) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e) (2) and (3), (e)(4) (G) and (H), (e)(8), (f) and (g):

(1) U.S. Marshals Service Administrative Proceedings, Claims and Civil Litigation Files (JUSTICE/USM-013).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2) or (k)(5).

(n) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because to release the disclosure accounting for disclosures pursuant to the routine uses published for this system would permit the subject of a criminal or civil case or matter under investigation, or a case or matter in litigation, or under regulatory or administrative

review or action, to obtain valuable information concerning the nature of that investigation, case or matter, and present a serious impediment to law enforcement or civil legal activities, or reveal a confidential source.

(2) From subsection (c)(4) because the exemption claimed for subsection (d) will make this section inapplicable.

(3) From subsection (d) because to permit access to records contained in this system would provide information concerning litigation strategy, or case development, and/or reveal the nature of the criminal or civil case or matter under investigation or administrative review, or in litigation, and present a serious impediment to law enforcement or civil legal activities, or reveal a confidential source.

(4) From subsection (e)(2) because effective legal representation, defense, or claim adjudication necessitates collecting information from all individuals having knowledge of the criminal or civil case or matter. To collect information primarily from the subject individual would present a serious impediment to law enforcement or civil legal activities.

(5) From subsection (e)(3) because to inform the individuals as required by this subsection would permit the subject of a criminal or civil matter under investigation or administrative review to compromise that investigation or administrative review and thereby impede law enforcement efforts or civil legal activities.

(6) From subsections (e)(4) (G) and (H) because these provisions are inapplicable since this system is exempt from subsections (d) and (f) of the Act.

(7) From subsection (e)(8) because to serve notice would give persons sufficient warning to compromise a criminal or civil investigation or administrative review and thereby impede law enforcement of civil legal activities.

(8) From subsection (f) because this system of records is exempt from the provisions of subsection (d).

(9) From subsection (g) because it is inapplicable since an exemption is claimed for subsections (d) and (f).

(o) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e) (1), (2), (5) and (g):

(1) U.S. Marshals Service Prisoner Transportation System (JUSTICE/USM-003).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(p) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) where the release of the disclosure accounting for disclosures made pursuant to subsection (b) of the Act would reveal a source who furnished information to the Government in confidence.

(2) From subsection (c)(4) to the extent that the system is exempt from subsection (d).

(3) From subsection (d) because access to records would reveal the names and other information pertaining to prisoners, including sensitive security information such as the identities and locations of confidential sources, e.g., informants and protected witnesses; and disclose access codes, data entry codes and message routing symbols used in law enforcement communications systems to schedule and effect prisoner movements. Thus, such a compromise of law enforcement communications systems would subject law enforcement personnel and other prisoners to harassment and possible danger, and present a serious threat to law enforcement activities. To permit amendment of the records would interfere with ongoing criminal law enforcement and impose an impossible administrative burden by requiring that information affecting the prisoner's security classification be continuously reinvestigated when contested by the prisoner, or by anyone on his behalf.

(4) From subsections (e) (1) and (5) because the security classification of prisoners is based upon information collected during official criminal investigations; and, in the interest of ensuring safe and secure prisoner movements it may be necessary to retain information the relevance, necessity, accuracy, timeliness, and completeness of which cannot be readily established, but which may subsequently prove useful in establishing patterns of criminal activity or avoidance, and thus be essential to assigning an appropriate se-

curity classification to the prisoner. The restrictions of subsection (e) (1) and (5) would impede the information collection responsibilities of the USMS, and the lack of all available information could result in death or serious injury to USMS and other law enforcement personnel, prisoners in custody, and members of the public.

(5) From subsection (e)(2) because the requirement to collect information from the subject individual would impede the information collection responsibilities of the USMS in that the USMS is often dependent upon sources other than the subject individual for verification of information pertaining to security risks posed by the individual prisoner.

(6) From subsection (g) to the extent that the system is exempt from subsection (d).

(q) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1), (2), (3), (e)(5) and (e)(8) and (g):

(1) U.S. Marshals Service Prisoner Processing and Population Management System (JUSTICE/USM-005).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(r) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because to release the disclosure accounting would permit the subject of a criminal proceeding to determine the extent or nature of law enforcement authorities' knowledge regarding his/her alleged misconduct or criminal activities. The disclosure of such information could alert the subject to devise ways in which to conceal his/her activities and/or prevent law enforcement from learning additional information about his/her activities, or otherwise inhibit law enforcement efforts. In addition, where the individual is the subject of an ongoing or potential inquiry/investigation, such release could reveal the nature thereof prematurely, and may also enable the subject to determine the identity of witnesses and informants. Such disclosure could compromise the ongoing or potential inquiry/investigation, endanger the lives of witnesses

and informants, or otherwise impede or thwart law enforcement efforts.

(2) From subsection (c)(4) to the extent that the system is exempt from subsection (d).

(3) From subsection (d) because to permit unlimited access would permit the subject of a criminal proceeding to determine the extent or nature of law enforcement authorities' knowledge regarding his/her alleged misconduct or criminal activities. The disclosure of such information could alert the subject to devise ways in which to conceal his/her activities and/or prevent law enforcement from learning additional information about his/her activities, or otherwise inhibit law enforcement efforts. Disclosure would also allow the subject to obtain sensitive information concerning the existence and nature of security measures and jeopardize the safe and secure transfer of the prisoner, the safety and security of other prisoners, informants and witnesses, law enforcement personnel, and the public. In addition, disclosure may enable the subject to learn prematurely of an ongoing or potential inquiry/investigation, and may also permit him/her to determine the identities of confidential sources, informants, or protected witnesses. Such disclosure could compromise the ongoing or potential inquiry/investigation, endanger the lives of witnesses and informants, or otherwise impede or thwart law enforcement efforts. Disclosure may also constitute an unwarranted invasion of the personal privacy of third parties. Further, disclosure would reveal access codes, data entry codes and message routing symbols used in law enforcement communications systems. Access to such codes and symbols would permit the subject to impede the flow of law enforcement communications and compromise the integrity of law enforcement information, and thus present a serious threat to law enforcement activities. To permit amendment of the records would expose security matters, and would impose an impossible administrative burden by requiring that security precautions, and information pertaining thereto, be continuously re-evaluated if contested by the prisoner, or by anyone on his or her behalf. Similarly, to permit amendment could

interfere with ongoing or potential inquiries/investigations by requiring that such inquiries/investigations be continuously reinvestigated, or that information collected (the relevance and accuracy of which cannot readily be determined) be subjected to continuous change.

(4) From subsections (e)(1) and (5) because the system may contain investigatory information or information which is derived from information collected during official criminal investigations. In the interest of effective law enforcement and litigation, of securing the prisoner and of protecting the public, it may be necessary to retain information the relevance, necessity, accuracy, timeliness and completeness of which cannot be readily established. Such information may nevertheless provide investigative leads to other Federal or law enforcement agencies, or prove necessary to establish patterns of criminal activity or behavior, and/or prove essential to the safe and secure detention (and movement) of prisoners. Further, the provisions of (e)(1) and (e)(5) would restrict the ability of the USMS in exercising its judgment in reporting information during investigations or during the development of appropriate security measures, and thus present a serious impediment to law enforcement efforts.

(5) From subsection (e)(2) because the requirement to collect information from the subject individual would impede the information collection responsibilities of the USMS which is often dependent upon sources other than the subject individual for verification of information pertaining to security risks posed by the individual prisoner, to alleged misconduct or criminal activity of the prisoner, or to any matter affecting the safekeeping and disposition of the individual prisoner.

(6) From subsection (e)(3) because to inform individuals as required by this subsection could impede the information gathering process, reveal the existence of an ongoing or potential inquiry/investigation or security procedure, and compromise law enforcement efforts.

(7) From subsection (e)(8) because to serve notice would give persons sufficient warning to compromise an ongoing

or potential inquiry/investigative and thereby evade and impede law enforcement and security efforts.

(8) From subsection (g) to the extent that the system is exempt from subsection (d).

(s) Consistent with the legislative purpose of the Privacy Act of 1974, the United States Marshals Service will grant access to nonexempt material in records which are maintained by the Service. Disclosure will be governed by the Department's Privacy Regulations, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal, civil or regulatory violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered; the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the requested documents and the balance made available. The controlling principle behind this limited access is to allow disclosures except those indicated above. The decisions to release information from these systems will be made on a case-by-case basis.

[Order No. 645-76, 41 FR 12640, Mar. 26, 1976, as amended by Order No. 8-83, 48 FR 19024, Apr. 27, 1983; Order No. 10-86, 51 FR 20275, June 4, 1986; Order No. 11-86, 51 FR 20277, June 4, 1986; Order No. 61-92, 57 FR 3284, Jan. 29, 1992; Order No. 66-92, 57 FR 20654, May 14, 1992]

#### **§ 16.102 Exemption of Drug Enforcement Administration and Immigration and Naturalization Service Joint System of Records.**

(a) The following system of records is exempted pursuant to provisions of 5 U.S.C. 552a(j)(2) from subsections (c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4) (G), (H), and (I), (e)(5) and (8), (f), (g), and (h) of 5 U.S.C. 552a; in addition the following system of records is exempted pursuant to the provisions of 5 U.S.C. 552 (k)(1) and (k)(2) from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) of 5 U.S.C. 552a.

(1) Automated Intelligence Record System (Pathfinder), JUSTICE/DEA-INS-111.

These exemptions apply to the extent that information in those systems is subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(1) and (k)(2).

(b) The system of records listed under paragraph (a) of this section is exempted, for the reasons set forth from the following provisions of 5 U.S.C. 552a:

(1)(c)(3). The release of the disclosure accounting for disclosures made pursuant to subsection (b) of the Act, including those permitted under the routine uses published for these systems of records, would permit the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to determine whether he is the subject of investigation, or to obtain valuable information concerning the nature of that investigation, and the information obtained, or the identity of witnesses and informants and would therefore present a serious impediment to law enforcement. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record; such notice requirement under subsection (f)(1) is specifically exempted for these systems of records.

(2)(c)(4). Since an exemption is being claimed for subsection (d) of the Act (Access to Records) this subsection is inapplicable to the extent that these systems of records are exempted from subsection (d).

(3)(d). Access to the records contained in these systems would inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation of the existence of that investigation, or the nature and scope of the information and evidence obtained as to his activities, of the identity of witnesses and informants, or would provide information that could enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement because they could prevent the successful completion of the investigation, endanger the physical safety of witnesses or informants, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(4)(e)(1). The notices of these systems of records published in the FEDERAL REGISTER set forth the basic statutory or related authority for maintenance of this system. However, in the course of criminal or other law enforcement investigations, cases, and matters, the Immigration and Naturalization Service or the Drug Enforcement Administration will occasionally obtain information concerning actual or potential violations of law that are not strictly within its statutory or other authority or may compile information in the course of an investigation which may not be relevant to a specific prosecution. In the interests of effective law en-

forcement, it is necessary to retain such information in these systems of records since it can aid in establishing patterns of criminal activity and can provide valuable leads for federal and other law enforcement agencies.

(5)(e)(2). In a criminal investigation or prosecution, the requirement that information be collected to the greatest extent practicable from the subject individual would present a serious impediment to law enforcement because the subject of the investigation or prosecution would be placed on notice as to the existence of the investigation and would therefore be able to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

(6)(e)(3). The requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(7)(e)(4) (G) and (H). Since an exemption is being claimed for subsections (f) (Agency Rules) and (d) (Access to Records) of the Act these subsections are inapplicable to the extent that these systems of records are exempted from subsections (f) and (d).

(8)(e)(4)(I). The categories of sources of the records in these systems have been published in the FEDERAL REGISTER in broad generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires. In the event, however, that this subsection should be interpreted to require more detail as to the identity of sources of the records in these systems, exemption from this provision is necessary in order to protect the confidentiality of the sources of criminal and other law enforcement information. Such exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(9)(e)(5). In the collection of information for criminal law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can often only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators, intelligence analysts, and government attorneys in exercising their judgment in reporting on information and investigations and impede the development of criminal or other intelligence necessary for effective law enforcement.

(10)(e)(8). The individual notice requirements of subsection (e)(8) could present a se-

rious impediment to law enforcement as this could interfere with the ability to issue warrants or subpoenas and could reveal investigative techniques, procedures, or evidence.

(11)(f). Procedures for notice to an individual pursuant to subsection (f)(1) as to the existence of records pertaining to him dealing with an actual or potential criminal, civil, or regulatory investigation or prosecution must be exempted because such notice to an individual would be detrimental to the successful conduct and/or completion of an investigation or prosecution pending or future. In addition, mere notice of the fact of an investigation could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

Since an exemption is being claimed for subsection (d) of the Act (Access to Records) the rules required pursuant to subsections (f) (2) through (5) are inapplicable to these systems of records to the extent that these systems of records are exempted from subsection (d).

(12)(g). Since an exemption is being claimed for subsections (d) (Access to Records) and (f) (Agency Rules) this section is inapplicable, and is exempted for the reasons set forth for those subsections, to the extent that these systems of records are exempted from subsections (d) and (f).

(13)(h). Since an exemption is being claimed for subsection (d) (Access to Records) and (f) (Agency Rules) this section is inapplicable, and is exempted for the reasons set forth for those subsections, to the extent that these systems of records are exempted from subsections (d) and (f).

(14) In addition, exemption is claimed for these systems of records from compliance with the following provisions of the Privacy Act of 1974 (5 U.S.C. 552a) pursuant to the provisions of 5 U.S.C. 552a(k)(1): subsections (c)(3), (d), (e)(4), (e)(4)(G), (H), and (I), and (f) to the extent that the records contained in these systems are specifically authorized to be kept secret in the interests of national defense and foreign policy.

[Order No. 742-77, 42 FR 40907, Aug. 12, 1977]

**§ 16.103 Exemption of the INTERPOL-United States National Central Bureau (INTERPOL-USNCB) System.**

(a) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e) (1), (2), and (3), (e)(4) (G) and (H), (e)(5) and (8), (f) and (g):

(1) The INTERPOL-United States National Central Bureau (INTERPOL-USNCB) (Department of Justice) INTERPOL-USNCB Records System (JUSTICE/INTERPOL-001).

This exemption applies only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(2), and (k)(5).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of accounting disclosures would place the subject of an investigation on notice that he is under investigation and provide him with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement.

(2) From subsections (c)(4), (d), (e)(4) (G), and (H), (f) and (g) because these provisions concern individual access to records and such access might compromise ongoing investigations reveal investigatory techniques and confidential informants, and invade the privacy of private citizens who provide information in connection with a particular investigation.

(3) From subsection (e)(1) because information received in the course of an international criminal investigation may involve a violation of state or local law, and it is beneficial to maintain this information to provide investigative leads to state and local law enforcement agencies.

(4) From subsection (e)(2) because collecting information from the subject of criminal investigations would thwart the investigation by placing the subject on notice.

(5) From subsection (e)(3) because supplying an individual with a statement of the intended use of the requested information could compromise the existence of a confidential investigation, and may inhibit cooperation.

(6) From subsection (e)(5) because the vast majority of these records come from local criminal justice agencies and it is administratively impossible to ensure that the records comply with this provision. Submitting agencies are, however, urged on a continuing basis to ensure that their records are accurate and include all disposition.

(7) From subsection (e)(8) because notice requirements of this provision



could present a serious impediment to law enforcement by revealing investigative techniques, procedures, and the existence of confidential investigations.

[Order No. 8-82, 47 FR 44255, Oct. 7, 1982, as amended by Order No. 6-86, 51 FR 15479, Apr. 24, 1986]

### Subpart F—Public Observation of Parole Commission Meetings

SOURCE: 42 FR 14713, Mar. 16, 1977, unless otherwise noted.

#### § 16.200 Definitions.

As used in this part:

(a) The term *Commission* means the U.S. Parole Commission and any subdivision thereof authorized to act on its behalf.

(b) The term *meeting* refers to the deliberations of at least the number of Commissioners required to take action on behalf of the Commission where such deliberations determine or result in the joint conduct or disposition of official Commission business.

(c) Specifically included in the term *meeting* are:

(1) Meetings of the Commission required to be held by 18 U.S.C. 4203(a);

(2) Special meetings of the Commission called pursuant to 18 U.S.C. 4204(a)(1);

(3) Meetings of the National Commissioners in original jurisdiction cases pursuant to 28 CFR 2.17(a);

(4) Meetings of the entire Commission to determine original jurisdiction appeal cases pursuant to 28 CFR 2.27; and

(5) Meetings of the National Appeals Board pursuant to 28 CFR 2.26.

(6) Meetings of the Commission to conduct a hearing on the record in conjunction with applications for certificates of exemption under section 504(a) of the Labor-Management Reporting and Disclosure Act of 1959, and section 411 of the Employee Retirement Income Security Act of 1974 (28 CFR 4.1-17 and 28 CFR 4a.1-17).<sup>1</sup>

(d) Specifically excluded from the term *meeting* are:

(1) Determination made through independent voting of the Commissioners without the joint deliberation of the number of Commissioners required to take such action, pursuant to § 16.201;

(2) Original jurisdiction cases determined by sequential vote pursuant to 28 CFR 2.17;

(3) Cases determined by sequential vote pursuant to 28 CFR 2.24 and 2.25;

(4) National Appeals Board cases determined by sequential vote pursuant to 28 CFR 2.26;

(5) Meetings of special committees of Commissioners not constituting a quorum of the Commission, which may be established by the Chairman to report and make recommendations to the Commission or the Chairman on any matter.

(6) Determinations required or permitted by these regulations to open or close a meeting, or to withhold or disclose documents or information pertaining to a meeting.

(e) All other terms used in this part shall be deemed to have the same meaning as identical terms used in chapter I, part 2 of this title.

[42 FR 14713, Mar. 16, 1977, as amended at 43 FR 4978, Feb. 7, 1978]

#### § 16.201 Voting by the Commissioners without joint deliberation.

(a) Whenever the Commission's Chairman so directs, any matter which (1) does not appear to require joint deliberation among the members of the Commission, or (2) by reason of its urgency, cannot be scheduled for consideration at a Commission meeting, may be disposed of by presentation of the matter separately to each of the members of the Commission. After consideration of the matter each Commission member shall report his vote to the Chairman.

(b) Whenever any member of the Commission so requests, any matter presented to the Commissioners for disposition pursuant to paragraph (a) of this section shall be withdrawn and scheduled instead for consideration at a Commission meeting.

(c) The provisions of § 16.206(a) of these rules shall apply in the case of any Commission determination made pursuant to this section.

<sup>1</sup> Part 4a was removed at 44 FR 6890, Feb. 2, 1979.

**§ 16.202 Open meetings.**

(a) Every portion of every meeting of the Commission shall be open to public observation unless closed to the public pursuant to the provisions of § 16.203 (Formal Procedure) or § 16.205 (Informal Procedure).

(b) The attendance of any member of the public is conditioned upon the orderly demeanor of such person during the conduct of Commission business. The public shall be permitted to observe and to take notes, but unless prior permission is granted by the Commission, shall not be permitted to record or photograph by means of any mechanical or electronic device any portion of meetings which are open to the public.

(c) The Commission shall be responsible for arranging a suitable site for each open Commission meeting so that ample seating, visibility, and acoustics are provided to the public and ample security measures are employed for the protection of Commissioners and Staff. The Commission shall be responsible for recording or developing the minutes of Commission meetings.

(d) Public notice of open meetings shall be given as prescribed in § 16.204(a), and a record of votes kept pursuant to § 16.206(a).

**§ 16.203 Closed meetings—Formal procedure.**

(a) The Commission, by majority vote, may close to public observation any meeting or portion thereof, and withhold from the public announcement concerning such meeting any information, if public observation or the furnishing of such information is likely to:

(1) Disclose matters: (i) Specifically authorized under criteria established by an executive order to be kept secret in the interests of national defense or foreign policy and (ii) in fact properly classified pursuant to such executive order;

(2) Relate solely to the internal personnel rules and practices of the Commission or any agency of the Government of the United States;

(3) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552, or the Federal Rules of Criminal Procedure): *Provided*,

That such statute or rule (i) requires that the matters be withheld 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, including exempted material under the Privacy Act of 1974 or the Commission's Alternate Means of Access under the Privacy Act of 1974, as set forth at 28 CFR 16.85;

(4) Disclose a trade secret or commercial or financial information obtained from any person, corporation, business, labor or pension organization, which is privileged or obtained upon a promise of confidentiality, including information concerning the financial condition or funding of labor or pension organizations, or the financial condition of any individual, in conjunction with applications for exemption under 29 U.S.C. 504 and 1111, and information concerning income, assets and liabilities of inmates, and persons on supervision;

(5) Involve accusing any person of a crime or formally censuring any person;

(6) Disclose information of a person nature, where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose an investigatory record compiled for law enforcement purposes, or information derived from such a record, which describes the criminal history or associations of any person under the Commission's jurisdiction or which describes the involvement of any person in the commission of a crime, but only to the extent that the production of such records or information would:

(i) Interfere with enforcement proceedings;

(ii) Deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Constitute an unwarranted invasion of personal privacy;

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Disclose information, the premature disclosure of which would be likely to significantly frustrate implementation of proposed Commission action except where

(i) The Commission has already publicly disclosed the content or nature of its proposed action or

(ii) The Commission is required by law to make such disclosure on its own initiative prior to taking final Commission action on such proposal;

(9) Specifically concern the Commission's issuance of subpoena or participation in a civil action or proceeding; or

(10) Specifically concern the initiation, conduct, or disposition of a particular case of formal adjudication pursuant to the procedures in 5 U.S.C. 554, or of any case involving a determination on the record after opportunity for a hearing. Included under the above terms are:

(i) Record review hearings following opportunity for an in-person hearing pursuant to the procedures of 28 CFR 4.1 through 4.17 and 28 CFR 4a.1 through 4a.17<sup>1</sup> (governing applications for certificates of exemption under the Labor-Management Reporting and Disclosure Act of 1959 and the Employee Retirement Income Security Act of 1974, and

(ii) The initiation, conduct, or disposition by the Commission of any matter pursuant to the procedures of 28 CFR 2.1 through 2.58 (parole, release, supervision, and recommitment of prisoners, youth offenders, and juvenile delinquents).

(b) *Public Interest Provision.* Notwithstanding the exemptions at paragraphs (a)(1) through (a)(10) of this section, the Commission may conduct a meeting or portion of a meeting in public when the Commission determines, in its discretion, that the public interest in an open meeting clearly outweighs the need for confidentiality.

(c) *Nonpublic matter in announcements.* The Commission may delete from any

announcement or notice required in these regulations information the disclosure of which would be likely to have any of the consequences described in paragraphs (a)(1) through (a)(10) of this section, including the name of any individual considered by the Commission in any case of formal or informal adjudication.

(d) *Voting and certification.* (1) A separate recorded vote of the Commission shall be taken with respect to each meeting or portion thereof which is proposed to be closed, and with respect to any information which is proposed to be withheld pursuant to this section. Voting by proxy shall not be permitted. In the alternative, the Commission may, by a single majority vote, close to public observation a series of meetings, or portion(s) thereof or withhold information concerning such series of meetings, provided that:

(i) Each meeting in such series involves the same particular matters, and

(ii) Each meeting is scheduled to be held no more than thirty days after the initial meeting in the series.

(2) Upon the request of any Commissioner, the Commission shall make a determination as to closure pursuant to this subsection if any person whose interests may be directly affected by a portion of a meeting requests the Commission to close such portion or portions to the public observation for any of the grounds specified in paragraph (a) (5), (6) or (7) of this section.

(3) The determination to close any meeting to public observation pursuant to this section shall be made at least one week prior to the meeting or the first of a series of meetings as the case may be. If a majority of the Commissioners determines by recorded vote that agency business requires the meeting to take place at any earlier date, the closure determination and announcement thereof shall be made at the earliest practicable time. Within one day of any vote taken on whether to close a meeting under this section, the Commission shall make available to the public a written record reflecting the vote of each Commissioner on the question, including a full written explanation of its action in closing the meeting, portion(s) thereof, or series of

<sup>1</sup> Part 4a was removed at 44 FR 6890, Feb. 2, 1979.

meetings, together with a list of all persons expected to attend the meeting(s) or portion(s) thereof and their affiliation, subject to the provisions of paragraph (c) of this section.

(4) For every meeting or series of meetings closed pursuant to this section, the General Counsel of the Parole Commission shall publicly certify that, in Counsel's opinion, the meeting may be closed to the public and shall state each relevant exemptive provision.

**§ 16.204 Public notice.**

(a) *Requirements.* Every open meeting and meeting closed pursuant to § 16.203 shall be preceded by a public announcement posted before the main entrance to the Chairman's Office at the Commission's headquarters, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815-7286, and, in the case of a meeting held elsewhere, in a prominent place at the location in which the meeting will be held. Such announcement shall be transmitted to the FEDERAL REGISTER for publication and, in addition, may be issued through the Department of Justice, Office of Public Affairs, as a press release, or by such other means as the Commission shall deem reasonable and appropriate. The announcement shall furnish:

- (1) A brief description of the subject matter to be discussed;
- (2) The date, place, and approximate time of the meeting;
- (3) Whether the meeting will be open or closed to public observation; and
- (4) The name and telephone number of the official designated to respond to requests for information concerning the meeting. See § 16.205(d) for the notice requirement applicable to meetings closed pursuant to that section.

(b) *Time of notice.* The announcement required by this section shall be released to the public at least one week prior to the meeting announced therein except where a majority of the members of the Commission determines by a recorded vote that Commission business requires earlier consideration. In the event of such a determination, the announcement shall be made at the earliest practicable time.

(c) *Amendments to notice.* The time or place of a meeting may be changed following the announcement only if the

Commission publicly announces such change at the earliest practicable time. The subject matter of a meeting, or determination of the Commission to open or close a meeting, or portion of a meeting, to the public may be changed following the announcement only if:

(1) A majority of the entire membership of the Commission determines by a recorded vote that Commission business so requires and that no earlier announcement of the change was possible, and

(2) The Commission publicly announces such change and the vote of each member upon such change at the earliest practicable time: *Provided*, That individual items which have been announced for Commission consideration at a closed meeting may be deleted without notice.

[42 FR 14713, Mar. 16, 1977 as amended by Order No. 960-81, 46 FR 52357, Oct. 27, 1981]

**§ 16.205 Closed meetings—Informal procedures.**

(a) *Finding.* Based upon a review of the meetings of the U.S. Parole Commission since the effective date of the Parole Commission and Reorganization Act (May 14, 1976), the regulations issued pursuant thereto (28 CFR part 2) the experience of the U.S. Board of Parole, and the regulations pertaining to the Commission's authority under 29 U.S.C. 504 and 29 U.S.C. 1111 (28 CFR parts 4 and 4a), the Commission finds that the majority of its meetings may properly be closed to the public pursuant to 5 U.S.C. 552 (d)(4) and (c)(10). The major part of normal Commission business lies in the adjudication of individual parole cases, all of which proceedings commence with an initial parole or revocation hearing and are determined on the record thereof.

Original jurisdiction cases are decided at bi-monthly meetings of the National Commissioners (28 CFR 2.17) and by the entire Commission in conjunction with each business meeting of the Commission (held at least quarterly) (28 CFR 2.27).

The National Appeals Board normally decides cases by sequential vote on a daily basis, but may meet from time to time for joint deliberations. In the period from October, 1975 through Sep-

tember, 1976, the National Appeals Board made 2,072 Appellate decisions.

Finally, over the last two years the Commission determined eleven cases under the Labor and Pension Acts, which are proceedings pursuant to 5 U.S.C. 554. The only meetings of the Commission not of an adjudicative nature involving the most sensitive inquiry into the personal background and behavior of the individual concerned, or involving sensitive financial information concerning the parties before the Commission, are the normal business meetings of the Commission, which are held at least quarterly.

(b) *Meetings to which applicable.* The following types of meetings may be closed in the event that a majority of the Commissioners present at the meeting, and authorized to act on behalf of the Commission, votes by recorded vote at the beginning of each meeting or portion thereof, to close the meeting or portions thereof:

(1) Original jurisdiction initial and appellate case deliberations conducted pursuant to 28 CFR 2.17 and 2.27;

(2) National Appeals Board deliberations pursuant to 28 CFR 2.26;

(3) Meetings of the Commission to conduct a hearing on the record regarding applications for certificates of exemption pursuant to the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 504, and the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1111 (28 CFR 4.1-17 and 29 CFR 4a.1-17).<sup>1</sup>

(c) *Written record of action to close meeting.* In the case of a meeting or portion of a meeting closed pursuant to this section, the Commission shall make available to the public as soon as practicable:

(1) A written record reflecting the vote of each member of the Commission to close the meeting; and

(2) A certification by the Commission's General Counsel to the effect that in Counsel's opinion, the meeting may be closed to the public, which certification shall state each relevant exemptive provision.

(d) *Public notice.* In the case of meetings closed pursuant to this section the

Commission shall make a public announcement of the subject matter to be considered, and the date, place, and time of the meeting. The announcement described herein shall be released to the public at the earliest practicable time.

**§ 16.206 Transcripts, minutes, and miscellaneous documents concerning Commission meetings.**

(a) In the case of any Commission meeting, whether open or closed, the Commission shall maintain and make available for public inspection a record of the final vote of each member on rules, statements of policy, and interpretations adopted by it: 18 U.S.C. 4203(d).

(b) The Commission shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public pursuant to § 16.203. In the case of a meeting, or portion of a meeting, closed to the public pursuant to § 16.205 of these regulations, the Commission may maintain either the transcript or recording described above, or a set of minutes unless a recording is required by title 18 U.S.C. 4208(f). The minutes required by this section shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each Commissioner on the question). All documents considered in connection with any action shall be identified in such minutes.

(c) The Commission shall retain a copy of every certification executed by the General Counsel's Office pursuant to these regulations, together with a statement from the presiding officer of the meeting, or portion of a meeting to which the certification applies, setting forth the time and place of the meeting, and the persons present.

(d) Nothing herein shall affect any other provision in Commission procedures or regulations requiring the preparation and maintenance of a record of all official actions of the Commission.

<sup>1</sup> Part 4a was removed at 44 FR 6890, Feb. 2, 1979.

**§ 16.207 Public access to nonexempt transcripts and minutes of closed Commission meetings—Documents used at meetings—Record retention.**

(a) *Public access to records.* Within a reasonable time after any closed meeting, the Commission shall make available to the public, in the Commission's Public Reading Room located at 5550 Friendship Boulevard, Chevy Chase, Maryland 20815-7286, 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 such meeting, maintained hereunder, except for such item or items of such discussion or testimony which contain information exempt under any provision of the Government in the Sunshine Act (Pub. L. 94-409), or of any amendment thereto. Copies of nonexempt transcripts, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription.

(b) *Access to documents identified or discussed in any Commission meeting,* open or closed, shall be governed by Department of Justice regulations at this part 16, subparts C and D. The Commission reserves the right to invoke statutory exemptions to disclosure of such documents under 5 U.S.C. 552 and 552a, and applicable regulations. The exemptions provided in 5 U.S.C. 552b(c) shall apply to any request made pursuant to 5 U.S.C. 552 or 552a to copy and inspect any transcripts, recordings or minutes prepared or maintained pursuant hereto.

(c) *Retention of records.* The Commission shall maintain a complete verbatim copy of the transcript, or a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any Commission proceeding with respect to which the meeting or portion thereof was held, whichever occurs later.

[42 FR 14713, Mar. 16, 1977, as amended by Order No. 960-81, 46 FR 52357, Oct. 27, 1981]

**§ 16.208 Annual report.**

The Commission shall report annually to Congress regarding its compliance with Sunshine Act requirements, including a tabulation of the total number of meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the Commission under this section, including any costs assessed against the Commission in such litigation and whether or not paid.

**APPENDIX I TO PART 16—COMPONENTS OF THE DEPARTMENT OF JUSTICE**

Unless otherwise noted, the address for each component is: United States Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530.

Office of the Attorney General  
Office of the Deputy Attorney General  
Office of the Associate Attorney General  
Office of the Solicitor General  
Office of Legal Counsel  
Office of Legal Policy  
Office of Legislative and Intergovernmental Affairs  
Civil Division  
Civil Rights Division  
Criminal Division  
Land and Natural Resources Division  
Tax Division  
Office of Justice Assistance, Research, and Statistics, United States Department of Justice, 633 Indiana Avenue, NW., Washington, DC 20531  
Justice Management Division  
Bureau of Prisons, United States Department of Justice, HOLC Building, 320 First Street, NW., Washington, DC 20534  
Community Relations Service, United States Department of Justice, 5550 Friendship Boulevard, Chevy Chase, MD 20815  
Drug Enforcement Administration, Eye Street Building, 1405 Eye Street, NW., Washington, DC 20005  
Executive Office for Immigration Review, United States Department of Justice, 5203 Leesburg Pike, Falls Church, VA 22041  
Executive Office for United States Attorneys  
Executive Office for United States Trustees, United States Department of Justice, HOLC Building, 320 First Street, NW., Washington, DC 20534  
Federal Bureau of Investigation, 9th St. & Pennsylvania Ave., NW., Washington, DC 20535 [for field offices, consult the list of FBI field offices in the United States Government Manual]  
Federal Prison Industries, Inc., HOLC Bldg., 320 First Street, NW., Washington, DC 20534

## Department of Justice

Foreign Claims Settlement Commission,  
Vanguard Building, 1111 20th Street, NW.,  
Washington, DC 20579

Immigration and Naturalization Service, 425  
Eye Street, NW., Washington, DC 20536 [for  
district offices consult the list of INS dis-  
trict offices in the United States Govern-  
ment Manual]

Office of Intelligence Policy and Review

Office of the Pardon Attorney, United States  
Department of Justice, Park Place Build-  
ing, 5550 Friendship Blvd., Chevy Chase,  
MD 20815

Office of Professional Responsibility

Office of Public Affairs

United States Marshals Service, One Tysons  
Corner Center, McLean, VA 22102

United States National Central Bureau—  
Interpol

United States Parole Commission, Park  
Place Building, 5550 Friendship Blvd.,  
Chevy Chase, MD 20815

### Field Offices

#### Antitrust Division:

Richard B. Russell Building, 75 Spring  
Street, SW., Suite 1394, Atlanta, Georgia  
30303, (404) 331-7100

John C. Kluczynski Building, 230 South  
Dearborn Street, Room 3820, Chicago, Illi-  
nois 60604, (312) 353-7530

995 Celebrezze Federal Building, 1240 East 9th  
Street, Cleveland, Ohio 44199-2089, (216) 522-  
4070

Earle Cabell Federal Building, 1100 Com-  
merce Street, Room 8C6, Dallas, Texas  
75242, (214) 767-8051

26 Federal Plaza, Room 3630, New York, New  
York 10278-0096, (212) 264-0390

11400 U.S. Courthouse, 601 Market Street,  
Philadelphia, Pennsylvania 19106, (215) 597-  
7405

450 Golden Gate Avenue, Box 36046, San  
Francisco, California 94102, (415) 556-6300

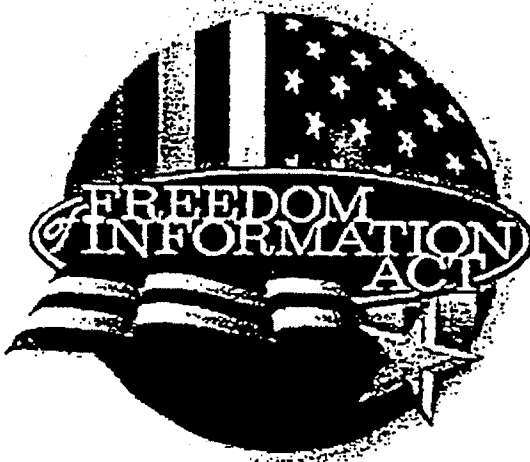
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Order 1215-87, 52 FR 34214, Sept. 10, 1987]

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FEDERAL BUREAU OF INVESTIGATION

**FREEDOM OF  
INFORMATION AND  
PRIVACY ACTS  
REFERENCE MANUAL**

**PART 5 OF 9**

# **MIOG SECTION 190**

## PART I

### SECTION 190. FREEDOM OF INFORMATION-PRIVACY ACTS (FOIPA)

#### 190-1 STATUTES

(1) The Freedom of Information Act (FOIA) should be cited as Title 5, USC, § 552.

(2) The Privacy Act of 1974 should be cited as Title 5, USC, § 552a.

#### 190-2 ACCESS TO GOVERNMENT RECORDS

(1) The Privacy Act permits a U.S. citizen or permanent resident alien to access records maintained in a system of records by an agency of the Executive Branch of the Federal Government. Under the Act, only records about the person making the request can be accessed. A system of records is any procedure whereby information is maintained in a manner permitting retrieval by name or other personal identifier, e.g., records maintained alphabetically, rather than chronologically.

(2) The FOIA provides for access by any person to all information maintained by a Federal agency, e.g., information relating to individuals other than the requester, and information relating to some phase or phases of the agency's work.

(3) FBI files containing information compiled for a criminal investigation, including determining possible violations of the espionage and related statutes, are exempt from the access provisions of the Privacy Act; however, a release of such records may be required under the FOIA. This includes FBI criminal, counterintelligence, and terrorism investigations.

#### 190-2.1 Exclusions From the FOIA

(1) "Tip-off" provisions in the FOIA allow the Government to treat certain records as not subject to the requirements of the FOIA. The provisions may be applied to a request which involves:

(a) interference with a pending criminal investigation when the subject of the investigation is not aware of its pendency;

(b) a request for records about an informant whose status as an informant has not been officially confirmed when the request is from someone other than the informant; or

(c) a foreign intelligence, foreign counterintelligence, or international terrorism investigation when the existence of the records is classified information.

(2) If the only records about the subject of the request are within the tip-off provisions, the response will be the same as if no record identifiable with the subject of the request was found. The response to the requester in both situations will be: "There are no records responsive to your FOIA request." [If some records about the subject of the request are within the tip-off provisions and some are not, the response will be: "The records responsive to your FOIA request are ..." followed by a description of the records not within the tip-off provisions.]

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(3) FBIHQ approval is required prior to the use of the tip-off provisions. Approval is obtained by sending a teletype to FBIHQ, Attention: FOIPA Section Front Office, containing:

(a) sufficient information about each of the essential elements of the recommended exclusion;

(b) any additional information known about the subject matter of the request or the requester that might affect the decision;

(c) the caption and a brief description of the investigation to be protected, along with its current status, field office file number, and Bufile number if known; and

(d) the identity of the field office official recommending the use of the "tip off" and the person in the office to contact about the request.

A copy of the teletype should be sent to the office of origin and any other interested offices. If approval is given, the field office will notify the requester as indicated above in 190-2.1(2).

190-2.2 Time Deadlines

(1) A first-party request (an individual asking for records concerning himself/herself) requires that a determination concerning disposition of the request be made under both the Privacy Act and the FOIA. While the Privacy Act contains no time deadlines concerning access to records, the time limits for responding to FOIA requests, as set out below in 190-2.2(2), should be followed.

(2) The time limits dictated by the FOIA are as follows:

(a) Within ten working days upon receipt of a valid request, i.e., one that contains sufficient descriptive information, and the authorization of living third party when necessary, provided no unusual circumstances exist; or

(b) Within no more than ten additional working days, upon written notice of extension to requester, where there exists a need to collect records from offices other than the one receiving the request, the need to collate voluminous records for a single request exists, or consultation with another agency is required.

(3) While it is recognized that these time limits may be difficult to meet in all instances, acknowledgment of the request and some indication of whether records exist that will be reviewed for possible disclosure should be made within ten working days after receipt of the request.

(4) Should the request involve a highly sensitive covert investigation, contact the Training, Research, and Field Coordination Unit, FOIPA Section, FBIHQ, by secure telephone or teletype for direction before acknowledgment.

[ 190-2.3 Searching Procedures

[ (1) An FOIPA request sent to a field office should be considered to be a request for records in the Central Records System, unless another system of records is specifically mentioned in the request. The fact that the requester directed the request to a specific field office raises the

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presumption that only records of that office are of interest to the requester. Thus, while a computer search might indicate that another field office or FBIHQ has information about the subject of the request, only information entered into the computer by the field office to which the FOIPA request was directed should be considered. Also, there is normally no processing of the computer printout for an FOIPA requester, unless it contains information in addition to that maintained in the source document or unless there is no source document.

(2) In response to FOIPA requests for records in the Central Records System, a field office must search the indices and other means by which it retrieves information from this system of records, including:

(a) the general indices, both manual and automated;

(b) automated investigative support systems, such as the Organized Crime Information System (OCIS), the Investigative Support Information System (ISIS), and the Intelligence Information System (IIS); and

(c) [a]microcomputer[data base]currently being operated by the field[division] must be searched if a comparison of the specific FOIPA request with the list of microcomputer data bases indicates that a specific data base could reasonably be expected to contain responsive information.]

(3) The Information Systems Administrator (ISA) will furnish a [list]of microcomputer data bases (see Part II, Section 16-18.4 (3)(a)) to the Field Privacy Control Officer (FPCO) and inform the FPCO[whenever]a microcomputer data base is to be added to or removed from the list. [The ISA is responsible for providing the FPCO with a list of microcomputer data bases which shall be current, have a revision date, include the case caption and/or an indication of the subject matter and type of investigation being conducted, and indicate whenever full-text retrieval capabilities have been or are being used.]

(4) [The FPCO will identify the system of records with which the microcomputer data base is associated and will ensure that the appropriate microcomputers are searched in response to FOIPA requests. When full-text retrieval capabilities are being used on the data base to be searched, in accordance with section (2)(c) above, the FPCO must determine if a full-text retrieval search of the data base is required for the FOIPA request. Full-text retrieval is used in a limited number of cases as an investigative technique to collate, analyze, and retrieve information. It is not part of the normal search process and is not used as a substitute for the general indices or the automated investigative support systems. However, if, at the time an FOIPA request is received, full-text retrieval capabilities are being used to retrieve information about individuals by name or personal identifier, a full-text retrieval search of that data base should be considered. In such cases, it may be appropriate to contact the requester before the search is conducted to determine if the requester is willing to pay the actual direct costs of conducting the search (see 28 CFR 16.10 and 16.47).]

[(5)] A microcomputer[data base]used exclusively in connection with a system of records other than the Central Records System, such as the Elsur Index or the National Center for the Analysis of Violent Crime, need be searched only in response to a request involving the other system of records.

190-2.4 Filing Procedures, Classification 190

(1) In order to preserve and maintain accurate records concerning the handling of a request submitted pursuant to the FOIPA, a separate correspondence-type file in the 190 classification is to be initiated at such time as it is determined that records are being maintained which pertain to the requester or to the subject matter which has been requested; however, a separate 190 file should not be opened if an exclusion (one of the tip-off provisions) is being used and no records are being released. Such a file can be opened when searching procedures determine the existence of records under the requester's name, even though it might be determined at a later time that those records are not identical with the requester.

(2) Where the initial search fails to locate the existence of possibly identifiable information or when a tip-off provision is used to exclude all the information about the subject of the request, the incoming

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request letter and the response are to be maintained in the 190-0 or in a 190 control file, rather than in a separate, substantive file. This 190 file can also be utilized to maintain copies of correspondence where the only action by the field office is to forward the request to FBIHQ.

(3) The handling of all documents concerning the use of the tip-off provisions should be in accordance with procedures for the maintenance of the classified and informant information these documents often contain.

#### 190-2.5 Field Office Records Referral Procedures

(1) The field office receiving a request for access to FBI records must determine what records (files) are responsive to the request. Existing Bureau instructions will determine where the records are processed, i.e., at FBIHQ, at the office receiving the request, or at the office of origin (OO).

(2) All main files which show the investigation was reported to FBIHQ will be processed at FBIHQ. Unreported main files will be processed by the OO. All "see" references normally are processed by the office receiving the request. Where the request is referred to FBIHQ, the FOIPA Section, [IMD,] will process the main file records, not only in the FBIHQ file, but also in the files of the office receiving the request and/or the OO, which are responsive to the request.

#### 190-2 Seeking Access in Person

When a Privacy Act request is presented to a field office in person, the requester should be advised to put the request in writing or to complete an FD-706, after which the field office will process the request pursuant to the same time limits pertaining to requests received by mail. Should the individual wish to return to the field office to personally review processed documents, when available, it should be permitted. In addition, the requester is permitted to have one other person accompany him/her, providing the requester furnishes a statement authorizing a discussion of his/her personal records in the presence of this other individual. An FBI employee is to be present at all times during the requester's review of copies of FBI records in FBI space.

#### 190-2.7 Consultation and Referral to Other Agency

(1) Where material to be released includes information previously obtained from another Federal agency, that agency is to be consulted prior to release of the information.

(2) Where the material being considered for release includes copies of the original documents obtained from another Federal agency, said documents will be referred to that agency whether on local or headquarters level. The field office should inquire at the local office of the Federal agency as to the proper disposition of the referral.

#### 190-3 CONDITIONS OF DISCLOSURE

##### 190-3.1 Written Authorization By Subject

The Privacy Act prohibits disclosure of personal information, with certain exceptions, to any person or other agency unless specifically authorized in writing by the person to whom the record pertains.

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#### 190-3.2 Exceptions

The Act provides for twelve exceptions to this disclosure prohibition. The exceptions used most often by the FBI in disseminating information from the central records system are:

(1) Information from FBI files may be disseminated as a proper "routine use" without the subject's authorization to any Federal Executive Branch agency to the extent the information is relevant to an authorized function of such agency. Information also may be disclosed as a routine use to a member of the Federal Judiciary if considered relevant to an authorized function of the recipient. In addition, information may be disclosed to a state or local criminal justice agency for an legitimate law enforcement purpose. ("Routine Use" is defined in the Privacy Act as the use of such record for a purpose which is compatible with the purpose for which it was collected.) Such a routine use dissemination does not constitute any change in past policy or procedures as the FBI always has been authorized to disseminate its records to other Government agencies for official business only. Such dissemination will continue under this new routine use procedure.

(2) Background and descriptive information on Federal fugitives is disseminated as a routine use to the general public and the news media to assist in the apprehension of the fugitives.

(3) News releases are disseminated as a routine use to the general public and the news media concerning apprehensions and other accomplishments.

(4) Public source information is similarly disseminated as a routine use on a continuing basis.

(5) Information is disclosed to private individuals and/or organizations when necessary to solicit information or cooperation for an authorized purpose, i.e., when it is necessary during the course of an official investigation to seek information from private individuals such as their observations, descriptions, or account of events which transpired. In such instances it might be necessary to disclose the nature of the crime of which the subject was suspect or similar personal information about the subject. Also, information may be disclosed to the private sector to the extent necessary to protect life or property.

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190-3.3 Accounting of Disclosures

(1) Each time a record pertaining to an individual is disseminated to a person or other Federal, state, local, or foreign agency, whether orally or by any type of communication, written or electronic, an accounting of such dissemination, consisting of the date, nature, and purpose of each disclosure as well as the name and address of the person or agency to whom the disclosure is made, must be maintained for at least [six] years or the life of the record, whichever is longer, following the disclosure.

(2) The Act provides for access by the individual subject-requester to the accounting of disclosure made of records pertaining to him/her. Normally, the FBI will release this accounting to the individual at his/her request; however, the FBI is exempt from this particular statutory requirement and, where circumstances so dictate, the FBI will deny such a request, e.g., where dissemination was of a sensitive nature to an agency such as National Security Agency, Central Intelligence Agency or Drug Enforcement Administration.

190-4 INFORMATION COMPILED FOR CIVIL LITIGATION

(1) The Privacy Act does not permit an individual access to any information compiled in reasonable anticipation of a civil action or proceeding brought either by the Government or against the Government.

(2) In order for information to be denied a requester based on this provision, Office of Management and Budget (OMB) has indicated the civil action actually must have been filed so that the agency is on notice, as the original intent of this provision is to protect information collected by or at the request of the Office of the USA in preparation for civil litigation brought by or against the Government.

190-5 REQUIREMENTS IMPOSED BY THE PRIVACY ACT

(1) Only that information about an individual which is relevant and necessary to accomplish a purpose authorized by statute, Executive order of the President, or by the Constitution is to be recorded in FBI files.

(2) When interviewing an individual in an applicant- or civil-type investigation to solicit information about that individual, himself/herself, and not about someone else, the individual must be apprised in writing, of:



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(a) The authority, whether by statute or Executive Order, which authorizes solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(b) The principal purpose for which the information is intended to be used;

(c) The routine use which may be made of the information;

(d) The effects on the interviewee, if any, of not providing all or any part of the requested information.

(3) Written forms containing the above information in all of the suitability- and civil-type classifications are maintained in each field office. At the termination of the interview, the form should be left with the interviewee. [Note: This requirement is not necessary in those applicant matters which are referred to the FBI by another agency or department, including the Department of Justice. The FBI conducts the interviews in these instances with the understanding that the referral agency or department notifies each person it solicits information from of the Privacy Act requirements described in subparagraph (2).]

(4) All information about an individual is to be maintained with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness in any determination made concerning the individual based on such information. Only information meeting these four standards should be disseminated to other agencies.

190-5.1 Restrictions on Information Relating to First Amendment Rights

(1) The FBI is prohibited from maintaining records describing how any individual exercises rights guaranteed by the First Amendment unless authorized by statute or by the individual, or unless the particular record is pertinent to and within the scope of an authorized law enforcement activity.

(2) This restriction prohibits the collection, maintenance, use or dissemination of information concerning an individual's religious or political beliefs or activities, or membership in associations or organizations, unless:

(a) The individual has volunteered such information for [[his/her]own benefit;

(b) The information is expressly authorized by statute to be collected, maintained, used, or disseminated; or

(c) The activities involved are pertinent to and within the scope of an authorized investigation, adjudication, or correctional activity.

190-6 CRIMINAL PENALTIES

190-6.1 Unauthorized Disclosure

[ Any officer or employee of any agency, who by virtue of [his/her] employment or official position, has possession of, or access to, agency records which contain individually identifiable information, the disclosure of which is prohibited by this Section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material

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is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

190-6.2 Unpublished Records System

Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of the Act shall be guilty of a misdemeanor and fined not more than \$5,000.

190-6.3 Use of False Pretenses

Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than \$5,000.

190-6.4 FBI Jurisdiction

The FBI has been designated by the Department of Justice as the agency having jurisdiction to investigate violations of the Privacy Act, [described above. The classification is 187, Privacy Act[of 1974]- Criminal.

190-7 PROMISE OF CONFIDENTIALITY

190-7.1 When Applicable

(1) In applicant, background-type investigations and investigations involving civil matters, as well as administrative inquiries, individuals interviewed in order to solicit information about someone other than the interviewee have a right to request from the FBI an express promise that the identity of the interviewee will be held in confidence. Such a promise is not to be encouraged, but granted on a selective basis when it is the only means to secure the information from the individual being interviewed.

(2) All individuals from whom information is sought in applicant- and civil-type cases must be apprised not only of the purpose for which the information is sought, as well as the uses to be made of the information; but also of the provisions of the Privacy Act regarding access to records and the allowance for confidentiality.

[ (3) At what point in the interview process the person interviewed should be told of the Privacy Act and given the opportunity to request confidentiality is left to the best judgment of the interviewing Agent. However, in almost every case, the logical time is at the beginning of the interview to avoid the appearance of intentionally misleading or misinforming the person interviewed. Where confidentiality is requested, the person being interviewed should be assured any information he or she provides, which could identify them as the source, will be withheld from anyone requesting access to the records under the Privacy Act or the Freedom of Information Act.]

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190-7.2 Recording of Promise of Confidentiality

- [ Where such an express promise has been requested and granted, it is absolutely imperative this fact be clearly recorded along with the results of the interview. Failure to note the interviewee was granted an express promise of confidentiality will result in the disclosure of the interviewee's identity to the subject of the investigation upon the latter's request to review the results of the investigation in accordance with the Privacy Act.

190-7.3 Types of Confidentiality

- [ A promise of confidentiality, when furnished to a source of information, may pertain to any one of three areas:
- [ [(1)] Source's identity to be concealed only from the subject of the investigation.
- [ [(2)] Source's identity not to be unnecessarily revealed until such time as the information is required in a judicial proceeding or administrative hearing.
- [ [(3)] Source's identity is to be concealed from anyone outside the FBI, in which case the use of "T" symbols should be employed in all communications prepared for dissemination.

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190-7.4 Custodian of Records

The express promise of confidentiality may also be furnished on request to a state or local custodian of records, e.g., police department, private corporation, credit bureau, in applicant- and civil-type investigations. The custodian must be made aware that this is the only procedure which will afford adequate confidentiality to his/her agency.

190-8 USE OF SOCIAL SECURITY ACCOUNT NUMBER (SSAN)

190-8.1 Restrictions

(1) No Federal, state or local agency shall deny an individual any right, benefit or privilege provided by law because of the individual's refusal to disclose his/her SSAN except:

(a) A disclosure required by Federal statute, or

(b) A disclosure to a Federal, state or local agency maintaining a system of records in existence prior to 1/1/75, if such disclosure was required under statute or regulation adopted prior to that date to verify the identity of the individual.

(2) When requesting an individual to furnish SSAN, ensure that the individual be apprised of whether such disclosure is voluntary or mandatory, the statutory or other authority for its solicitation, and what uses will be made of it.

(3) There is no statutory provision for enforcement of this requirement; therefore, the FBI is not authorized to conduct an investigation of alleged violations by Federal, state or local agency personnel.

190-9 EMPLOYEE STANDARDS OF CONDUCT

[ Except to the extent permitted pursuant to the Privacy Act, employees of the FBI shall:

[ [(1)] Collect no information of a personal nature unless authorized to collect it to achieve a function or carry out a responsibility of the FBI;

[ [(2)] Collect only that information which is necessary to FBI functions or responsibilities;

[ [(3)] Collect information, wherever practicable, directly from the individual to whom it relates;

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- [ (4) Inform individuals from whom information (about themselves) is collected, of the authority for collection, the purposes thereof, the uses that will be made of the information, and the effects both legal and practical, of not furnishing the information;
- [ (5) Neither collect, maintain, use, nor disseminate information concerning an individual's religious or political beliefs or activities or his/her membership in associations or organizations, unless, (i) the individual has volunteered such information for his/her own benefit; (ii) the information is expressly authorized by statute to be collected, maintained, used, or disseminated; or (iii) the activities involved are pertinent to and within the scope of an authorized investigation, adjudication or correctional activity;
- [ (6) Advise their supervisors of the existence or contemplated development of any record system which retrieves information about individuals by individual identifier;
- [ (7) Wherever required by the Act, maintain an accounting, in the prescribed form, of all dissemination of personal information outside the Department, whether made orally or in writing;
- [ (8) Disseminate no information concerning individuals outside the Department except when authorized by Title 5, USC, § 552a, or pursuant to a routine use published in the Federal Register;
- [ (9) Maintain and process information concerning individuals with care in order to ensure that no inadvertent disclosure of the information is made either within or without the Department; and
- [ (10) Call to the attention of the field office Privacy Control Officer any information in a system maintained by the FBI which is not authorized to be maintained under the provisions of the Privacy Act of 1974, including information on First Amendment activities and information that is inaccurate, irrelevant or so incomplete as to risk unfairness to the individual concerned. The field office Privacy Control Officer should then consider the appropriate action to be taken after consultation with FBIHQ where necessary.

190-10 SYSTEMS OF RECORDS-NOTICE REQUIREMENTS

190-10.1 Definitions

- (1) Record - a documentary or computer record containing personal information identifiable with a U.S. citizen or permanent resident alien.
- (2) System of records - a group of "records," under the control of the FBI, from which information is retrieved by name or other personal identifier.

190-10.2 Notice Requirements

- (1) The Department of Justice, like every Executive Branch agency, must publish in the Federal Register a complete description of each system of records maintained by each component of the Department (system notice).

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(2) For the FBI, the Department has published notices of several records systems, including National Crime Information Center (NCIC), Identification Division Records System, and the Central Records System.

(3) The FBI Central Records System is comprised of the over 200 classifications of investigative, administrative and correspondence files maintained at FBIHQ, all FBI field divisions, and the Legal Attache offices abroad. Information is retrieved from the Central Records System by means of manual and/or automated indices in each location at which the records are stored.

190-10.3 Noncompliance

Maintaining a system of records, as described above, independent of published FBI systems, without meeting the notice requirements, can subject the FBI to civil liability and the responsible FBI official or employee to criminal prosecution (see 190-6.2).

190-10.4 Special Indices Relating to Individual Major Investigations

[ (1) [The]FBI can maintain a separate index or listing, containing individually retrievable personal information, only by publishing a system notice in the Federal Register, or making the information also retrievable through[a search of]the Central Records System (GAO Report to the Comptroller General, 12/26/77).

[ (2) Making information[about an individual]retrievable through a search of the Central Records System is accomplished by[making the individual's name or personal identifier retrievable in the general indices, in an automated investigative support system, or in a microcomputer searched under the procedures described in 190-2.3.]

[ (3) If the information[to be]maintained separately[(e.g., in a microcomputer)]is only duplicative of that which was previously[made equally retrievable through the Central Records System, the information is already part of the Central Records System and no additional action need be taken.]



FEDERAL BUREAU OF INVESTIGATION

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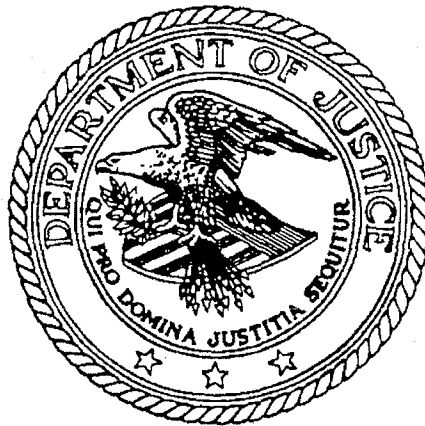
**JUSTICE  
DEPARTMENT  
GUIDE TO FOIA**



**JUSTICE DEPARTMENT GUIDE**

**TO THE**

**FREEDOM OF INFORMATION ACT**



September 1993

## JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT

The "Justice Department Guide to the Freedom of Information Act" is an overview discussion of the FOIA's exemptions, its law enforcement record exclusions, and its most important procedural aspects. Prepared by the attorney and paralegal staff of the Office of Information and Privacy, it is updated and revised each year. Any inquiry about the points addressed below, or regarding matters of FOIA administration or interpretation, should be made through the Office of Information and Privacy's FOIA Counselor Service, at (202) 514-3642 (514-FOIA).

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## INTRODUCTION

The Freedom of Information Act<sup>1</sup> generally provides that any person has a right, enforceable in court, of access to federal agency records, except to the extent that such records (or portions thereof) are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions.

Enacted in 1966, the FOIA established for the first time an effective statutory right of access to government information. The principles of government openness and responsibility underlying the FOIA, however, are inherent in the democratic ideal: "The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."<sup>2</sup> The Supreme Court has emphasized that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose."<sup>3</sup>

To be sure, achieving an informed citizenry is a goal often counterpoised against other vital societal aims. Society's strong interest in an open government can conflict with other important interests of the general public--such as the public's interests in the effective and efficient operations of government; in the responsible governmental use of limited fiscal resources; and in the preservation of the confidentiality of sensitive personal, commercial, and governmental information. Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula that encompasses, balances, and appropriately protects all interests, while placing emphasis on maximum responsible disclosure.<sup>4</sup> It is this task of accommodating countervailing concerns, with disclosure as the predominant objective, that the FOIA seeks to accomplish.

The FOIA evolved after a decade of debate among agency officials, legislators, and public interest group representatives. It revised the public disclosure section of the Administrative Procedure Act,<sup>5</sup> which generally had been recognized as falling far short of its disclosure goals and had come to be looked upon by some as more a withholding statute than a disclosure statute.<sup>6</sup>

By contrast, under the thrust and structure of the FOIA, virtually every record possessed by a federal agency must be made available to the public in one form or another, unless it is specifically exempted from disclosure or spe-

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<sup>1</sup> 5 U.S.C. § 552 (1988).

<sup>2</sup> NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

<sup>3</sup> United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

<sup>4</sup> See S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

<sup>5</sup> 5 U.S.C. § 1002 (1964) (amended 1966).

<sup>6</sup> See S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).

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cially excluded from the Act's coverage in the first place.<sup>7</sup> The nine exemptions of the FOIA ordinarily provide the only bases for nondisclosure<sup>8</sup> and generally are discretionary, not mandatory in nature.<sup>9</sup> (For a discussion of the discretionary nature of FOIA exemptions, see Discretionary Disclosure and Waiver, below.) Dissatisfied record requesters are given a relatively speedy remedy in the United States district courts, where judges determine the propriety of agency withholdings de novo and agencies bear the burden of sustaining their nondisclosure actions.<sup>10</sup>

The FOIA contains six subsections, the first of which establishes two categories of information which must automatically be disclosed. Subsection (a)(1) of the FOIA<sup>11</sup> requires publication in the Federal Register of information such as descriptions of agency organization, functions, procedures, substantive rules and statements of general policy.<sup>12</sup> This requirement provides automatic public access to important basic information regarding the transaction of agency business.<sup>13</sup>

Subsection (a)(2) of the FOIA<sup>14</sup> requires that materials such as final opinions rendered in the adjudication of cases, specific policy statements, and certain administrative staff manuals routinely be made available for public inspection.

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<sup>7</sup> See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

<sup>8</sup> See 5 U.S.C. § 552(d).

<sup>9</sup> See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979); see also, e.g., FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

<sup>10</sup> See 5 U.S.C. § 552(a)(4)(B)-(C); see also FOIA Update, Spring 1985, at 6.

<sup>11</sup> 5 U.S.C. § 552(a)(1).

<sup>12</sup> See, e.g., Hughes v. United States, 953 F.2d 531, 539 (9th Cir. 1992); NI Indus., Inc. v. United States, 841 F.2d 1104, 1107 (Fed. Cir. 1988); Bright v. INS, 837 F.2d 1330, 1331 (5th Cir. 1988); see also DiCarlo v. Commissioner, T.C. Memo 1992-280, slip op. at 9-10 (May 14, 1992) (publication in United States Government Manual, special edition of Federal Register, satisfies publication requirement of subsection (a)(1)(A)) (citing 1 C.F.R. § 9 (1992)); cf., e.g., Daingerfield Island Protective Soc'y v. Babbitt, 823 F. Supp. 950, 958 (D.D.C. 1993) (approval of highway design by National Park Service not substantive rule and thus not required to be published in Federal Register).

<sup>13</sup> See FOIA Update, Summer 1992, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)") (advising agencies to meet their subsection (a)(1) responsibilities on no less than a quarterly basis).

<sup>14</sup> 5 U.S.C. § 552(a)(2).

## INTRODUCTION

tion and copying.<sup>15</sup> Additionally, these materials are required to be indexed to facilitate that public inspection.<sup>16</sup> These records commonly are referred to as "reading room" materials.<sup>17</sup> Public access to such information serves to guard against the development of agency "secret law" known to agency personnel but not to members of the public who deal with agencies.<sup>18</sup>

The courts have held that providing official notice and guidance to the general public is the fundamental purpose of the publication requirement of subsection (a)(1) and the availability requirement of subsection (a)(2).<sup>19</sup> Failure to comply with the requirements of either subsection can result in invalidation of related agency action,<sup>20</sup> unless the complaining party had actual and timely notice of the unpublished agency policy,<sup>21</sup> or unless he is unable to

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<sup>15</sup> See, e.g., Leeds v. Commissioner of Patents & Trademarks, 955 F.2d 757, 763 (D.C. Cir. 1992); Capuano v. National Transp. Safety Bd., 843 F.2d 56, 57-58 (1st Cir. 1988); Public Citizen v. Office of the U.S. Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (documents containing statements of policy or interpretations--in addition to descriptive information--held subject to subsection (a)(2)).

<sup>16</sup> 5 U.S.C. § 552(a)(2).

<sup>17</sup> See FOIA Update, Summer 1992, at 4 (advising that all agencies should at a minimum have published procedures by which "reading room" access is allowed).

<sup>18</sup> See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. at 153-54; Skelton v. Postal Serv., 678 F.2d 35, 41 (5th Cir. 1982) ("That requirement was designed to help the citizen find agency statements 'having precedential significance' when he becomes involved in 'a controversy with an agency.'" (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 8 (1966))); see also Vietnam Veterans of America v. Department of the Navy, 876 F.2d 164, 165 (D.C. Cir. 1989) (opinions in which Judge Advocates General of Army and Navy have authority only to dispense legal advice--rendered in subject areas for which those officials do not have authority to act on behalf of agency--found not to be "statements of policy or interpretations adopted by" the agencies and held not required to be published or made available for public inspection).

<sup>19</sup> See, e.g., Welch v. United States, 750 F.2d 1101, 1111 (1st Cir. 1985).

<sup>20</sup> See, e.g., NI Indus., Inc. v. United States, 841 F.2d at 1108; D&W Food Ctrs., Inc. v. Block, 786 F.2d 751, 757-58 (6th Cir. 1986); Anderson v. Butz, 550 F.2d 459, 462-63 (9th Cir. 1977); see also Texas Health Care Ass'n v. Bowen, 710 F. Supp. 1109, 1113-14, 1116 (W.D. Tex. 1989).

<sup>21</sup> See, e.g., United States v. F/V Alice Amanda, 987 F.2d 1078, 1084-85 (4th Cir. 1993) (statutory defense of subsection (a)(1) not available where defendant had copy of unpublished regulations); United States v. Bowers, 920 F.2d 220, 222 (4th Cir. 1990) (IRS failure to publish tax forms did not preclude defendants' convictions for income tax evasion, as defendants had notice of duty to pay those taxes, duty is "manifest on face" of statutes, listing of (continued...))

## INTRODUCTION

show that he was adversely affected by the lack of publication.<sup>22</sup> However, unpublished interpretive guidelines that were available for copying and inspection in an agency program manual have been held not to violate subsection (a)(1),<sup>23</sup> and it also has been held that regulations pertaining solely to internal personnel matters that do not affect members of the public need not be published.<sup>24</sup>

Under subsection (a)(3)--by far the most commonly utilized portion of the FOIA--all records not covered by subsections (a)(1) or (a)(2),<sup>25</sup> or exempted from mandatory disclosure under subsection (b), or excluded under subsection (c), are subject to disclosure upon an agency's receipt of a proper access request from any person. (See discussions of the procedural aspects of subsection (a)(3) (including fees and fee waivers), the exemptions of subsection (b), and the exclusions of subsection (c), below.)

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<sup>21</sup>(...continued)

places where forms can be obtained is published in Code of Federal Regulations, and defendants had filed tax returns before); Lonsdale v. United States, 919 F.2d 1440, 1447 (10th Cir. 1990); Tearney v. National Transp. Safety Bd., 868 F.2d 1451, 1454 (5th Cir. 1989); Bright v. INS, 837 F.2d at 1331; Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1018 (9th Cir. 1987); see also United States v. \$200,000 in United States Currency, 590 F. Supp. 866, 874-75 (S.D. Fla. 1984) (alternative holding) (published regulations adequately apprised individuals of obligation to use unpublished reporting form).

<sup>22</sup> See, e.g., United States v. Bowers, 920 F.2d at 222; Sheppard v. Sullivan, 906 F.2d 756, 762 (D.C. Cir. 1990); Nguyen v. United States, 824 F.2d 697, 702 (9th Cir. 1987); Coos-Curry Elec. Coop., Inc. v. Jura, 821 F.2d 1341, 1347 (9th Cir. 1987).

<sup>23</sup> See McKenzie v. Bowen, 787 F.2d 1216, 1222-23 (8th Cir. 1986); see also Capuano v. National Transp. Safety Bd., 843 F.2d at 57-58; Medics, Inc. v. Sullivan, No. 88-2120, slip op. at 7-9 (D.P.R. May 31, 1991); Sturm v. James, 684 F. Supp. 1218, 1223 n.6 (S.D.N.Y. 1988).

<sup>24</sup> Pruner v. Department of the Army, 755 F. Supp. 362, 365 (D. Kan. 1991) (Army regulation governing procedures for applications for conscientious objector status concerned internal personnel matters and was not required to be published); see also Lonsdale v. United States, 919 F.2d at 1446-47 (FOIA does not require publication of Treasury Department orders which internally delegate authority to enforce internal revenue laws). But see also Smith v. National Transp. Safety Bd., 981 F.2d 1326, 1328-29 (D.C. Cir. 1993) (unpublished policy statement regarding sanctions not valid basis for suspension of license because sanctions policy affects public by altering public's behavior).

<sup>25</sup> See 5 U.S.C. § 552(a)(3) ("FOIA request" under subsection (a)(3) cannot be made for any records encompassed within "reading room" materials required to be made available under subsection (a)(2)); United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 152 (1989); Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653, 657 (9th Cir. 1980); see also FOIA Update, Summer 1992, at 4; FOIA Update, Spring 1991, at 5.

## INTRODUCTION

Subsection (c) of the FOIA, added as a part of the Freedom of Information Reform Act of 1986,<sup>26</sup> establishes three special categories of law enforcement-related records which have been entirely excluded from the coverage of the FOIA in order to safeguard against unique types of harm.<sup>27</sup> The extraordinary protection now embodied in subsection (c) permits an agency to respond to a request for such records as if the records in fact did not exist. (See discussion of the operation of these special provisions under Exclusions, below.)

Subsection (d) makes clear that the FOIA was not intended to authorize any new withholding of information, including from Congress. While individual Members of Congress possess merely the rights of access guaranteed to "any person" under subsection (a)(3), Congress as a body (or through its committees and subcommittees) cannot be denied access to information on the grounds of FOIA exemptions.<sup>28</sup>

Subsection (e) requires an annual report to Congress from each federal agency regarding its FOIA operations and an annual report from the Attorney General regarding FOIA litigation and the Department of Justice's efforts (through the Office of Information and Privacy) to encourage agency compliance with the FOIA. Subsection (f) defines the term "agency" so as to subject the records of nearly all executive branch entities to the FOIA. (See discussion of the term "agency" under Procedural Requirements, below.)

As originally enacted in 1966, the FOIA contained, in the views of many, weaknesses which detracted from its ideal operation. In response, the courts fashioned certain procedural devices, such as the requirement of a "Vaughn Index"--a detailed index of withheld documents and the justification for their exemption, established in Vaughn v. Rosen<sup>29</sup>--and the requirement that agencies release segregable nonexempt portions of a partially exempt record, first established in EPA v. Mink.<sup>30</sup>

In an effort to further extend the FOIA's disclosure requirements, and also as a reaction to the abuses of the Watergate era, the FOIA was substantial-

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<sup>26</sup> Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207, 3207-48.

<sup>27</sup> See generally Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18 (Dec. 1987) [hereinafter Attorney General's Memorandum].

<sup>28</sup> See FOIA Update, Winter 1984, at 3-4 ("OIP Guidance: Congressional Access Under FOIA" (citing, e.g., H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11-12 (1966))); see also 5 U.S.C. § 552a(b)(9) (1988) (counterpart provision of Privacy Act of 1974).

<sup>29</sup> 484 F.2d 820, 827 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

<sup>30</sup> 410 U.S. 73, 91 (1973); see 5 U.S.C. § 552(b) (final sentence) (explicitly requiring disclosure of any "reasonably segregable" nonexempt information); see also, e.g., Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1068, 1071-72 (D.C. Cir. 1993) (emphasizing importance of Act's "reasonable segregation" requirement).



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ly amended in 1974. The 1974 FOIA amendments considerably narrowed the overall scope of the Act's law enforcement and national security exemptions and broadened many of its procedural provisions, such as those relating to fees, time limits, segregability, and in camera inspection of withheld information by the courts.

In 1976, Congress again limited what could be withheld as exempt from disclosure under the FOIA, this time by narrowing its incorporation of the disclosure prohibitions of other statutes. (See discussion of Exemption 3, below.) A technical change was made in 1978 to update the FOIA's provision for administrative disciplinary proceedings,<sup>31</sup> and in 1984 Congress repealed the expedited court-review provision previously contained in former subsection (a)(4)(D) of the Act.<sup>32</sup>

In 1981, after several years of administrative experience with the FOIA, as amended, congressional hearings demonstrated that the Act was in need of both substantive and procedural reform.<sup>33</sup> Consequently, new FOIA amendments were advanced through the legislative process with the aim of strengthening the Act's nondisclosure provisions and improving many of its procedural provisions.<sup>34</sup> Through mid-1986, though, those FOIA reform efforts continued to be stalled.<sup>35</sup>

Late in 1986, however, in a relatively sudden development, Congress passed major FOIA reform legislation as part of the Anti-Drug Abuse Act of 1986. Signed into law on October 27, 1986, the Freedom of Information Reform Act of 1986<sup>36</sup> amended the FOIA to provide broader exemption protection for law enforcement information, plus special law enforcement record exclusions, and it also created a new fee and fee waiver structure.<sup>37</sup> While all of the law enforcement provisions of the 1986 FOIA amendments became ef-

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<sup>31</sup> 5 U.S.C. § 552(a)(4)(F) (1988).

<sup>32</sup> 5 U.S.C. § 552(a)(4)(D) (1982); see Federal Courts Improvement Act of 1984, Pub. L. No. 98-620, § 402, 98 Stat. 3335, 3357 (1984) (codified at 28 U.S.C. § 1657); see also FOIA Update, Spring 1985, at 6.

<sup>33</sup> See generally Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) (two volumes).

<sup>34</sup> See FOIA Update, Fall 1984, at 1; FOIA Update, Summer 1984, at 1, 4; FOIA Update, Winter 1984, at 1, 6; FOIA Update, Summer 1983, at 1-2; FOIA Update, Spring 1983, at 1; FOIA Update, June 1982, at 1-2; FOIA Update, March 1982, at 1-2; FOIA Update, Dec. 1981, at 1-2.

<sup>35</sup> See FOIA Update, Spring 1986, at 1.

<sup>36</sup> Pub. L. No. 99-570, 100 Stat. 3207.

<sup>37</sup> See FOIA Update, Fall 1986, at 1-2; see also id. at 3-6 (setting out statute in its amended form, interlineated to show exact changes made).

## PROCEDURAL REQUIREMENTS

fective immediately, the revised fee and fee waiver provisions were made effective only after the expiration of a 180-day implementation period, on April 25, 1987, with implementing regulations required to be in place for their full effectiveness.<sup>38</sup> The Department of Justice and other federal agencies have taken numerous steps to implement all provisions of the 1986 FOIA amendments.<sup>39</sup>

In sum, the FOIA is a vital, continuously developing mechanism which, with necessary refinements to accommodate technological advancements<sup>40</sup> as well as society's countervailing interests in an open yet fully responsible government, can truly enhance our democratic way of life.

## PROCEDURAL REQUIREMENTS

The Freedom of Information Act applies to "records" maintained by "agencies" within the executive branch of the federal government, including the Executive Office of the President and independent regulatory agencies.<sup>1</sup> Not included are records maintained by state governments,<sup>2</sup> by municipal corporations,<sup>3</sup> by the courts,<sup>4</sup> by Congress,<sup>5</sup> or by private citizens.<sup>6</sup>

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<sup>38</sup> See FOIA Update, Winter/Spring 1987, at 1-2.

<sup>39</sup> See id.; FOIA Update, Summer 1988, at 1-14; FOIA Update, Winter 1988, at 2; see also Attorney General's Memorandum.

<sup>40</sup> See, e.g., FOIA Update, Spring 1992, at 3 (discussing need to adjust FOIA to accommodate "electronic record" environment not envisioned when statute enacted).

<sup>1</sup> 5 U.S.C. § 552(f) (1988).

<sup>2</sup> See, e.g., Butler v. Marshall, No. 92-16955, slip op. at 2 (9th Cir. June 4, 1993); Smith v. Herriott, No. 91-35424, slip op. at 2 (9th Cir. June 9, 1992); Davidson v. Georgia, 622 F.2d 895, 897 (5th Cir. 1980); see also Gillard v. United States Marshals Serv., No. 87-0689, slip op. at 1-2 (D.D.C. May 11, 1987) (District of Columbia government records not covered).

<sup>3</sup> See, e.g., Rankel v. Town of Greensburgh, 117 F.R.D. 50, 54 (S.D.N.Y. 1987).

<sup>4</sup> See, e.g., Warth v. Department of Justice, 595 F.2d 521, 523 (9th Cir. 1979); Williams v. Thornburgh, No. 89-2152, slip op. at 2 n.2 (D.D.C. Mar. 24, 1992), summary affirmance granted sub nom. Williams v. Barr, No. 92-5149 (D.C. Cir. Jan. 29, 1993); see also Andrade v. United States Sentencing Comm'n, 989 F.2d 308, 309-10 (9th Cir. 1993) (Sentencing Commission, an independent body within judicial branch, not subject to FOIA); Chambers v. Division of Probation, No. 87-0163, slip op. at 2 (D.D.C. Apr. 8, 1987) (Division of Probation, part of Administrative Office of United States Courts, not covered).

<sup>5</sup> See, e.g., Goland v. CIA, 607 F.2d 339, 348 (D.C. Cir. 1978), cert. de-  
(continued...)

## PROCEDURAL REQUIREMENTS

In general, the FOIA does not apply to entities that "are neither chartered by the federal government [n]or controlled by it."<sup>7</sup> Nor does the FOIA apply to a presidential transition team.<sup>8</sup> Additionally, the personal staff of the President and units within the Executive Office of the President whose sole function is to advise and assist the President are not intended to fall within the definition of "agency."<sup>9</sup> The Court of Appeals for the District of Columbia Circuit illustrated this point this past year in holding that the former Presidential Task Force on Regulatory Relief--chaired by the Vice President and composed of several cabinet members--was not an agency for purposes of the FOIA, as the cabinet members were not acting as heads of their departments "but rather as the functional equivalents of assistants to the President."<sup>10</sup>

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<sup>5</sup>(...continued)

nied, 445 U.S. 927 (1980); see also Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990) (Congress not an "agency" for any purpose under FOIA).

<sup>6</sup> See, e.g., Kurz-Kasch v. DOD, 113 F.R.D. 147, 148 (S.D. Ohio 1986).

<sup>7</sup> H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974); see, e.g., Forsham v. Harris, 445 U.S. 169, 179-80 (1980) (private grantee of federal agency not subject to FOIA); Public Citizen Health Research Group v. HEW, 668 F.2d 537, 543-44 (D.C. Cir. 1981) (medical peer review committees not "agencies" under FOIA); Irwin Memorial Blood Bank v. American Nat'l Red Cross, 640 F.2d 1051, 1057 (9th Cir. 1981) (American Red Cross not an "agency" under FOIA). But see also Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992) (Smithsonian Institution held an "agency" under FOIA on basis that it "performs governmental functions as a center of scholarship and national museum responsible for the safekeeping and maintenance of national treasures"); Association of Community Orgs. for Reform Now v. Barclay, No. 3-89-409T, slip op. at 8 (N.D. Tex. June 9, 1989) (holding federal home loan banks "agencies" under FOIA).

<sup>8</sup> Illinois Inst. for Continuing Legal Educ. v. United States Dep't of Labor, 545 F. Supp. 1229, 1232-33 (N.D. Ill. 1982); see also FOIA Update, Fall 1988, at 3-4 ("FOIA Counselor: Transition Team FOIA Issues").

<sup>9</sup> S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 15 (1974); see, e.g., Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985) (Council of Economic Advisors held not an "agency" under FOIA); Nation Co. v. Archivist of the United States, No. 88-1939, slip op. at 5-6 (D.D.C. July 24, 1990) (Tower Commission held not an "agency" under FOIA); National Sec. Archive v. Executive Office of the President, 688 F. Supp. 29, 31 (D.D.C. 1988) (Office of Counsel to the President not an "agency" under FOIA), aff'd sub nom. National Sec. Archive v. Archivist of the United States, 909 F.2d 541 (D.C. Cir. 1990).

<sup>10</sup> Meyer v. Bush, 981 F.2d 1288, 1294 (D.C. Cir. 1993); cf. Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 911 (D.C. Cir. 1993) (President's Task Force on National Health Care Reform, composed of cabinet officials and chaired by First Lady, held not subject to Federal Advisory Committee Act).

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Such government entities whose functions are not limited to advising and assisting the President are "agencies" under the FOIA.<sup>11</sup> For example, the D.C. Circuit, after examining one entity's responsibilities in detail, concluded that its investigatory, evaluative and recommendatory functions exceeded merely advising the President and that therefore it was an "agency" subject to the FOIA.<sup>12</sup>

The Supreme Court has articulated a basic, two-part test for determining what constitutes an "agency record" under the FOIA: "Agency records" are documents which are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.<sup>13</sup> The D.C. Circuit has provided comprehensive discussions of relevant factors and precedents regarding the "agency record" concept<sup>14</sup> and of how certain records maintained by

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<sup>11</sup> See Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971); see also Ryan v. Department of Justice, 617 F.2d 781, 784-89 (D.C. Cir. 1980).

<sup>12</sup> Energy Research Found. v. Defense Nuclear Facilities Safety Bd., 917 F.2d 581, 584-85 (D.C. Cir. 1990); see also Pacific Legal Found. v. Council on Envtl. Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (Council on Environmental Quality held an "agency" under FOIA).

<sup>13</sup> United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (court opinions in agency files held to be agency records); see, e.g., International Bhd. of Teamsters v. National Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (submission of gummed-label mailing list as required by court order held not sufficient to give "control" over record to agency); KDVA v. Thornburgh, No. 90-1536, slip op. at 11 (D.D.C. Sept. 30, 1992) (Canadian Safety Board report of air crash, although possessed by National Transportation Safety Board, not under "control" of agency because of restrictions imposed by Convention on International Civil Aviation); Teich v. FDA, 751 F. Supp. 243, 248-49 (D.D.C. 1990) (documents submitted to FDA in "legitimate conduct of its official duties" are agency records notwithstanding FDA's presubmission review regulation allowing submitters to withdraw their documents from agency's files) (quoting Tax Analysts, 492 U.S. at 145), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992); Rush v. Department of State, 716 F. Supp. 598, 600 (S.D. Fla. 1989) (correspondence between former ambassador and Henry Kissinger (then Assistant to the President) held "agency records" of Department of State as it exercised control over them); see also FOIA Update, Summer 1992, at 5 (advising that records subject to "protective order" issued by administrative law judge remain within agency control and are subject to FOIA).

<sup>14</sup> See Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (transition team records, physically maintained within the "four walls" of agency, held not "agency records" under FOIA); see also, e.g., United States Dep't of Justice v. Tax Analysts, 492 U.S. at 146 (federal court tax opinions maintained and used by Justice Department's Tax Division are "agency records"); Hercules, Inc. v. Marsh, 838 F.2d 1027, 1029 (4th Cir. 1988) (army ammunition plant telephone directory prepared by contractor at government expense, bearing "property of  
(continued...)

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agency employees may qualify as "personal" rather than "agency" records.<sup>15</sup>

<sup>14</sup>(...continued)

the U.S." legend, held "agency record"); General Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (agency "use" of internal report submitted in connection with licensing proceedings resulted in finding report an "agency record"); Animal Legal Defense Fund v. Secretary of Agric., 813 F. Supp. 882, 892 (D.D.C. 1993) (plans regarding treatment of animals maintained on-site by entities subject to USDA regulation held not "agency records"); Rush Franklin Publishing, Inc. v. NASA, No. 90-CV-2855, slip op. at 10 (E.D.N.Y. Apr. 13, 1993) (mailing list created by contractor held not "agency record" as agency did not create, obtain or exercise control over it); Washington Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991) (transcript of closed congressional committee hearing furnished to testifying witnesses held not "agency record" as Congress had not "abandoned control over a transcript released to witnesses from an agency for the limited purpose of correcting and emending"); Lewisburg Prison Project, Inc. v. Federal Bureau of Prisons, No. 86-1339, slip op. at 4-5 (M.D. Pa. Dec. 16, 1986) (training videotape provided by contractor not "agency record"); Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (records created outside federal government which the "agency in question obtained without legal authority" held not "agency records"), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987); Waters v. Panama Canal Comm'n, No. 85-2029, slip op. at 5-6 (D.D.C. Nov. 26, 1985) (Internal Revenue Code held not "agency record"); Center for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) (agency report, prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy, held not "agency record"); see also "Department of Justice Report on 'Electronic Record' Issues under the Freedom of Information Act" [hereinafter Department of Justice "Electronic Record" Report], abridged in FOIA Update, Fall 1990, at 6-12 (discussing issue of "agency record" status of computer software).

<sup>15</sup> See Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1488-96 (D.C. Cir. 1984) (appointment calendars and telephone message slips of agency officials held not "agency records"); see also Gallant v. NLRB, No. 92-873, slip op. at 8 (D.D.C. Nov. 6, 1992) (letters written on agency time on agency equipment by board member seeking renomination, which had been reviewed by other agency employees but not integrated into agency record system and over which author had not relinquished control, held not "agency records") (appeal pending); Hamrick v. Department of the Navy, No. 90-283, slip op. at 6 (D.D.C. Aug. 28, 1992) (employee notebooks containing handwritten notes and comments, created and maintained for personal convenience and not placed in official files or referenced in agency documents, held not "agency records") (appeal pending); Sibille v. Federal Reserve Bank, 770 F. Supp. 134, 139 (S.D.N.Y. 1991) (handwritten notes of meetings and telephone conversations taken by employees for their personal convenience and not placed in agency's files held not "agency records"); Dow Jones & Co. v. GSA, 714 F. Supp. 35, 39 (D.D.C. 1989) (agency head's recusal list, shared only with personal secretary and chief of staff, held not "agency record"); Forman v. Chapotan, No. 88-1151, slip op. at 14 (W.D. Okla. Dec. 12, 1988)

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Each federal agency is required to publish in the Federal Register its procedural regulations governing access to its records under the FOIA.<sup>16</sup> These regulations must inform the public of where and how to address requests; of what types of records are maintained by the agency; of its schedule of fees for search, review and duplication; of its fee waiver criteria; and of its administrative appeal procedures.<sup>17</sup> Although an agency may occasionally waive some aspect of its published procedures for reasons of public interest, speed, or simplicity, unnecessary bureaucratic hurdles should not be imposed and no requirement may be imposed on a requester beyond those prescribed in the agency's regulations.<sup>18</sup> A requester's failure to comply with an agency's procedural regulations governing first-party access to records has been held to constitute a failure to properly exhaust administrative remedies.<sup>19</sup>

A FOIA request can be made by "any person," as defined in 5 U.S.C.

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<sup>15</sup>(...continued)

(materials distributed to agency officials at privately sponsored seminar held not "agency records"), aff'd, No. 89-6035 (10th Cir. Oct. 31, 1989); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1277 (D.D.C. 1986) (employee logs created voluntarily to facilitate work held not "agency records" even though containing substantive information), aff'd, 907 F.2d 203 (D.C. Cir. 1990); Miranda Manor v. HHS, No. 85-C-10015, slip op. at 5-7 (N.D. Ill. Apr. 7, 1986) (personal notes of agency surveyors held not "agency records"); Kalmin v. Department of the Navy, 605 F. Supp. 1492, 1494-95 (D.D.C. 1985) (uncirculated personal notes maintained at residence or in office desk drawer held personal property, not "agency records"); British Airports Auth. v. CAB, 531 F. Supp. 408, 416 (D.D.C. 1982) (employee notes maintained in personal file and retained at employee's discretion held not "agency records"); Porter County Chapter of the Izaak Walton League of Am. v. United States Atomic Energy Comm'n, 380 F. Supp. 630, 633 (N.D. Ind. 1974) (handwritten notes within personal files held not "agency records"); see also FOIA Update, Fall 1988, at 3-4 (discussing circumstances under which presidential transition team documents can be regarded as "personal records" when brought to federal agency); FOIA Update, Fall 1984, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'"). But see Washington Post Co. v. United States Dep't of State, 632 F. Supp. 607, 616 (D.D.C. 1986) (logs compiled by Secretary of State's staff--without his knowledge--held "agency records").

<sup>16</sup> 5 U.S.C. § 552(a)(3), (4)(A).

<sup>17</sup> See, e.g., 28 C.F.R. pt. 16(A) (1993) (Department of Justice FOIA regulations).

<sup>18</sup> See Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985); see also FOIA Update, Summer 1989, at 5 (addressing submission of FOIA requests by "fax" in absence of contrary agency regulation).

<sup>19</sup> See, e.g., Keil v. HHS, No. 88-C-360, slip op. at 3-4 (E.D. Wis. May 20, 1989); see also Muhammad v. United States Bureau of Prisons, 789 F. Supp. 449, 450 (D.D.C. 1992) (inmate's initial request for records made to court, rather than to agency, "constitutes a failure to exhaust his administrative remedies").

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§ 551(2), which encompasses individuals (including foreign citizens), partnerships, corporations, associations and foreign or domestic governments.<sup>20</sup> The statute specifically excludes federal agencies from the definition of a "person,"<sup>21</sup> but state agencies certainly can make FOIA requests.<sup>22</sup> The only apparent exception of any significance to this broad "any person" standard is for those who flout the law, such as a fugitive from justice.<sup>23</sup> This is true also where the FOIA plaintiff is an agent acting on behalf of a fugitive.<sup>24</sup>

FOIA requests can be made for any reason whatsoever, with no showing of relevancy required. Because the purpose for which records are sought "has no bearing" upon the merits of the request, FOIA requesters do not have to explain or justify their requests.<sup>25</sup> As a result, despite repeated Supreme Court admonitions for restraint,<sup>26</sup> the FOIA has been invoked successfully as a

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<sup>20</sup> See generally Doherty v. United States Dep't of Justice, 596 F. Supp. 423, 427 n.4 (S.D.N.Y. 1984) (reviewing legislative history), aff'd on other grounds, 775 F.2d 49 (2d Cir. 1985); see, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 840 n.2 (6th Cir. 1988) (recognizing standing of attorney to request documents on behalf of client).

<sup>21</sup> See FOIA Update, Winter 1985, at 6 (citing 5 U.S.C. § 551(2)).

<sup>22</sup> See, e.g., Texas v. ICC, 935 F.2d 728, 728 (5th Cir. 1991); Massachusetts v. HHS, 727 F. Supp. 35, 35 (D. Mass. 1989).

<sup>23</sup> See Doyle v. United States Dep't of Justice, 494 F. Supp. 842, 843 (D.D.C. 1980) (fugitive not entitled to enforcement of the FOIA's access provisions because he cannot expect judicial aid in obtaining government records when he has fled the jurisdiction of the courts), aff'd, 668 F.2d 1365 (D.C. Cir. 1981), cert. denied, 455 U.S. 1002 (1982). But cf. O'Rourke v. United States Dep't of Justice, 684 F. Supp. 716, 718 (D.D.C. 1988) (convicted criminal, a fugitive from his home country undergoing U.S. deportation proceedings, held to qualify as "any person" for purpose of making FOIA request); Doherty v. United States Dep't of Justice, 596 F. Supp. at 424-29 (same).

<sup>24</sup> See Javelin Int'l, Ltd. v. United States Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,141, at 82,479 (D.D.C. Dec. 9, 1981).

<sup>25</sup> United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989); see North v. Walsh, 881 F.2d 1088, 1096 (D.C. Cir. 1989) (requester's identity and intended use not proper factors in determining access rights under FOIA); Durns v. Bureau of Prisons, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access to agency records."), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988); Forsham v. Califano, 587 F.2d 1128, 1134 (D.C. Cir. 1978) (while factors such as need, interest or public interest may bear on agency's determination of order of processing, they have no bearing on individuals' rights of access under FOIA); see also FOIA Update, Spring 1989, at 5; FOIA Update, Summer 1985, at 5.

<sup>26</sup> See United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02

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substitute for, or a supplement to, document discovery in the contexts of both civil<sup>27</sup> and criminal<sup>28</sup> litigation.

By the same token, as the Supreme Court has stated, a FOIA requester's basic rights to access "are neither increased nor decreased" by virtue of having a greater interest in the records than that of an average member of the general public.<sup>29</sup> However, such considerations do logically have a bearing on certain procedural areas of the FOIA--such as expedited access, waiver or reduction of fees, and the award of attorney's fees and costs to a successful FOIA plaintiff--where it is appropriate to examine a requester's need or purpose in seeking records. And as the Supreme Court has observed, a requester's identity can be significant in one substantive respect: "The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating [an exemption] differently as to one class of those who make requests than as to another class."<sup>30</sup> In short, an agency should not invoke a FOIA exemption to

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<sup>26</sup>(...continued)

(1984); Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974).

<sup>27</sup> See, e.g., Jackson v. First Fed. Sav., 709 F. Supp. 887, 889 (E.D. Ark. 1989); see also FOIA Update, Dec. 1981, at 10. But cf. Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419 (N.D. Cal. 1986) (FOIA cannot be used to circumvent nonreviewable decision to impound requested documents); Morrison-Knudsen Co. v. Department of the Army of the United States, 595 F. Supp. 352, 356 (D.D.C. 1984) ("[T]he use of FOIA to unsettle well established procedures governed by a comprehensive regulatory scheme must be . . . viewed not only 'with caution' but with concern."), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite).

<sup>28</sup> See, e.g., North v. Walsh, 881 F.2d at 1096.

<sup>29</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. at 143 n.10; see also United States v. United States Dist. Court, Central Dist. of Cal., 717 F.2d 478, 480 (9th Cir. 1983) (FOIA does not expand scope of criminal discovery permitted under Rule 16 of Federal Rules of Criminal Procedure); Johnson v. United States Dep't of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991) ("Resort to Brady v. Maryland as grounds for waiving confidentiality is . . . outside the proper role of FOIA."); Stimac v. United States Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985) ("Brady v. Maryland . . . provides no authority for releasing material under FOIA."); cf. Calder v. IRS, 890 F.2d 781, 783 (5th Cir. 1989) (historian denied access under FOIA also held to have no "constitutional right of access" to Al Capone's tax records).

<sup>30</sup> United States Dep't of Justice v. Julian, 486 U.S. 1, 14 (1988); accord United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. at 771 (recognizing single exception to general FOIA-disclosure rule in case of "first-party" requester).



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protect a requester from himself.<sup>31</sup>

The FOIA specifies only two requirements for access requests: that they "reasonably describe" the records sought<sup>32</sup> and that they be made in accordance with agencies' published procedural regulations.<sup>33</sup> The legislative history of the 1974 FOIA amendments indicates that a description of a requested record is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort."<sup>34</sup> It has been observed that "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters."<sup>35</sup> Accordingly, one FOIA request was held invalid on the grounds that it required an agency's FOIA staff either to have "clairvoyant capabilities" to discover the requester's needs or to spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks."<sup>36</sup> However, an agency "must be careful not to read [a] request so strictly that the requester is denied

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<sup>31</sup> See FOIA Update, Spring 1989, at 5 (advising agencies to treat first-party FOIA requests in accordance with the protectible interests that requesters can have in their own information, such as with personal privacy information, and to treat third-party FOIA requesters differently).

<sup>32</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>33</sup> 5 U.S.C. § 552(a)(3)(B); see, e.g., McDonnell v. United States, No. 91-5916, slip op. at 10-11 (3d Cir. Sept. 21, 1993) (to be published).

<sup>34</sup> H.R. Rep. No. 876, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271; see also, e.g., Brumley v. United States Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985); Goland v. CIA, 607 F.2d at 353; Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978).

<sup>35</sup> Assassination Archives & Research Ctr., Inc. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414 (D.C. Cir. Aug. 13, 1990); Blakey v. Department of Justice, 549 F. Supp. 362, 366-67 (D.D.C. 1982), aff'd, 720 F.2d 215 (D.C. Cir. 1983) (table cite); see also Trenerry v. Department of the Treasury, No. 92-5053, slip op. at 6 (10th Cir. Feb. 5, 1993) (agency not required to provide personal services such as legal research); Davis v. United States Dep't of Justice, 968 F.2d 1276, 1280-82 (D.C. Cir. 1992) (burden is on requester, not agency, to show prior disclosure of otherwise exempt records).

<sup>36</sup> Devine v. Marsh, 2 Gov't Disclosure Serv. (P-H) ¶ 82,022, at 82,186 (E.D. Va. Aug. 27, 1981); see also Canning v. United States Dep't of Justice, No. 92-503, slip op. at 2 (D.D.C. July 15, 1992) (subsequent request for additional searches of State Department files "unjustified" after agency had conducted "reasonable and adequate search"); Freeman v. United States Dep't of Justice, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish."); Massachusetts v. HHS, 727 F. Supp. at 36 n.2 (request for all records "relating to" particular subject held overbroad, "thus unfairly plac[ing] the onus of non-production on the recipient of the request and not where it belongs--upon the person who drafted such a sloppy request").

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information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester."<sup>37</sup>

The fact that a FOIA request is very broad or "burdensome" in its magnitude does not, in and of itself, entitle an agency to deny that request on the ground that it does not "reasonably describe" the records sought.<sup>38</sup> The key factor is the ability of an agency's staff to reasonably ascertain and locate exactly which records are being requested.<sup>39</sup> It has been held that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records.<sup>40</sup>

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<sup>37</sup> Hemenway v. Hughes, 601 F. Supp. 1002, 1005 (D.D.C. 1985); see also Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984) (agency required to read FOIA request as drafted, "not as either [an] agency official or [the requester] might wish it was drafted"); Ferri v. Bell, 645 F.2d 1213, 1220 (3d Cir. 1981) (request "inartfully presented in the form of questions" cannot be dismissed, in toto, as too burdensome); Landes v. Yost, No. 89-6338, slip op. at 4-5 (E.D. Pa. Apr. 11, 1990) (request found "reasonably descriptive" where it relied on agency's own outdated identification code), aff'd, 922 F.2d 832 (3d Cir. 1990) (table cite); FOIA Update, Summer 1983, at 5; cf. Truitt v. Department of State, 897 F.2d 540, 544-46 (D.C. Cir. 1990) (where request was "reasonably clear as to the materials desired," agency failed to conduct adequate search as its search did not include file likely to contain responsive records). But see also Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) (agency search properly limited to scope of FOIA request, with no requirement that secondary references or variant spellings be checked).

<sup>38</sup> See FOIA Update, Summer 1983, at 5.

<sup>39</sup> See Yeager v. DEA, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding valid a request encompassing over 1,000,000 computerized records: "The linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested.'" (quoting legislative history)).

<sup>40</sup> See Van Strum v. EPA, No. 91-35404, slip op. at 3 (9th Cir. Aug. 17, 1992) (agency justified in denying or seeking clarification of overly broad requests which would place inordinate search burden on agency resources); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (holding request which would require agency "to locate, review, redact, and arrange for inspection a vast quantity of material" to be "so broad as to impose an unreasonable burden upon the agency" (citing Goland v. CIA, 607 F.2d at 353)); Marks v. United States Dep't of Justice, 578 F.2d at 263 (FBI not required to search every one of its field offices); Canning v. United States Dep't of the Treasury, No. 91-2324, slip op. at 8 (D.D.C. Apr. 28, 1993) ("[I]f the locations to be searched are not plain from the face of the request, the government agency . . . need not imply additional locations into the search."); Roberts v. United States Dep't of Justice, No. 92-1707, slip op. at 3 (D.D.C. Jan. 28, 1993) (agency not expected to "search every nook and cranny of its vast offices" in order to locate records which requester believes may exist); Nance v. United States Postal Serv., No. 91- (continued...)

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It also has been held by the courts that agencies do not have to organize or reorganize file systems in order to respond to particular FOIA requests,<sup>41</sup> to write new computer programs to search for "electronic" data not already compiled for agency purposes,<sup>42</sup> or to aggregate computerized data files so as to effectively create new, releasable records.<sup>43</sup> The adequacy of an agency's search under the FOIA is to be determined by a test of "reasonableness," which may vary from case to case.<sup>44</sup> (For a discussion of the litigation aspects of adequacy of search, see Litigation Considerations, below.)

Although "a person need not title a request for government records a

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<sup>40</sup>(...continued)

1183, slip op. at 5 n.3 (D.D.C. Jan. 24, 1992) (dictum) (there may be instances where "search burden is too disruptive," regardless of requester's ability to pay fees); Hale Fire Pump Co. v. United States, No. 90-2714, slip op. at 2 (E.D. Pa. July 30, 1990) (agency not required to direct FOIA request to "hundreds of [its] installations that might have responsive documents"); see also, e.g., Nolen v. Rumsfeld, 535 F.2d 890, 891-92 (5th Cir. 1976) (FOIA does not compel agencies to locate missing records), cert. denied, 429 U.S. 1104 (1977). But see also Truitt v. Department of State, 897 F.2d at 546 (subsequent search required for responsive records agency knew were removed from file).

<sup>41</sup> See, e.g., Church of Scientology v. IRS, 792 F.2d 146, 150-51 (D.C. Cir. 1986); Miller v. United States Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1986); Neff v. IRS, No. 85-816, slip op. at 8 (S.D. Fla. Nov. 24, 1986); Auchterlonie v. Hodel, No. 83-C-6724, slip op. at 13 (N.D. Ill. May 7, 1984).

<sup>42</sup> See Burlington N. R.R. v. EPA, No. 91-1636, slip op. at 4 (D.D.C. June 15, 1992); Clarke v. United States Dep't of the Treasury, No. 84-1873, slip op. at 2-3 (E.D. Pa. Jan. 24, 1986); see also FOIA Update, Spring 1992, at 3-7 (congressional testimony discussing "electronic record" FOIA issues).

<sup>43</sup> See Yeager v. DEA, 678 F.2d at 324; see also Department of Justice "Electronic Record" Report, abridged in FOIA Update, Spring/Summer 1990, at 8-21 (discussing use of "computer programming" for FOIA search and processing purposes). But cf. International Diatomite Producers Ass'n v. United States Social Sec. Admin., No. 92-1634, slip op. at 13-14 (N.D. Cal. Apr. 28, 1993) (agency must respond to request for specific information, portions of which are maintained in four separate computerized listings, by either compiling new list or redacting existing lists) (appeal pending).

<sup>44</sup> See Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (agency may not limit search to one record system if others are likely to contain responsive records); Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request."); Spannaus v. DOD, No. 92-2435, transcript at 16 (D.D.C. Sept. 13, 1993) (bench order) (fact that it is "conceivable" that other responsive documents exist "does not mean that the search itself was inadequate"); see also Zemansky v. EPA, 767 F.2d at 571-73 (reasonableness of agency search depends upon facts of each case (citing Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983))).

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'FOIA request.'"<sup>45</sup> a request should be made in full observance of an agency's procedural regulations.<sup>46</sup> However, agencies should exercise sound administrative discretion in this regard--for example, a first-party access request that cites only the Privacy Act of 1974<sup>47</sup> should be processed under both that statute and the FOIA as well.<sup>48</sup>

Until a FOIA request is properly received by an agency (and, further, by the proper component of that agency), there is no obligation on the agency to search, to meet time deadlines or to release documents.<sup>49</sup> Requests not filed in accordance with published regulations are not deemed to have been received until such time as they are identified as proper FOIA requests by agency personnel.<sup>50</sup> For example, the Department of Justice regulation requiring either a promise to pay fees (above a minimum amount) or a determination to waive all fees before the request is deemed received<sup>51</sup> has been specifically upheld.<sup>52</sup> Moreover, if a requester fails to pay properly assessed search, review and/or duplication fees, despite his prior commitment to pay such an amount, an agency may refuse to process subsequent requests until that outstanding balance is fully paid by the requester.<sup>53</sup> (For a discussion of procedures pertaining to the assessment of fees, see Fees and Fee Waivers, below.)

Once an agency is in receipt of a proper FOIA request, it is required to inform the requester of its decision to grant or deny access to the requested

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<sup>45</sup> Newman v. Legal Servs. Corp., 628 F. Supp. 535, 543 (D.D.C. 1986); see also FOIA Update, Winter 1986, at 6.

<sup>46</sup> See, e.g., Church of Scientology v. IRS, 792 F.2d at 150 (requesters must follow "the statutory command that requests be made in accordance with published rules"). But see also Summers v. United States Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (holding that 28 U.S.C. § 1746--which requires that unsworn declarations be treated with "like force and effect" as sworn declarations--can be used in place of notarized-signature requirement of agency regulation for verification of FOIA privacy waivers).

<sup>47</sup> 5 U.S.C. § 552a.

<sup>48</sup> See FOIA Update, Winter 1986, at 6.

<sup>49</sup> See Brumley v. United States Dep't of Labor, 767 F.2d at 445; see also McDonnell v. United States, slip op. at 11 (person whose name does not appear on request does not have standing).

<sup>50</sup> See, e.g., Lykins v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,092, at 83,637 (D.D.C. Feb. 28, 1983).

<sup>51</sup> 28 C.F.R. § 16.10(e) (1993).

<sup>52</sup> See Irons v. FBI, 571 F. Supp. 1241, 1243 (D. Mass. 1983); see also Oglesby v. United States Dep't of the Army, 920 F.2d at 66.

<sup>53</sup> See Atkin v. EEOC, No. 92-3275, slip op. at 5 (D.N.J. June 24, 1993); Crooker v. United States Secret Serv., 577 F. Supp. 1218, 1219-20 (D.D.C. 1983); FOIA Update, Spring 1986, at 2; see also 5 U.S.C. § 552(a)(4)(A)(v).

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records within ten working days.<sup>54</sup> Agencies are not necessarily required to release records within the ten days, but access to releasable records should be granted promptly thereafter.<sup>55</sup> The FOIA provides for extensions of initial time limits for three specific situations: (1) the need to search for and collect records from separate offices; (2) the need to examine a voluminous amount of records required by the request; and (3) the need to consult with another agency or agency component.<sup>56</sup> Further, determinations of administrative appeals are required to be made within twenty working days.<sup>57</sup>

In many instances, however, agencies are unable to meet these time limits for a variety of reasons, including the limitations of their resources.<sup>58</sup> The D.C. Circuit has approved the general practice of handling backlogged FOIA requests on a "first-in, first-out" basis.<sup>59</sup> However, if a requester can show an "exceptional need or urgency," his or her request may be "expedited" and processed out of sequence.<sup>60</sup> Expedited access has been granted where exceptional circumstances surrounding a request warrant such treatment to the relative disadvantage of prior FOIA requesters, such as jeopardy to life or personal safety,<sup>61</sup> or a threatened loss of substantial due process rights.<sup>62</sup> (For a fur-

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<sup>54</sup> 5 U.S.C. § 552(a)(6)(A)(i); see also FOIA Update, Summer 1992, at 5 (merely acknowledging request within ten-day period is simply insufficient).

<sup>55</sup> 5 U.S.C. § 552(a)(6)(C); see Larson v. IRS, No. 85-3076, slip op. at 2-3 (D.D.C. Dec. 11, 1985) (As the FOIA "does not require that the person requesting records be informed of the agency's decision within ten days, it only demands that the government make [and mail] its decision within that time."). Contra Manos v. United States Dep't of the Air Force, No. C-92-3986, slip op. at 12 (N.D. Cal. Feb. 10, 1993) (exceptional decision holding that mailing response within ten-day period not sufficient and that requester must actually receive response within ten-day period).

<sup>56</sup> 5 U.S.C. § 552(a)(6)(B).

<sup>57</sup> 5 U.S.C. § 552(a)(6)(A)(ii).

<sup>58</sup> See, e.g., FOIA Update, Spring 1992, at 8-10; FOIA Update, Winter 1990, at 1-2.

<sup>59</sup> Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 614-16 (D.C. Cir. 1976) (citing 5 U.S.C. § 552(a)(6)(C)).

<sup>60</sup> Id. at 616; see FOIA Update, Summer 1983, at 3 ("OIP Guidance: When to Expedite FOIA Requests"); see also FOIA Update, Summer 1992, at 5 (emphasizing need to promptly determine whether to expedite processing of a request).

<sup>61</sup> See, e.g., Exner v. FBI, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978) (plaintiff entitled to expedited access after leak of information exposed her to harm from organized crime figures), aff'd, 612 F.2d 1202 (9th Cir. 1980); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (plaintiff faced multiple criminal charges carrying possible death penalty in state court); compare Free-  
(continued...)

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ther discussion of expedited access, see the "Open America" Stays subsection of Litigation Considerations, below.)

When an agency locates records responsive to a FOIA request, it should determine whether any of those records, or information contained in those records, originated with another agency or agency component.<sup>63</sup> As a matter of sound administrative practice, an agency receiving such a request should consult with the component or agency whose information appears in responsive records and, if the response to that consultation is delayed, notify the requester that a supplemental response will follow its completion.<sup>64</sup> When entire records originating with another agency or component are located, those records ordinarily should be referred to their originating agency for its direct response to the requester,<sup>65</sup> and the requester ordinarily should be advised of such a referral.<sup>66</sup> Some agencies have streamlined their practices of continually referring certain routine records or classes of records to other agencies or components by

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<sup>61</sup>(...continued)

man v. United States Dep't of Justice, No. 92-557, slip op. at 6 (D.D.C. Oct. 2, 1992) (expedited treatment granted where requester "reasonably has demonstrated" that FOIA release may produce information from limited amount of records that will assist his defense of pending state criminal charges where discovery not available) with Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 11-12 (D.D.C. June 28, 1993) (denying any further expedited treatment for requested "hand search of approximately 50,000 pages").

<sup>62</sup> See, e.g., Ferguson v. FBI, 722 F. Supp. 1137, 1141-43 (S.D.N.Y. 1989) (noting that "due process interest must be substantial" and holding that plaintiff's request for information regarding his particular postconviction proceeding required expedition).

<sup>63</sup> Accord 5 U.S.C. § 552(a)(6)(B)(iii).

<sup>64</sup> See FOIA Update, Summer 1991, at 3-4 ("OIP Guidance: Referral and Consultation Procedures").

<sup>65</sup> See id.; FOIA Update, Summer 1983, at 5; see, e.g., Stone v. Defense Investigative Serv., No. 91-2013, slip op. at 2 (D.D.C. Feb. 24, 1992) (agencies may refer responsive records to originating agencies in responding to FOIA requests), aff'd, 978 F.2d 744 (D.C. Cir. 1992) (table cite); see also, e.g., 28 C.F.R. § 16.4(c) (1993) (Department of Justice FOIA regulation concerning referrals and consultations). But see also Williams v. FBI, No. 92-5176, slip op. at 2 (D.C. Cir. May 7, 1993) (illustrating that, in litigation, referring agency is nevertheless required to justify withholding of record that was referred to another agency); Grove v. Department of Justice, 802 F. Supp. 506, 518 (D.D.C. 1992) (agency may not use "'consultation' as its reason for a deletion, without asserting a valid exemption").

<sup>66</sup> But see FOIA Update, Spring 1991, at 6 (warning agencies not to notify requesters of identities of other agencies to which record referrals are made, in any exceptional case in which so doing would reveal sensitive abstract fact about record's existence).

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establishing standard processing protocols.<sup>67</sup>

Regarding the mechanics of responding to FOIA requests, it should be noted that the D.C. Circuit has suggested that an agency is not required to mail copies of requested records to a FOIA requester if it prefers to make the "responsive records available in one central location for [the requester's] perusal."<sup>68</sup> As a matter of sound policy and administrative practice, however, the Department of Justice strongly advises agencies to decline to follow such a practice except where it is the requester's preference as well.<sup>69</sup>

The Act requires that "any reasonably segregable portion of a record" must be released after appropriate application of the nine exemptions.<sup>70</sup> Agencies should pay particularly close attention to this "reasonably segregable" requirement as the courts can closely examine whether segregability determinations have been made properly.<sup>71</sup> (For a further discussion of segregability, see the "Vaughn Index" subsection of Litigation Considerations, below.) If, however, an agency determines that nonexempt material is so "inextricably intertwined" that disclosure of it would "leave only essentially meaningless words and phrases," the entire record may be withheld.<sup>72</sup> In cases involving a

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<sup>67</sup> See, e.g., 28 C.F.R. § 16.4(g) (1993) (Department of Justice FOIA regulation on such formal or informal agreements).

<sup>68</sup> Oglesby v. United States Dep't of the Army, 920 F.2d at 69.

<sup>69</sup> See FOIA Update, Spring 1991, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision"); accord Carson v. United States Dep't of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980).

<sup>70</sup> 5 U.S.C. § 552(b) (final sentence).

<sup>71</sup> See, e.g., Krikorian v. Department of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (affirming general application of exemption but nevertheless remanding to district court for finding as to segregability); Schiller v. NLRB, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992) (noting that agency's affidavit referred to withholding of "documents, not information," and remanding for specific finding as to segregability); Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 983 (1st Cir. 1985) ("detailed process of segregation" held not unreasonable for request involving 36 document pages); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970) ("statutory scheme does not permit a bare claim of confidentiality to immunize agency [records] from scrutiny" in their entirety); Church of Scientology v. IRS, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) ("The burden is on the agency to prove the document cannot be segregated for partial release.") (appeal pending); Schreibman v. United States Dep't of Commerce, 785 F. Supp. 164, 166 (D.D.C. 1991) (segregation required for computer vulnerability assessment withheld under Exemption 2); Wellford v. Hardin, 315 F. Supp. 768, 770 (D.D.C. 1970) ("It is a violation of the Act to withhold [entire] documents on the ground that parts are exempt and parts [are] nonexempt.").

<sup>72</sup> Neufeld v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981); see Local 3, Int'l (continued...)

## PROCEDURAL REQUIREMENTS

large amount of records or an unreasonably high-cost "line-by-line" review, it has been held that agencies may withhold small segments of nonexempt facts "if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing by the courts would impose an inordinate burden."<sup>73</sup>

It also has been held without contradiction that the agency, not the requester, has the right to choose the format of disclosure, so long as the agency chooses reasonably under the circumstances presented.<sup>74</sup> While it is well established "that computer-stored records, whether stored in the central processing unit, on magnetic tape or in some other form, are records for the purposes of the FOIA,"<sup>75</sup> it also has been held that the FOIA "in no way contemplates

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<sup>72</sup>(...continued)

Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988); Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977); see also Yeager v. DEA, 678 F.2d at 322 n.16 (appropriate to consider "intelligibility" of document and burden imposed by editing and segregation of nonexempt matters).

<sup>73</sup> Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979); see also Doherty v. United States Dep't of Justice, 775 F.2d at 53 ("The fact that there may be some nonexempt matter in documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing approximately 300 pages of documents, line-by-line."); Neufeld v. IRS, 646 F.2d at 666 (segregation not required where it "would impose significant costs on the agency and produce an edited document of little informational value"); Journal of Commerce v. United States Dep't of the Treasury, No. 86-1075, slip op. at 16 (D.D.C. Mar. 30, 1988) (segregation "neither useful, feasible nor desirable" where it would compel agency "to pour through [literally millions of pages of documents] to segregate nonexempt material [and] would impose an immense administrative burden . . . that would in the end produce little in the way of useful nonexempt material").

<sup>74</sup> See Coalition for Alternatives in Nutrition & Healthcare v. FDA, No. 90-1025, slip op. at 3 (D.D.C. Jan. 4, 1991) (release of requested documents in microfiche format, rather than paper, held to be disclosure in "reasonably accessible form"); National Sec. Archive v. CIA, No. 88-119, slip op. at 1-2 (D.D.C. July 26, 1988) (agency not required to provide requested records in "electronic data base" format where it already had provided paper copy in response to FOIA request), aff'd on mootness grounds, No. 88-5298 (D.C. Cir. Feb. 6, 1989); Dismukes v. Department of the Interior, 603 F. Supp. 760, 761-63 (D.D.C. 1984) (providing requested data in microfiche form, rather than "9 track, 1600 bpi, DOS or unlabeled, IBM Compatible formats, with file dumps and file layouts," held proper in light of fact that microfiche form preferred by most requesters as well as by agency); see also Department of Justice "Electronic Record" Report, abridged in FOIA Update, Fall 1990, at 3-6 (discussing "choice of format" issues regarding "electronic records").

<sup>75</sup> Yeager v. DEA, 678 F.2d at 321; see Long v. IRS, 596 F.2d 362, 364-  
(continued...)



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that agencies, in providing information to the public, should invest in the most sophisticated and expensive form of technology."<sup>76</sup>

All notifications to requesters of denials of initial requests and appeals should contain certain specific information. While "[t]here is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation,"<sup>77</sup> a decision to deny an initial request must inform the requester of the reasons for denial, of the right to appeal and of the name and title of each person responsible for the denial.<sup>78</sup> Agencies now must include administrative appeal notifications in all of their "no record" responses to FOIA requesters.<sup>79</sup> An administrative appeal decision upholding a denial must inform the requester of the reasons for denial, of the requester's right to judicial review in the federal courts and of the name and title of each person responsible for the appeal denial.<sup>80</sup>

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<sup>75</sup>(...continued)

65 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980); see also FOIA Update, Spring/Summer 1990, at 4 n.1.

<sup>76</sup> Martin & Merrell, Inc. v. United States Customs Serv., 657 F. Supp. 733, 734 (S.D. Fla. 1986) ("computer terminals for public reference" not required).

<sup>77</sup> Crooker v. CIA, No. 83-1426, slip op. at 3 (D.D.C. Sept. 28, 1984); see Schaake v. IRS, No. 91-958, slip op. at 9-10 (S.D. Ill. June 3, 1991) (court "lacks jurisdiction" to require agency to provide Vaughn Index at initial request or administrative appeal stages); SafeCard Servs., Inc. v. SEC, No. 84-3073, slip op. at 4-5 (D.D.C. Apr. 21, 1986) (requester has no right to Vaughn Index during administrative process), aff'd & remanded on other grounds, 926 F.2d 1197 (D.C. Cir. 1991); see also FOIA Update, Summer 1986, at 6.

<sup>78</sup> 5 U.S.C. § 552(a)(6)(A)(i), (C); see also Mayock v. INS, 714 F. Supp. 1558, 1567 (N.D. Cal. 1989) (denying plaintiff's request for Vaughn Index at administrative level, but suggesting that even agency's own regulations require "more information than just the number of pages withheld and an unexplained citation to the exemptions"), rev'd & remanded on other grounds sub nom. Mayock v. Nelson, 938 F.2d 1006 (9th Cir. 1991); Hudgins v. IRS, 620 F. Supp. 19, 20-21 (D.D.C. 1985) (suggesting that statements of appellate rights should be provided even where request was interpreted by agency as not reasonably describing records), aff'd, 808 F.2d 137 (D.C. Cir.), cert. denied, 484 U.S. 803 (1987); see also FOIA Update, Fall 1985, at 6 (discussing significance of apprising requesters of their rights to file administrative appeals of adverse FOIA determinations).

<sup>79</sup> See Oglesby v. United States Dep't of the Army, 920 F.2d at 67 (holding that a "no record" response constitutes an "adverse determination" and therefore requires notification of appeal rights under 5 U.S.C. § 552(a)(6)(A)(i)); see also FOIA Update, Spring 1991, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (superseding FOIA Update, Summer 1984, at 2).

<sup>80</sup> 5 U.S.C. § 552(a)(6)(A)(ii), (C).

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Notifications to requesters should also contain other pertinent information: when and where records will be made available; what fees, if any, must be paid prior to the granting of access; what records are or are not responsive to the request; the date of receipt of the request/appeal; and the nature of the request/appeal and, where appropriate, the agency's interpretation of it.<sup>81</sup> Agencies may apply a "cut-off" date for including records as responsive to requests.<sup>82</sup> Where an agency employs a particular "cut-off" date, however, it should give notice of that to requesters through a published regulation to that effect, if not also in the agency's letter to the requester as well.<sup>83</sup> As this letter of notification is the primary means of agency communication with a FOIA requester, as well as potentially the initial basis for the agency's position in the event of litigation, it should be as comprehensive as reasonably possible.<sup>84</sup>

An agency's failure to comply with the time limits for either the initial request or the administrative appeal may be treated as a "constructive exhaustion" of administrative remedies, and a requester may immediately seek judicial review if he or she wishes to do so.<sup>85</sup> However, the D.C. Circuit has modified this rule of constructive exhaustion by holding that once the agency responds to the FOIA request--after the ten-day time limit but before the requester has filed suit--the requester must administratively appeal the denial before proceeding to court.<sup>86</sup> (For a discussion of the litigation aspects of exhaustion of

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<sup>81</sup> See, e.g., Astley v. Lawson, No. 89-2806, slip op. at 5 (D.D.C. Jan. 11, 1991) (suggesting that agency "might have been more helpful" to requester by "explaining why the information he sought would not be provided").

<sup>82</sup> See, e.g., Church of Scientology v. IRS, 816 F. Supp. at 1148 (documents generated subsequent to date specified in request held outside of scope of request and need not be disclosed).

<sup>83</sup> Accord McGee v. CIA, 697 F.2d 1095, 1105 (D.C. Cir.), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983); see also FOIA Update, Fall 1983, at 14; see also, e.g., 28 C.F.R. § 16.4(j) (1993).

<sup>84</sup> See Grove v. Department of Justice, 802 F. Supp. 506, 519 (D.D.C. 1992) (agency required to provide plaintiff with legible copies of releasable records or else to state that no better copies exist); see also McDonnell v. United States, slip op. at 60-61 n.21 (FOIA requester should "receive the best possible reproductions of the documents to which he is entitled").

<sup>85</sup> 5 U.S.C. § 552(a)(6)(C); see, e.g., Spannaus v. United States Dep't of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987); see also Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978); FOIA Update, Jan. 1983, at 6 (superseded in part).

<sup>86</sup> Oglesby v. United States Dep't of the Army, 920 F.2d at 61-65; accord McDonnell v. United States, slip op. at 59 (dismissal of claim proper where plaintiff filed suit before filing administrative appeal of denial received after exhaustion of ten-day period); see also FOIA Update, Spring 1991, at 3-4 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision").

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administrative remedies, see Litigation Considerations, below.)

Once in court, if an agency can show that its failure to meet the statutory time limits resulted from "exceptional circumstances" and that it is applying "due diligence" in processing the request, the agency may be allowed additional time to complete its processing and possibly to prepare a Vaughn Index as well.<sup>87</sup> In this connection, the need to process an extremely large volume of requests has been held to constitute "exceptional circumstances," and the commitment of large amounts of resources to process requests on a first-come, first-served basis has been held to constitute "due diligence" under this subsection.<sup>88</sup> (For a discussion of the litigation aspects of "exceptional circumstances," see the "Open America Stays" subsection of Litigation Considerations, below.)

Finally, several miscellaneous characteristics of the FOIA should also be noted. First, it applies only to records, not to tangible, evidentiary objects.<sup>89</sup> Also, agencies are not required to create records in order to respond to FOIA requests.<sup>90</sup> Nor are agencies required to answer questions posed as FOIA re-

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<sup>87</sup> 5 U.S.C. § 552(a)(6)(C); see also FOIA Update, Fall 1988, at 5.

<sup>88</sup> See Open America v. Watergate Special Prosecution Force, 547 F.2d at 615-16; see also Caifano v. Wampler, 588 F. Supp. 1392, 1394-95 (N.D. Ill. 1984) (agency directed to "continue to work diligently and expeditiously in a good faith manner to respond to plaintiff's requests"); see generally FOIA Update, Spring 1992, at 8-10 (discussing agency difficulties with FOIA time limits and administrative backlogs); FOIA Update, Winter 1990, at 1-2 (discussing effects of budgetary constraints upon agency FOIA operations).

<sup>89</sup> Nichols v. United States, 325 F. Supp. 130, 135-36 (D. Kan. 1971) (archival exhibits consisting of guns, bullets and clothing pertaining to assassination of President Kennedy held not "records"), aff'd on other grounds, 460 F.2d 671 (10th Cir.), cert. denied, 409 U.S. 966 (1972); see also FOIA Update, Winter 1993, at 1 (discussing implementation of President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 note).

<sup>90</sup> See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. at 162 (agency not required to produce or create explanatory materials); Yeager v. DEA, 678 F.2d at 321-23 (agency not obligated to restructure records for release); Krohn v. Department of Justice, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (an agency "cannot be compelled to create the [intermediary records] necessary to produce" the information sought); see also FOIA Update, Winter 1984, at 5. But see McDonnell v. United States, slip op. at 26 (suggesting, in dictum, that agency might be compelled to create translation of any disclosable encoded information); cf. International Diatomite Producers Ass'n v. United States Social Sec. Admin., slip op. at 13-14 (agency given choice of compiling responsive list or redacting existing lists containing responsive information).

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quests.<sup>91</sup> It likewise is well recognized that the FOIA does not provide for limited disclosure; rather, it "speaks in terms of disclosure and nondisclosure. It does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents."<sup>92</sup> Moreover, it has been held that requesters cannot compel agencies to make automatic releases of records as they are created.<sup>93</sup>

There also is no damage remedy available to FOIA requesters for non-disclosure.<sup>94</sup> Furthermore, agencies are not required to seek the return of records wrongfully removed from their possession,<sup>95</sup> or to seek the delivery of records held by private entities.<sup>96</sup> Lastly, the District Court for the District of

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<sup>91</sup> See, e.g., Zemansky v. EPA, 767 F.2d at 574; DiViaio v. Kelley, 571 F.2d 538, 542-43 (10th Cir. 1978); Patton v. United States R.R. Retirement Bd., No. ST-C-91-04-MU, slip op. at 3 (W.D.N.C. Apr. 26, 1991) (The FOIA "provides a means for access to existing documents and is not a way to interrogate an agency."), aff'd, 940 F.2d 652 (4th Cir. 1991) (table cite); Astley v. Lawson, slip op. at 5 (agency not required to respond to requests for answers to questions); Priest v. IRS, No. C88-20785, slip op. at 7-8 (N.D. Cal. Jan. 10, 1990) (agency not required to create explanatory material in response to FOIA request); Hudgins v. IRS, 620 F. Supp. at 21 ("FOIA creates only a right of access to records, not a right to personal services."); see also FOIA Update, Winter 1984, at 5.

<sup>92</sup> Julian v. United States Dep't of Justice, 806 F.2d 1411, 1419 n.7 (9th Cir. 1986), aff'd, 486 U.S. 1 (1988); Berry v. Department of Justice, 733 F.2d 1343, 1355 n.19 (9th Cir. 1984); see also Seawell, Dalton, Hughes & Timms v. Export-Import Bank of the United States, No. 84-241-N, slip op. at 2 (E.D. Va. July 27, 1984) (no "middle ground between disclosure and nondisclosure").

<sup>93</sup> See Mandel Grunfeld & Herrick v. United States Customs Serv., 709 F.2d 41, 43 (11th Cir. 1983) (plaintiff not entitled to automatic mailing of materials as they are updated); Howard v. Secretary of the Air Force, No. SA-89-CA-1008, slip op. at 6 (W.D. Tex. Oct. 2, 1991) (plaintiff's request for records on continuing basis would "create an enormous burden, both in time and taxpayers' money"); see also FOIA Update, Spring 1985, at 6.

<sup>94</sup> See, e.g., Lanter v. FBI, No. CIV-93-34, slip op. at 2 (W.D. Okla. July 30, 1993) (appeal pending); Lufkin v. Director, Executive Office for United States Attorneys, No. 85-1959, slip op. at 1 (D.D.C. Mar. 10, 1987); Daniels v. St. Louis VA Regional Office, 561 F. Supp. 250, 252 (E.D. Mo. 1983); King v. Califano, 471 F. Supp. 180, 182 (D.D.C. 1979).

<sup>95</sup> Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 151-55 (1980).

<sup>96</sup> Forsham v. Harris, 445 U.S. at 182-86 (data generated and held by federal grantee); Rush Franklin Publishing, Inc. v. NASA, slip op. at 9-10 (mailing list generated and held by federal contractor); Conservation Law Found. v. Department of the Air Force, No. 85-4377, slip op. at 8 (D. Mass. June 6, 1986) (computer program generated and held by federal contractor); cf. United States v. Napper, 887 F.2d 1528, 1530 (11th Cir. 1989) (FBI en-

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## EXEMPTION 1

Columbia has held, in the first such decision, that under some circumstances a FOIA claim may not be extinguished by the death of a requester.<sup>97</sup>

## EXEMPTION 1

Exemption 1 of the FOIA protects from disclosure national security information concerning the national defense or foreign policy, provided that it has been properly classified in accordance with the substantive and procedural requirements of an executive order.<sup>1</sup> The applicable executive order currently in effect is Executive Order No. 12,356,<sup>2</sup> which replaced predecessor Executive Order No. 12,065 on August 1, 1982.

It should be noted, however, that earlier this year President Clinton established an interagency task force to draft a proposed executive order on national security information to supersede Executive Order No. 12,356.<sup>3</sup> The President has directed this task force to submit its draft to him through the National Security Council staff by November 30, 1993, for formal coordination.<sup>4</sup> The issuance of a new executive order, of course, will have a significant impact upon the implementation of Exemption 1 in the future. Meanwhile, Exemption 1's proper application continues to be governed by the provisions of Executive

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<sup>96</sup>(...continued)

titled to return of documents loaned to city law enforcement officials, notwithstanding fact that copies of some documents had been disclosed) (non-FOIA case). But see also Cal-Almond, Inc. v. United States Dep't of Agric., No. 89-574, slip op. at 3-4 (E.D. Cal. Mar. 17, 1993) (agency ordered to reacquire records which were returned mistakenly to submitter upon closing of administrative appeal).

<sup>97</sup> D'Aleo v. Department of the Navy, No. 89-2347, slip op. at 3 (D.D.C. Mar. 21, 1991) (allowing decedent's executrix to be substituted as plaintiff). But see Hayles v. United States Dep't of Justice, No. H-79-1599, slip op. at 3 (S.D. Tex. Nov. 2, 1982) (case dismissed upon death of plaintiff where no timely motion for substitution filed).

<sup>1</sup> 5 U.S.C. § 552(b)(1) (1988).

<sup>2</sup> 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 note (1988); see also FOIA Update, June 1982, at 6-7.

<sup>3</sup> See Presidential Review Directive 29 (Apr. 26, 1993) (stating that purpose of effort to review present classification and safeguarding systems is "to ensure that they are in line with the reality of the current, rather than the past, threat potential," given end of Cold War).

<sup>4</sup> Id. at 1-2 (matters to be addressed in review include identifying steps that can be taken "to avoid excessive classification[,] . . . to declassify information as quickly as possible . . . [and] to declassify . . . the large amounts of classified information that currently exist in Government archives").

## EXEMPTION 1

Order No. 12,356.<sup>5</sup>

In order to appreciate the evolution of Exemption 1, it is necessary to review briefly the early decisions construing it and its legislative history. In 1973, the Supreme Court in EPA v. Mink<sup>6</sup> held that records classified under proper procedures were exempt from disclosure per se, without any further judicial review, thereby obviating the need for in camera review of information withheld under this exemption.<sup>7</sup> Responding in large part to the thrust of that decision, Congress amended the FOIA in 1974 to provide expressly for de novo review by the courts and for in camera review of documents, including classified documents, where appropriate.<sup>8</sup> In so doing, Congress apparently sought to ensure that national security records are properly classified by agencies and that reviewing courts remain cognizant of their authority to verify the correctness of agency classification determinations.<sup>9</sup>

### Standard of Review

Numerous litigants thereafter challenged the sufficiency of agency affidavits in Exemption 1 cases, requesting in camera review by the courts and hoping to obtain disclosure of challenged documents. Nevertheless, courts initially upheld agency classification decisions in reliance upon agency affidavits, as a matter of routine, in the absence of evidence of bad faith on the part of an agency.<sup>10</sup> In 1978, however, the Court of Appeals for the District of Columbia Circuit departed somewhat from such routine reliance on agency affidavits, prescribing in camera review to facilitate full de novo determinations of Exemption 1 claims, even where there was no showing of bad faith on the part of the agency.<sup>11</sup> This decision nevertheless recognized that the courts should "first 'accord substantial weight to an agency's affidavit concerning the details of the

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<sup>5</sup> See, e.g., Bonner v. United States Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (judicial review of agency withholdings "evaluated" as of time of agency's determination, not time of judicial proceedings); King v. United States Dep't of Justice, 830 F.2d 210, 215-17 (D.C. Cir. 1987) (judicial assessment of Exemption 1 excisions is based upon executive order in effect at time "agency's ultimate classification decision . . . actually made"); Lesar v. United States Dep't of Justice, 636 F.2d 472, 480 (D.C. Cir. 1980) (same).

<sup>6</sup> 410 U.S. 73 (1973).

<sup>7</sup> Id. at 84.

<sup>8</sup> See 5 U.S.C. § 552(a)(4)(B).

<sup>9</sup> See H.R. Rep. No. 876, 93d Cong., 2d Sess. 7-8 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6272-73, and in House Comm. on Gov't Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts and Other Documents 121, 127-28 (1975).

<sup>10</sup> See, e.g., Weissman v. CIA, 565 F.2d 692, 698 (D.C. Cir. 1977).

<sup>11</sup> Ray v. Turner, 587 F.2d 1187, 1194-95 (D.C. Cir. 1978).

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classified status of the disputed record."<sup>12</sup>

The D.C. Circuit further refined the appropriate standard for judicial review of national security claims under Exemption 1 (or under Exemption 3, in conjunction with certain national security protection statutes), finding that summary judgment is entirely proper if an agency's affidavits are reasonably specific and there is no evidence of bad faith.<sup>13</sup> Rather than conduct a detailed inquiry, the court deferred to the expert opinion of the agency, noting that judges "lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case."<sup>14</sup> This review standard has been reaffirmed by the D.C. Circuit on a number of occasions,<sup>15</sup> and it has been

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<sup>12</sup> *Id.* at 1194 (quoting legislative history).

<sup>13</sup> Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980); see also Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992) (Exemption 3); cf. Center for Nat'l Sec. Studies v. Office of Indep. Counsel, No. 91-1691, slip op. at 3-4 (D.D.C. Mar. 2, 1993) (discovery denied in FOIA lawsuit involving Exemption 1 because affidavits "relatively detailed, . . . nonconclusory and submitted in good faith"). But see Wiener v. FBI, 943 F.2d 972, 978-79 (9th Cir. 1991) (rejecting as inadequate agency justifications contained in coded Vaughn affidavits, based upon view that they consist of "boilerplate" explanations not "tailored" to particular information being withheld pursuant to Exemption 1), *cert. denied*, 112 S. Ct. 3013 (1992); Oglesby v. United States Dep't of the Army, 920 F.2d 57, 66 n.12 (D.C. Cir. 1990) (noting degree of specificity required in public Vaughn affidavit in Exemption 1 case, especially with regard to agency's obligation to segregate and release nonexempt material); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (ordering new Vaughn affidavits for all disputed documents, finding that to rule on "a few" sufficient affidavits would be "waste of time" and "unnecessary splitting of issues"), *subsequent decision*, No. C89-1843, slip op. at 22-23 (N.D. Cal. June 4, 1993) (upholding Exemption 1 with holdings for most of documents at issue given more detailed affidavits, but ordering in camera inspection and additional affidavits for several remaining documents because excisions on them were still inadequately justified by agency).

<sup>14</sup> 629 F.2d at 148; see also Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981) (emphasizing deference due agency's classification judgment).

<sup>15</sup> See, e.g., Krikorian v. Department of State, 984 F.2d 461, 464 (D.C. Cir. 1993); King v. United States Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987) ("the court owes substantial weight to detailed agency explanations in the national security context"); Goldberg v. United States Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 904 (1988); see also Steinberg v. United States Dep't of Justice, 801 F. Supp. 800, 802-03 (D.D.C. 1992) (rejecting plaintiff's attack that coded Vaughn Index constituted inadequate "boilerplate," especially given "nature of underlying materials" which purportedly concern assassination of prime minister of friendly country) (appeal (continued...))

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adopted by courts in other circuits as well.<sup>16</sup>

Indeed, if an agency affidavit passes muster under this standard, in camera review may be inappropriate because substantial weight must be accorded that affidavit.<sup>17</sup> In one case, the Court of Appeals for the Seventh Circuit ana-

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<sup>15</sup>(...continued)

pending); National Sec. Archive v. Office of Indep. Counsel, No. 89-2308, slip op. at 6-7 (D.D.C. Aug. 28, 1992) (finding adequate Vaughn Index which includes copies of redacted pages and "topic codes" explaining FOIA exemptions applied to each deletion when "read in conjunction with agency declarations"); Washington Post v. DOD, 766 F. Supp. 1, 6-7 (D.D.C. 1991) (judicial review of agency's classification decisions should be "quite deferential"; national security threat of disclosure of working files of Iranian hostage rescue attempt "evident even to a judicial eye"); National Sec. Archive v. FBI, 759 F. Supp. 872, 875 (D.D.C. 1991) (government's burden to demonstrate proper withholding of material "relatively light" in Exemption 1 context because court is required to "accord substantial weight to determination of [agency] officials"); cf. Department of the Navy v. Egan, 484 U.S. 518, 529-30 (1988) (deference to agency expertise in granting of security clearances) (non-FOIA case); Mangino v. Department of the Army, No. 91-2318, slip op. at 17-18 (D. Kan. Mar. 30, 1993) (similar deference regarding revocation of security clearance) (non-FOIA case).

<sup>16</sup> See, e.g., McDonnell v. United States, No. 91-5916, slip op. at 23 (3d Cir. Sept. 21, 1993) (summary judgment appropriate where agency's affidavits reasonably specific and not controverted by contrary evidence or showing of bad faith) (to be published); Maynard v. CIA, 986 F.2d 547, 555-56 & n.7 (1st Cir. 1993) ("substantial deference" so long as withheld information logically falls into exemption category cited and there exists no evidence of agency "bad faith"); Bowers v. United States Dep't of Justice, 930 F.2d 350, 357 (4th Cir.) ("What fact or bit of information may compromise national security is best left to the intelligence experts."), cert. denied, 112 S. Ct. 308 (1991); Patterson v. FBI, 893 F.2d 595, 601 (3d Cir. 1990) ("[C]ourts are expected to accord 'substantial weight' to the agency's affidavit."), cert. denied, 498 U.S. 812 (1990); see also Jones v. FBI, No. C77-1001, slip op. at 8-9 (N.D. Ohio Aug. 12, 1992) (rejecting plaintiff's argument that agency must demonstrate that national security source actually provided classified information because "to do so would violate . . . principle of affording substantial weight to . . . agency's expert opinion") (appeal pending); cf. Hunt v. CIA, 981 F.2d at 1119 (similar deference in Exemption 3 case involving national security); Knight v. CIA, 872 F.2d 660, 664 (5th Cir. 1989) (same), cert. denied, 494 U.S. 1004 (1990).

<sup>17</sup> See, e.g., Doherty v. United States Dep't of Justice, 775 F.2d 49, 53 (2d Cir. 1985) ("the court should restrain its discretion to order in camera review"); Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979) ("When the agency meets its burden by means of affidavits, in camera review is neither necessary nor appropriate."), cert. denied, 446 U.S. 937 (1980); Carney v. CIA, No. 88-602, slip op. at 48-51 (C.D. Cal. Feb. 28, 1991) (magistrate's recommendation) (in camera review "not required, necessary, or appropriate" because agency's affidavits sufficient and "entitled to substantial deference"), adopted (C.D. (continued...))



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lyzed the legislative history of the 1974 FOIA Amendments and went so far as to conclude that "Congress did not intend that the courts would make a true de novo review of classified documents, that is, a fresh determination of the legitimacy of each classified document."<sup>18</sup> It is also noteworthy that the only Exemption 1 FOIA decision to find agency "bad faith,"<sup>19</sup> which initially held that certain CIA procedural shortcomings amounted to "bad faith" on the part of the agency, was subsequently vacated on panel rehearing.<sup>20</sup>

### Deference to Agency Expertise

While the standard of judicial review is often expressed in different ways, courts have generally deferred to agency expertise in national security cases.<sup>21</sup>

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<sup>17</sup>(...continued)

Cal. Apr. 26, 1991); King v. United States Dep't of Justice, 586 F. Supp. 286, 290 (D.D.C. 1983) (in camera review last resort), aff'd in part & rev'd in part on other grounds, 830 F.2d 210 (D.C. Cir. 1987); cf. Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992) (district court did not abuse its discretion by refusing to review documents in camera--despite small number--because agency's affidavits found sufficiently specific to meet required standards for proper withholding). But see, e.g., Patterson v. FBI, 893 F.2d at 599 (in camera review of two documents appropriate where agency description of records was insufficient to permit meaningful review and to verify good faith of agency in conducting its investigation); Allen v. CIA, 636 F.2d 1287, 1291 (D.C. Cir. 1980) (conclusory affidavit by agency requires remand to district court for in camera inspection of 15-page document); Moore v. FBI, No. 83-1541, slip op. at 7 (D.D.C. Mar. 9, 1984) (in camera review particularly appropriate where only small volume of documents involved and government makes proffer), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite); cf. Wiener v. FBI, 943 F.2d at 979 & n.9 (in camera review by district court cannot "replace" requirement for sufficient Vaughn Index and can only "supplement" agency's justifications contained in affidavits); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. at 1301 (applying Wiener standard).

<sup>18</sup> Stein v. Department of Justice, 662 F.2d 1245, 1253 (7th Cir. 1981).

<sup>19</sup> McGehee v. CIA, 697 F.2d 1095, 1113 (D.C. Cir. 1983).

<sup>20</sup> McGehee v. CIA, 711 F.2d 1076, 1077 (D.C. Cir. 1983); see also Washington Post Co. v. DOD, No. 84-2949, slip op. at 9 (D.D.C. Feb. 25, 1987) (addition of second classification category at time of litigation "does not create an inference of 'bad faith' concerning the processing of plaintiff's request or otherwise implicating the affiant's credibility"); cf. Gilmore v. NSA, No. C92-3646, slip op. at 21-22 (N.D. Cal. Apr. 30, 1993) (fact that agency subsequently released some material initially withheld pursuant to Exemption 1 not any indication of "bad faith"); Center for Nat'l Sec. Studies v. Office of Indep. Counsel, slip op. at 5-6 (same) (discovery denied in FOIA litigation).

<sup>21</sup> See, e.g., Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1993); Bowers v. United States Dep't of Justice, 930 F.2d 350, 357 (4th Cir.), cert. denied, 112 S. Ct. 308 (1991); Doherty v. United States Dep't of Justice, 775 F.2d 49, (continued...)

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Accordingly, courts are usually reluctant to substitute their judgment in place of the agency's "unique insights" in the areas of national defense and foreign relations.<sup>22</sup> Courts have demonstrated this general deference to agency expertise by according little or no weight to opinions of persons other than the agency classification authority when reviewing the propriety of agency classification.<sup>23</sup>

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<sup>21</sup>(...continued)

52 (2d Cir. 1985); Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984); Taylor v. Department of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (classification affidavits entitled to "the utmost deference") (reversing district court disclosure order).

<sup>22</sup> See, e.g., Miller v. United States Dep't of State, 779 F.2d 1378, 1387 (8th Cir. 1985); see also Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993) (court "not in a position to 'second-guess'" agency's determination regarding need for continued classification of material); Krikorian v. Department of State, 984 F.2d 461, 464-65 (D.C. Cir. 1993) (acknowledging agency's "unique insights" in areas of national defense and foreign relations); Holland v. CIA, No. 91-1233, slip op. at 15-16 (D.D.C. Aug. 31, 1992) (deferring to judgment of agency's designated classification officer as to possible harm; rejecting plaintiff's claim that she lacks subject-matter expertise); Willens v. NSC, 726 F. Supp. 325, 326-27 (D.D.C. 1989) (court cannot second-guess agency's national security determinations where they are "credible and have a rational basis"); Washington Post Co. v. DOD, No. 84-2949, slip op. at 13-14 (D.D.C. Feb. 25, 1987) (court need not agree with government's evaluation of harm; court's task is to determine whether agency judgment is "plausible, reasonable, and exercised in good faith"). But see also King v. United States Dep't of Justice, 830 F.2d 210, 226 (D.C. Cir. 1987) (where executive order presumed declassification of information over 20 years old and agency merely indicated procedural compliance with order, trial court erred in deferring to agency's judgment that information more than 35 years old remained classified); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 561 (S.D.N.Y. 1989) (such deference does not give agency "carte blanche" to withhold responsive documents without "valid and thorough affidavit"), subsequent decision, No. 87-Civ-1115, slip op. at 1-2 (S.D.N.Y. June 7, 1990) (after in camera review of certain documents and classified CIA Vaughn affidavit, Exemption 1 withholdings upheld).

<sup>23</sup> See, e.g., Van Atta v. Defense Intelligence Agency, No. 87-1508, slip op. at 2-4 (D.D.C. July 6, 1988) (rejecting opinion of requester who claimed that willingness of foreign diplomat to discuss issue indicated no expectation of confidentiality); Washington Post Co. v. DOD, slip op. at 14 (rejecting opinion of U.S. Senator who read document in official capacity as member of Committee on Foreign Relations); cf. Lawyers Alliance for Nuclear Arms Control v. Department of Energy, No. 88-CV-7635, slip op. at 1-5 (E.D. Pa. Dec. 18, 1991) (upholding Exemption 1 claim for Joint Verification Agreement records where requester provided no "admissible evidence" that officials of Soviet Union consented to release of requested nuclear test results); Alveska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 315 (D.C. Cir. 1988) (no "special deference to agency beyond Exemption 1 context"). But cf. Washington Post v. DOD,

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Persons whose opinions have been rejected by the courts in this context include a former ambassador who originated some of the records at issue,<sup>24</sup> a retired admiral,<sup>25</sup> a former CIA agent<sup>26</sup> and a retired CIA staff historian.<sup>27</sup>

### In Camera Submissions

There are numerous instances in which courts have permitted agencies to submit explanatory in camera affidavits in order to protect certain national security information which could not be discussed in a public affidavit.<sup>28</sup> It is entirely clear, though, that agencies taking such a special step are under a duty to "create as complete a public record as is possible" before so doing.<sup>29</sup>

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<sup>23</sup>(...continued)

766 F. Supp. 1, 13-14 (D.D.C. 1991) ("non-official releases" contained in books by participants involved in Iranian hostage rescue attempt--including ground assault commander and former President Carter--have "good deal of reliability" and require government to explain "how official disclosure" of code names "at this time would damage national security").

<sup>24</sup> Rush v. Department of State, No. 88-8245, slip op. at 17-18 (S.D. Fla. Sept. 12, 1990) (magistrate's recommendation), adopted, 748 F. Supp. 1548, 1554 (S.D. Fla. 1990); cf. Goldberg v. United States Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987) (classification officer's determination accepted even though more than 100 ambassadors did not initially classify information), cert. denied, 485 U.S. 904 (1988).

<sup>25</sup> Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989).

<sup>26</sup> Gardels v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982); Liechty v. CIA, No. 79-2064, slip op. at 6 (D.D.C. Apr. 16, 1981).

<sup>27</sup> Pfeiffer v. CIA, 721 F. Supp. 337, 340-41 (D.D.C. 1989); accord Pfeiffer v. CIA, No. 91-736, slip op. at 10 n.2 (D.D.C. Sept. 28, 1992) (non-FOIA case).

<sup>28</sup> See, e.g., Patterson v. FBI, 893 F.2d 595, 599-600 (3d Cir. 1990), cert. denied, 498 U.S. 812 (1990); Simmons v. United States Dep't of Justice, 796 F.2d 709, 711 (4th Cir. 1986); Ingle v. Department of Justice, 698 F.2d 259, 264 (6th Cir. 1983) (in camera review should be secondary to testimony or affidavits); Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982); Stein v. Department of Justice, 662 F.2d 1245, 1255-56 (7th Cir. 1981); Wilson v. Department of Justice, No. 87-2415, slip op. at 3 (D.D.C. June 30, 1993) (agency must submit in camera affidavit to justify Exemption 1 withholdings as to certain documents and describe "with greater specificity . . . reason[s] for their nondisclosure").

<sup>29</sup> Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976); accord Patterson v. FBI, 893 F.2d at 600; Simmons v. United States Dep't of Justice, 796 F.2d at 710; National Sec. Archive v. Office of Indep. Counsel, No. 89-2308, slip op. at 4-5 (D.D.C. Aug. 28, 1992) (applying Phillippi standards, refusing (continued...))

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In this regard, it is reasonably well settled that counsel for plaintiffs are not entitled to participate in such in camera proceedings.<sup>30</sup> Several years ago, however, one court took the unprecedented step of appointing a special master to review and categorize a large volume of classified records.<sup>31</sup> In other instances involving large numbers of records, courts have on occasion ordered agencies to submit samples of the documents at issue for in camera review.<sup>32</sup>

In a decision which highlights some of the difficulties of Exemption 1 liti-

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<sup>29</sup>(...continued)

to review in camera affidavits until agency "has stated publicly 'in as much detail as possible' . . . reasons for nondisclosure"); Green v. United States Dep't of State, No. 85-504, slip op. at 17-18 (D.D.C. Apr. 17, 1990) (classification of documents upheld after reviewing in camera submissions in conjunction with public record); Moessmer v. CIA, No. 86-948, slip op. at 9-11 (E.D. Mo. Feb. 17, 1987) (in camera review appropriate when record contains contradictory evidence), aff'd, 871 F.2d 1092 (6th Cir. 1988) (table cite). But see Public Citizen v. Department of State, No. 91-746, slip op. at 5-6 (D.D.C. Aug. 26, 1991) (ordering in camera review of records upon basis that public testimony of ambassador may have "waived" Exemption 1 protection).

<sup>30</sup> See Salisbury v. United States, 690 F.2d at 973 n.3; Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982); Hayden v. NSA/Cent. Sec. Serv., 608 F.2d 1381, 1385-86 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); Martin v. United States Dep't of Justice, No. 83-2674, slip op. at 1 (W.D. Pa. June 5, 1986) (agency required to release unclassified portions of transcript of in camera testimony), aff'd, 800 F.2d 1135 (3d Cir. 1986) (table cite); see also Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983) (plaintiff's counsel not permitted to participate in in camera review of documents arguably covered by state secrets privilege); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (no reversible error where court not only reviewed affidavit and documents in camera, but also received authenticating testimony ex parte); cf. Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1470-71 & n.2 (D.C. Cir. 1983) (no participation by plaintiff's counsel permitted even where information withheld was personal privacy information). But cf. Lederle Lab. v. HHS, No. 88-249, slip op. at 2-3 (D.D.C. May 2, 1988) (restrictive protective order granted in Exemption 4 case permitting counsel for requester to review contested business information).

<sup>31</sup> See Washington Post Co. v. DOD, No. 84-3400, slip op. at 2 (D.D.C. Jan. 15, 1988), petition for mandamus denied sub nom. In re DOD, 848 F.2d 232 (D.C. Cir. 1988); cf. Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1301 (N.D. Cal. 1992) (court "will not hesitate" to appoint special master to assist in in camera review of disputed documents if agency fails to submit adequate Vaughn affidavits).

<sup>32</sup> See, e.g., Wilson v. CIA, No. 89-3356, slip op. at 5-6 (D.D.C. Oct. 15, 1991) (ordering in camera submission of "sample" of 50 documents because "neither necessary nor practicable" for court to review all 1000 processed records).

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gation practice, the Court of Appeals for the Fourth Circuit issued a writ of mandamus which required that court personnel who would have access to classified materials submitted in camera in an Exemption 1 case obtain security clearances prior to the submission of any such materials to the court.<sup>33</sup> On remand, the district court judge reviewed the disputed documents entirely on his own.<sup>34</sup> Consistent with the special precautions taken by courts in Exemption 1 cases, the government also has been ordered to provide a court reporter with the requisite security clearances to transcribe in camera proceedings, in order "to establish a complete record for meaningful appellate review."<sup>35</sup>

Agencies have in other cases been compelled to submit in camera affidavits where disclosure in a public affidavit would vitiate the very protection afforded by Exemption 1.<sup>36</sup> Such a procedure is sometimes employed where even the confirmation or denial of the existence of records at issue would pose

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<sup>33</sup> In re United States Dep't of Justice, No. 87-1205, slip op. at 4-5 (4th Cir. Apr. 7, 1988).

<sup>34</sup> See Bowers v. United States Dep't of Justice, No. C-C-86-336, slip op. at 1 (W.D.N.C. Mar. 9, 1990).

<sup>35</sup> Willens v. NSC, 720 F. Supp. 15, 16 (D.D.C. 1989); cf. Physicians for Social Responsibility, Inc. v. United States Dep't of Justice, No. 85-169, slip op. at 3-4 (D.D.C. Aug. 25, 1985) (transcript of in camera proceedings--from which plaintiff's counsel excluded--placed under seal). But cf. Pollard v. FBI, 705 F.2d at 1154 (no reversible error where no transcript made of ex parte testimony of FBI agent who merely "authenticated and described" documents at issue).

<sup>36</sup> See, e.g., Green v. United States Dep't of State, slip op. at 17-18 (public Vaughn affidavit containing additional information could "well have the effect of prematurely letting the cat out of the bag"); cf. Maynard v. CIA, 986 F.2d 547, 557 (1st Cir. 1993) ("[A] more detailed affidavit could have revealed the very intelligence sources and methods the CIA wished to keep secret."); Gilmore v. NSA, No. C92-3646, slip op. at 14-15 (N.D. Cal. Apr. 30, 1993) (agency has provided as much information as possible in public affidavit without "thwarting" purpose of Exemption 1); Center for Nat'l Sec. Studies v. Office of Indep. Counsel, No. 91-1691, slip op. at 4 (D.D.C. Mar. 2, 1993) ("In the national security context, the release of detailed information through discovery may render the FOIA exemption meaningless and compromise intelligence sources and methods."); Varelli v. FBI, No. 88-1865, slip op. at 6 (D.D.C. Oct. 4, 1991) ("[T]oo much detail [in public affidavit] defeats the claim of the exemption in the national security area. Release of too much information would result in the exact harm sought to be avoided by [its] assertion."); Krikorian v. Department of State, No. 88-3419, slip op. at 6-7 (D.D.C. Dec. 19, 1990) (agency's public affidavits sufficient because requiring more detailed descriptions of substance of information would give foreign governments and confidential intelligence sources "reason to pause" before offering advice or useful information to agency officials in future), aff'd in pertinent part, 984 F.2d 461, 464-65 (D.C. Cir. 1993).

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a threat to the national security.<sup>37</sup> (For a further discussion of in camera inspection, see Litigation Considerations, below.)

### Rejection of Classification Claims

Prior to 1986, no appellate court had ever upheld, on the substantive merits of the case, a decision to reject an agency's classification claim. In 1980, the Court of Appeals for the District of Columbia Circuit let stand, but on entirely procedural grounds, a district court determination that the CIA's affidavits were general and conclusory and that its Exemption 1 claims had to be rejected as "overly broad."<sup>38</sup> Moreover, that portion of the D.C. Circuit's decision was subsequently vacated by the Supreme Court.<sup>39</sup> Several years later, in an unprecedented and exceptionally complex case, a district court ordered the disclosure of classified records belatedly determined by it to be within the scope of the request and therefore not addressed in the agency's classification affidavits.<sup>40</sup> The government never had the opportunity to obtain appellate review of the merits of this adverse decision because the records were disclosed after stays pending appeal were denied, successively, by the district court, the Court of Appeals for the Ninth Circuit, and even by the Supreme Court.<sup>41</sup> In addition, the district court ordered the disclosure of certain other segments of classified information because it was "convinced [that] disclosure

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<sup>37</sup> Phillippi v. CIA, 546 F.2d at 1013 (request for documents pertaining to Glomar Explorer submarine-retrieval ship; consequently, "neither confirm nor deny" response now known as "Glomar" denial or "Glomarization"); see, e.g., Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984) (request for any record reflecting any attempt by western countries to overthrow Albanian government); Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (request for any record revealing any covert CIA connection with University of California); Peterzell v. CIA, No. 85-2685, slip op. at 2 (D.D.C. July 11, 1986) (request for records describing CIA covert paramilitary operations in Nicaragua); Marrera v. United States Dep't of Justice, 622 F. Supp. 51, 53-54 (D.D.C. 1985) (request for any record which would reveal whether requester was target of surveillance pursuant to Foreign Intelligence Surveillance Act); Kapsa v. CIA, No. C-2-78-1062, slip op. at 7-8 (S.D. Ohio Mar. 6, 1985) (request for any record revealing any covert CIA connection with Ohio State University); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 26 (Dec. 1987); FOIA Update, Spring 1983, at 5.

<sup>38</sup> Holy Spirit Ass'n v. CIA, 636 F.2d 838, 845 (D.C. Cir. 1980).

<sup>39</sup> See CIA v. Holy Spirit Ass'n, 455 U.S. 997 (1982); see also FOIA Update, March 1982, at 5.

<sup>40</sup> Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 16 (N.D. Cal. Mar. 27, 1985); see also Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1517-18, 1530-31 (N.D. Cal. 1984).

<sup>41</sup> See Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 4-6 (N.D. Cal. June 14, 1985), stay denied, No. 85-1918 (9th Cir. July 18, 1985), stay denied, No. A-84 (U.S. July 31, 1985) (Rehnquist, Circuit Justice) (undocketed order).

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of this information poses no threat to national security."<sup>42</sup> The district court did, however, grant a stay of this aspect of its disclosure order so the government could take an appeal.<sup>43</sup> Ultimately, the case was settled with the government being permitted to withhold this classified information.

In 1986, the Court of Appeals for the Second Circuit upheld a district court disclosure order in a case in which the district court found that the affidavit submitted by the FBI inadequately described the withheld documents and was unconvincing as to any potential harm which would result from disclosure.<sup>44</sup> This finding, coupled with in camera inspection of the documents by the district court, led the court of appeals to conclude that "it would be inappropriate . . . to give more deference to the FBI's characterization of the information than did the trial court."<sup>45</sup> The case was subsequently settled, however, and the plaintiff withdrew his request for the classified records ordered disclosed in exchange for the government's agreement not to seek to vacate the Second Circuit's opinion in the Supreme Court. The precedential value of the Second Circuit's decision is therefore questionable in light of the extraordinary procedural and factual nature of the case.

Also of note in this regard is a district court decision in which it required in camera affidavits on all records, most of which were classified, "not because the agencies' good faith had been controverted, but 'in order that the Court may be able to monitor the agencies' determinations'"; ultimately, the district court did order some classified information disclosed.<sup>46</sup> However, the D.C. Circuit, on appeal, remanded the case for submission of briefs in light of the Supreme Court's decision in CIA v. Sims.<sup>47</sup> On remand, the district court found most of the information to be protected under Sims, but it affirmed its disclosure order with regard to some of the information that the CIA had sought to protect under Exemptions 1 and 3.<sup>48</sup> The D.C. Circuit subsequently reversed that part of the district court's order on remand that still required disclosure of certain CIA information, though it rested its decision upon Exemption 3

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<sup>42</sup> Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 8 (N.D. Cal. Mar. 27, 1985).

<sup>43</sup> Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 6 (N.D. Cal. June 14, 1985).

<sup>44</sup> Donovan v. FBI, 806 F.2d 55 (2d Cir. 1986); see also Donovan v. FBI, 625 F. Supp. 808, 811 (S.D.N.Y. 1986).

<sup>45</sup> 806 F.2d at 60.

<sup>46</sup> Fitzgibbon v. CIA, 578 F. Supp. 704, 709 (D.D.C. 1983), motion for reconsideration granted in part, No. 79-956 (D.D.C. July 5, 1984).

<sup>47</sup> 471 U.S. 159 (1985); see Fitzgibbon v. CIA, No. 84-5632 (D.C. Cir. Mar. 13, 1986).

<sup>48</sup> Fitzgibbon v. CIA, No. 79-956, slip op. at 14-15, 17-18 (D.D.C. May 19, 1989).

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grounds alone.<sup>49</sup> It concluded that "whatever merits" there may have been to support disclosure of the information at issue in the case had been "vaporized by the unequivocal sweep of the Supreme Court's decision in Sims."<sup>50</sup>

Two significant D.C. Circuit decisions, each of which reversed a district court disclosure order, strongly reaffirmed the deference that is due an agency's classification judgment. In the first, the D.C. Circuit overturned a lower court conclusion that the existence of information in the public domain similar to the information at issue warranted the disclosure of that classified information.<sup>51</sup> Emphasizing that the least "bit" of classified information deserves protection, it observed that the "district court's finding . . . reveals a basic misunderstanding of the information withheld," and that the "district court did not give the required 'substantial weight' to the [agency's] uncontradicted affidavits."<sup>52</sup>

Similarly, in the second case, the D.C. Circuit vacated a district court determination that public statements by senior executive and legislative branch officials constituted sufficient official acknowledgment of "covert action" by the government against Nicaragua to warrant release of the sensitive documents at issue, specifically chastised the lower court for "refusing to consider in camera the confidential declaration and confidential memorandum of law offered by the government," and remanded the case for a more careful consideration of the government's classification judgment.<sup>53</sup> On remand, the district court found that the "Government's general acknowledgment of covert activities . . . is insufficient to require release" of its records.<sup>54</sup>

In a more recent district court case, the full Supreme Court has taken the extraordinary step of staying a district court disclosure order of classified information pending a full review of the decision by the Ninth Circuit.<sup>55</sup> Rejecting

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<sup>49</sup> Fitzgibbon v. CIA, 911 F.2d 755, 757, 760, 764 (D.C. Cir. 1990).

<sup>50</sup> Id. at 760; see also Siminoski v. FBI, No. 83-6499, slip op. at 14-18 (C.D. Cal. Jan. 16, 1990) (rejecting magistrate's recommendation to disclose classified information).

<sup>51</sup> Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985).

<sup>52</sup> Id. at 607 & n.3; see also Bowers v. United States Dep't of Justice, 930 F.2d 350, 352, 354-55 (4th Cir.) (reversing district court order to disclose classified information because lower court was "clearly erroneous" in not applying proper standards in review of records and in not giving any weight to detailed explanations of FBI as to why undisclosed information in its counterintelligence files should be withheld), cert. denied, 112 S. Ct. 308 (1991).

<sup>53</sup> Peterzell v. Department of State, No. 84-5805, slip op. at 2 (D.C. Cir. Apr. 2, 1985).

<sup>54</sup> Peterzell v. Department of State, No. 82-2853, slip op. at 3 (D.D.C. Sept. 20, 1985).

<sup>55</sup> Rosenfeld v. United States Dep't of Justice, 761 F. Supp. 1440, 1451 (continued...)



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an FBI Exemption 1 claim, the district court judge ignored the recommendation of a magistrate who had concluded that the information was properly classified.<sup>56</sup> In so ruling, the district court grounded its decision on the supposition that the information involved was "likely to have been public knowledge."<sup>57</sup>

### "Public Domain" Information

Several courts also have had occasion to consider whether agencies have a duty to disclose classified information which has purportedly found its way into the public domain. In this regard, it has been held that, in asserting a claim of prior public disclosure, a FOIA plaintiff bears "the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld."<sup>58</sup> Accordingly, Exemption 1 claims should not be undermined by mere allegations that classified information has been leaked to the press or otherwise made available to members of the public. Courts have carefully recognized the distinction between a bona fide declassification action or official release and unsubstantiated speculation lacking official confirmation,

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<sup>55</sup>(...continued)

(N.D. Cal. 1991), emergency stay denied on jurisdictional grounds, No. 91-15854 (9th Cir. June 12, 1991), stay pending appeal granted, 111 S. Ct. 2846 (1991); see also FOIA Update, Summer 1991, at 1-2.

<sup>56</sup> 761 F. Supp. at 1451.

<sup>57</sup> Id.

<sup>58</sup> Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983); see Holland v. CIA, No. 91-1233, slip op. at 13 (D.D.C. Aug. 31, 1992) (plaintiff failed to overcome "number of hurdles" involved in meeting initial burden of proving official disclosure of information at issue); Public Citizen v. Department of State, 782 F. Supp. 144, 145-46 (D.D.C. 1992) ("[F]act [plaintiff has shown] that some of the information [contained in documents] was revealed does not negate the confidentiality of the documents as they exist."), reconsideration & summary judgment granted, 787 F. Supp. 12 (D.D.C. 1992) (appeal pending); Pfeiffer v. CIA, 721 F. Supp. 337, 342 (D.D.C. 1989) (plaintiff must do more than simply identify "information that happens to find its way into a published account" to meet this burden); cf. Davis v. United States Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992) ("[P]arty who asserts . . . material publicly available carries the burden of production on that issue . . . because the task of proving the negative--that the information has not been revealed--might require the government to undertake an exhaustive, potentially limitless search.") (Exemptions 3, 7(C) and 7(D)); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) ("It is far more efficient, and . . . fairer, to place the burden of production on the party who claims that the information is publicly available.") (reverse FOIA suit). But see Washington Post v. DOD, 766 F. Supp. 1, 12-13 (D.D.C. 1991) (agency has ultimate burden of proof when comparing publicly disclosed information with information being withheld, determining whether information is identical and, if not, determining whether release of slightly different information would harm national security).

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holding that classified information is not considered to be in the public domain unless it has been the subject of an official disclosure.<sup>59</sup>

In a 1990 decision, the Court of Appeals for the District of Columbia Circuit held that for information to be "officially acknowledged" in the context of Exemption 1, it must: (1) be as "specific" as the information previously released; (2) "match" the information previously disclosed; and (3) have been made public through an "official and documented" disclosure.<sup>60</sup> In applying

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<sup>59</sup> See, e.g., Hoch v. CIA, No. 88-5422, slip op. at 2 (D.C. Cir. July 20, 1990) (Without official confirmation, "clear precedent establishes that courts will not compel [an agency] to disclose information even though it has been the subject of media reports and speculation."); Carney v. CIA, No. 88-602, slip op. at 61-62 (C.D. Cal. Feb. 28, 1991) (magistrate's recommendation) (successful "prior disclosure" argument must be based upon factual allegations that agency "officially previously disclosed documents that are identical in content to documents [it] continues to exempt from disclosure"; newspaper articles and press conferences not considered "official disclosures"), supplemental report & recommendation (C.D. Cal. Apr. 25, 1991), adopted (C.D. Cal. Apr. 26, 1991); see also Simmons v. United States Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (there had been no "widespread dissemination" of information in question); Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985) (even if withheld data was same as estimate in public domain, not same as knowing NRC's official policy as to "proper level of threat a nuclear facility should guard against"); Afshar v. Department of State, 702 F.2d at 1130-31 (foreign government can ignore "[u]nofficial leaks and public surmise . . . but official acknowledgment may force a government to retaliate"); Steinberg v. United States Dep't of Justice, 801 F. Supp. 800, 802 (D.D.C. 1992) ("Passage of time, media reports and informed or uninformed speculation based on statements by participants cannot be used . . . to undermine [government's] legitimate interest in protecting international security [information]") (appeal pending); Rush v. Department of State, No. 88-8245, slip op. at 19 (S.D. Fla. Sept. 12, 1990) (magistrate's recommendation) (fact that existence of secret negotiations officially acknowledged does not mean that substance of such talks has been officially disclosed by government), adopted, 748 F. Supp. 1548, 1549; 1555 (S.D. Fla. 1990); Van Atta v. Defense Intelligence Agency, No. 87-1508, slip op. at 5-6 (D.D.C. July 6, 1988) (disclosure of information to foreign government during diplomatic negotiations held not "public disclosure"); cf. Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (fact that some information about subject of request may have been made public by other governmental agencies found not to defeat agency's "Glomar" response in Exemption 3 context); Maxwell v. First Nat'l Bank of Md., 143 F.R.D. 590, 597-98 (D. Md. 1992) (published articles "speculating" on possible relationship between CIA and corporation do not constitute official confirmation of such fact) (state secrets privilege). Contra Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (Exemption 1 protection not available where same documents were disclosed by foreign government or where same information was disclosed to press in "off-the-record exchanges").

<sup>60</sup> Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990); see also Afshar (continued...)

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these criteria, the D.C. Circuit reversed the lower court's disclosure order and held that information published in a congressional report did not constitute "official acknowledgment" of the purported location of a CIA station, because the information sought related to an earlier time period than that discussed in the report.<sup>61</sup> In so ruling, it did not address the broader question of whether congressional release of the identical information relating to intelligence sources and methods could ever constitute "official acknowledgment," thus requiring disclosure under the FOIA.<sup>62</sup> However, the D.C. Circuit had previously considered this broader question and had concluded that congressional publications do not constitute "official acknowledgment" for purposes of the FOIA.<sup>63</sup>

In another case, the Court of Appeals for the Second Circuit rejected the argument that a retired admiral's statements constituted an authoritative disclosure by the government.<sup>64</sup> It pointedly stated: "Officials no longer serving with an executive branch department cannot continue to disclose official agency policy, and certainly they cannot establish what is agency policy through speculation, no matter how reasonable it may appear to be."<sup>65</sup> Additionally, the Second Circuit affirmed the decision of the district court in holding that the congressional testimony of high-ranking Navy officials did not constitute official disclosure because it did not concern the specific information being sought.<sup>66</sup>

Indeed, in one case, the court went so far as to hold that 180,000 pages of CIA records pertaining to Guatemala were properly classified despite the fact that the public domain contained significant information and speculation about CIA involvement in the 1954 coup in Guatemala: "CIA clearance of books and

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<sup>60</sup>(...continued)

v. Department of State, 702 F.2d at 1130, 1133-34; Public Citizen v. Department of State, 787 F. Supp. 12, 13 (D.D.C. 1992) (applying Fitzgibbon standards) (appeal pending); Public Citizen v. Department of State, 782 F. Supp. at 146 (same). But see Krikorian v. Department of State, 984 F.2d 461, 467-68 (D.C. Cir. 1993) (remanding to district court to determine whether information excised in one document "officially acknowledged" by comparing publicly available record with record withheld; leaving to district court's discretion whether this can be better accomplished by supplemental agency affidavit or by in camera inspection).

<sup>61</sup> 911 F.2d at 765-66.

<sup>62</sup> Id.

<sup>63</sup> See, e.g., Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (information in Senate report "cannot be equated with disclosure by the agency itself"); Military Audit Project v. Casey, 656 F.2d 724, 744 (D.C. Cir. 1981) (Senate report does not constitute official release of information).

<sup>64</sup> See Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989).

<sup>65</sup> Id. at 422.

<sup>66</sup> Id. at 421.

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articles, books written by former CIA officials, and general discussions in Congressional publications do not constitute official disclosures."<sup>67</sup> In a subsequent case, one court went even further and held that documents were properly classified even though disclosed "involuntarily as a result of [a] tragic accident such as an aborted rescue mission [in Iran], or used in evidence to prosecute espionage."<sup>68</sup>

A recent district court case involved the question of whether the public congressional testimony of the U.S. Ambassador to Iraq had "waived" the agency's ability to invoke Exemption 1 to withhold related records.<sup>69</sup> In the first of two decisions, the court held, after in camera review, that the public testimony had not "waived" Exemption 1 protection as to five of the seven documents at issue, because the "context" of the information in the documents was sufficiently "different" so as to not "negate" their "confidentiality."<sup>70</sup> It ruled, however, that "waiver" had occurred as to the other two documents, and ordered disclosure of the Ambassador's memorandum relating to the published "transcript" of her last meeting with the Iraqi leader prior to the invasion of Kuwait.<sup>71</sup> Upon reconsideration, the court confessed "clear error" and held that "while certain facts contained in the [two remaining] documents were revealed [in the public testimony], the context in which the information appears is significantly different."<sup>72</sup> Accordingly, in applying the "strict" standard for a finding of "waiver" in Exemption 1 cases, it found that the Ambassador's testimony did not constitute an "official acknowledgment" requiring disclosure under the FOIA.<sup>73</sup> (For a further discussion of this issue, see Discretionary Disclosure and Waiver, below.)

A final, rather obvious point--but still one not accepted by some requesters--is that classified information will not be released under the FOIA even to a

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<sup>67</sup> Schlesinger v. CIA, 591 F. Supp. 60, 66 (D.D.C. 1984); accord Pfeiffer v. CIA, 721 F. Supp. at 342; see also Washington Post v. DOD, 766 F. Supp. at 11-12 (no "presumption of reliability" for facts contained in books subject to prepublication review by government agency); cf. McGehee v. Casey, 718 F.2d 1137, 1141 & n.9 (D.C. Cir. 1983) (CIA cannot reasonably bear burden of conducting exhaustive search to prove that particular items of classified information have never been published) (non-FOIA case).

<sup>68</sup> Washington Post Co. v. DOD, No. 84-3400, slip op. at 3 (D.D.C. Sept. 22, 1986).

<sup>69</sup> Public Citizen v. Department of State, 782 F. Supp. at 145.

<sup>70</sup> 782 F. Supp. at 146.

<sup>71</sup> Id. at 146-47.

<sup>72</sup> 787 F. Supp. at 13, 15.

<sup>73</sup> Id. at 15.

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requester of "unquestioned loyalty."<sup>74</sup> In a case decided several years ago, a government employee with a current "Top Secret" security clearance was denied access to classified records pertaining to himself because Exemption 1 protects "information from disclosure based on the nature of the material, not on the nature of the individual requester."<sup>75</sup>

### Executive Order No. 12,356

Until a new executive order on national security information is issued,<sup>76</sup> the course of future litigation of Exemption 1 withholdings will continue to depend upon precedents established under Executive Order No. 12,356.<sup>77</sup> On August 1, 1982, when Executive Order No. 12,356 replaced Executive Order No. 12,065, many government records had already been reviewed and marked pursuant to the superseded executive order. The appropriate executive order to be applied, with accompanying procedural and substantive standards, depends upon when the responsible agency official took the final classification action on the record in question.<sup>78</sup> In early decisions under Executive Order No.

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<sup>74</sup> Levine v. Department of Justice, No. 83-1685, slip op. at 6 (D.D.C. Mar. 30, 1984) (regardless of requester's loyalty, release of documents to him could "open the door to secondary disclosure to others").

<sup>75</sup> Martens v. United States Dep't of Commerce, No. 88-3334, slip op. at 8 (D.D.C. Aug. 6, 1990) (Privacy Act case); see also Miller v. Casey, 730 F.2d 773, 778 (D.C. Cir. 1984) (agency decision to deny historical research access not reviewable by courts); cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989) ("[T]he identity of the requester has no bearing on the merits of his or her FOIA request.") (Exemption 7(C)); FOIA Update, Spring 1989, at 5 (as general rule, all FOIA requesters should be treated alike).

<sup>76</sup> See Presidential Review Directive 29 (Apr. 26, 1993) (establishing inter-agency task force to draft new executive order on national security information).

<sup>77</sup> 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 note (1988).

<sup>78</sup> See Bonner v. United States Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (holding that judicial review of Exemption 1 excisions "properly focuses on the time the determination to withhold is made [by the agency]," and rejecting requester's argument that court should apply procedural and substantive requirements in existence at time of court's de novo review, because "[t]o require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing"); King v. United States Dep't of Justice, 830 F.2d 210, 215-17 (D.C. Cir. 1987); Miller v. United States Dep't of State, 779 F.2d 1378, 1388 (8th Cir. 1985); Lesar v. United States Dep't of Justice, 636 F.2d 472, 480 (D.C. Cir. 1980); Assassination Archives & Research Ctr., Inc. v. CIA, 720 F. Supp. 217, 221-22 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414 (D.C. Cir. Aug. 13, 1990); Iloch v. CIA, 593 F. Supp. 675, 679-80 (D.D.C. 1984), aff'd, 907 F.2d 1227 (D.C. Cir. 1990) (table cite). But see Powell v. United (continued...)

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12,356, the most controversial aspect of Executive Order No. 12,065--Section 3-303's balancing of the public's interest in disclosure against the government's need for national security secrecy--was found to have been mooted by the issuance of the current executive order, which does not contain a balancing provision.<sup>79</sup>

Executive Order No. 12,356 recognizes both the right of the public to be informed about activities of its government and the need to protect national security information from unauthorized or untimely disclosure. Accordingly, information may not be classified unless "its disclosure reasonably could be expected to cause damage to the national security."<sup>80</sup> Courts grappling with the degree of certainty necessary to demonstrate the contemplated damage under this standard have recognized that an agency's articulation of the threatened harm must always be speculative to some extent and that to require an actual showing of harm would be judicial "over-stepping."<sup>81</sup> In the area of intelligence sources and methods, courts are strongly inclined to accept the agency's position that disclosure of this type of information will cause damage to national security interests because this is "necessarily a region for forecasts in which [the agency's] informed judgment as to potential future harm should be respected."<sup>82</sup>

This standard is elaborated upon in Section 1.3 of the order, which specifies the types of information that may be considered for classification. Executive Order No. 12,356 establishes as bases for classification several widely

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<sup>78</sup>(...continued)

States Dep't of Justice, No. C-82-326, slip op. at 3 (N.D. Cal. June 14, 1985) (upon court-ordered re-review of classification, agency "cannot now hide behind the classification system in effect at the time the agency first analyzed the documents").

<sup>79</sup> See Afshar v. Department of State, 702 F.2d 1125, 1137 (D.C. Cir. 1983); Republic of New Afrika v. FBI, 656 F. Supp. 7, 14 (D.D.C. 1985); see also King v. United States Dep't of Justice, 830 F.2d at 216; Keys v. United States Dep't of Justice, No. 85-2588, slip op. at 5 (D.D.C. May 12, 1986) ("The public interest is not [now] a concern to be balanced in applying this exemption."), aff'd, 830 F.2d 337 (D.C. Cir. 1987); cf. Halkin v. Helms, 690 F.2d 977, 994 n.65 (D.C. Cir. 1982) (state secrets privilege case).

<sup>80</sup> Exec. Order No. 12,356, § 1.1(a)(3).

<sup>81</sup> Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980); cf. Snepp v. United States, 444 U.S. 507, 513 n.8 (1980) ("The problem is to ensure, in advance, and by proper [CIA prepublication review] procedures, that information detrimental to the national interest is not published.") (non-FOIA case).

<sup>82</sup> Gardels v. CIA, 689 F.2d 1100, 1106 (D.C. Cir. 1982); see also Washington Post v. DOD, 766 F. Supp. 1, 7 (D.D.C. 1991) (disclosure of working files of failed Iranian hostage rescue attempt containing intelligence planning documents would "serve as a model of 'do's and don't's'" for future counter-terrorist missions "with similar objectives and obstacles").

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recognized information categories: foreign government information;<sup>83</sup> vulnerabilities or capabilities of systems, installations, projects or plans relating to national security;<sup>84</sup> intelligence sources or methods;<sup>85</sup> foreign relations or foreign activities;<sup>86</sup> and military plans, weapons, or operations.<sup>87</sup> Executive Or-

<sup>83</sup> See, e.g., Krikorian v. Department of State, 984 F.2d 461, 465 (D.C. Cir. 1993) (telegram reporting discussion between agency official and high-ranking foreign diplomat regarding terrorism properly withheld as foreign government information; release would "jeopardize 'reciprocal confidentiality'" between governments); Southam News v. INS, 674 F. Supp. 881, 884 (D.D.C. 1987); Shaw v. United States Dep't of State, 559 F. Supp. 1053, 1063 (D.D.C. 1983).

<sup>84</sup> See, e.g., Gottesdiener v. Secret Serv., No. 86-576, slip op. at 5 (D.D.C. Feb. 21, 1989).

<sup>85</sup> See, e.g., Patterson v. FBI, 893 F.2d 595, 597, 601 (3d Cir. 1990) (information pertaining to intelligence sources and methods used by FBI in investigation of student who corresponded with 169 foreign nations), cert. denied, 498 U.S. 812 (1990); Jones v. FBI, No. C77-1001, slip op. at 8 (N.D. Ohio Aug. 12, 1992) ("numerical designators" assigned to national security sources) (appeal pending); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 709-11 (W.D.N.Y. 1991) (intelligence activities or methods, intelligence file numbers and other detailed information which could reveal a source); Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 4-7 (D.D.C. Dec. 19, 1990) (counterterrorism policy paper which could inhibit potential sources from providing intelligence information and limit ability of government to "penetrate" terrorist organizations); Allen v. DOD, 658 F. Supp. 15, 19-21 (D.D.C. 1986) (including deceased, potential and unwitting intelligence sources); cf. Knight v. CIA, 872 F.2d 660, 664 (5th Cir. 1989) (intelligence sources and methods protected under Exemption 3), cert. denied, 494 U.S. 1004 (1990).

<sup>86</sup> See, e.g., United States Comm. for Refugees v. Department of State, No. 91-3303, slip op. at 4-6 (D.D.C. Aug. 30, 1993) (disclosure of withheld information could damage nation's foreign policy by jeopardizing success of negotiations with Haiti on refugee issues "because documents contain frank assessments about the Haitian government"); St. Hilaire v. Department of Justice, No. 91-0078, slip op. at 8 (D.D.C. Mar. 18, 1992) (protecting portions of two cables between Department of State and its embassies because "protecting communications between . . . diplomatic instruments of sovereign states certainly [is an] . . . appropriate reason for classifying documents"); Van Atta v. Defense Intelligence Agency, No. 87-1508, slip op. at 4 (D.D.C. July 6, 1988) (information compiled at request of foreign government for purpose of negotiations); American Jewish Congress v. Department of the Treasury, 549 F. Supp. 1270, 1276-79 (D.D.C. 1982), aff'd, 713 F.2d 864 (D.C. Cir.) (table cite), cert. denied, 464 U.S. 895 (1983).

<sup>87</sup> See, e.g., Taylor v. Department of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (protection of combat-ready troop assessments); Washington Post Co. v. DOD, No. 84-2403, slip op. at 3 (D.D.C. Apr. 15, 1988) (foreign military information); Hudson River Sloop Clearwater, Inc. v. Department of the  
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der No. 12,356 also includes as classified any information which concerns cryptography,<sup>88</sup> and scientific, technological, or economic matters relating to national security.<sup>89</sup>

Of the classification categories identified above, it should be noted that Executive Order No. 12,356 establishes a presumption that the unauthorized disclosure of certain categories of information--foreign government information, the identity of a confidential foreign source and intelligence sources and methods--will cause damage to the national security.<sup>90</sup> This presumption has been recognized and applied in FOIA cases involving Exemption 1.<sup>91</sup>

In addition, Executive Order No. 12,356 permits the classification of other categories of information that are related to the national security and

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<sup>87</sup>(...continued)

Navy, 659 F. Supp. 674, 679 (E.D.N.Y. 1987) (NEPA/FOIA case), aff'd, 891 F.2d 414, 417 (2d Cir. 1989); Washington Post Co. v. DOD, No. 84-2402, slip op. at 16 (D.D.C. Apr. 11, 1988).

<sup>88</sup> See McDonnell v. United States, No. 91-5916, slip op. at 25 (3d Cir. Sept. 21, 1993) (upholding classification of cryptographic information dating back to 1934 where release "could enable hostile entities to interpret other, more sensitive documents similarly encoded") (to be published); Gilmore v. NSA, No. C92-3646, slip op. at 14, 17-18 (N.D. Cal. Apr. 30, 1993) (mathematical principles and techniques in agency treatise protectible under this category of executive order).

<sup>89</sup> Exec. Order No. 12,356, § 1.3; cf. U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 9 (D.D.C. Mar. 26, 1986) (protection of information regarding armoring of President's limousines).

<sup>90</sup> Exec. Order No. 12,356, § 1.3(c).

<sup>91</sup> See, e.g., Maynard v. CIA, 986 F.2d 547, 555 (1st Cir. 1993) (application of presumption in case involving intelligence sources and methods); Krikorian v. Department of State, 984 F.2d at 465 n.4 (noting presumed damage in connection with unauthorized disclosure of foreign government information); Holland v. CIA, No. 91-1233, slip op. at 12, 22 (D.D.C. Aug. 31, 1992) (court will not "second guess" propriety of classification, especially due to fact that identity of intelligence sources and methods and foreign government information is "presumed" to cause damage to national security); Green v. United States Dep't of State, No. 85-504, slip op. at 13 n.31 (D.D.C. Apr. 17, 1990) ("In examining the plausibility of defendant's explanation as to how disclosure of the information . . . could reasonably be expected to pose a danger to the national security, the [c]ourt must take into account that [disclosure of much of the information in question] is presumed to cause damage to the national security."); Siminoski v. FBI, No. 83-6499, slip op. at 15, 17 (C.D. Cal. Jan. 16, 1990) (disclosure of redactions relating to identity of foreign liaisons and intelligence sources presumed to result in damage to national security; no agency bad faith shown to "upset that presumption").



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which require protection against unauthorized disclosure.<sup>92</sup> Moreover, in those instances in which there is "reasonable doubt" about the need to classify information, or to classify information at a higher level, the order permits classification pending a final determination within 30 days.<sup>93</sup>

It should be noted that Executive Order No. 12,356 also contains a number of limitations on classification.<sup>94</sup> For example, information may not be classified to conceal violations of law,<sup>95</sup> to prevent embarrassment to a person or an agency,<sup>96</sup> or to restrain competition.<sup>97</sup>

Agencies with questions about the proper implementation of the substantive or procedural requirements of Executive Order No. 12,356 may consult with the Information Security Oversight Office (ISOO) within the General Services Administration, which holds governmentwide oversight responsibility for classification matters under the executive order ((202) 634-6150).<sup>98</sup> The Director of ISOO has been named by the President to chair the interagency task force established to draft a replacement executive order.<sup>99</sup>

### Duration of Classification

Another important provision of Executive Order No. 12,356 is that "in-

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<sup>92</sup> Exec. Order No. 12,356, § 1.3(a)(10); see, e.g., Gottesdiener v. Secret Serv., slip op. at 5 (records concerning United States' "emergency preparedness programs").

<sup>93</sup> Exec. Order No. 12,356, § 1.1(c).

<sup>94</sup> Id. § 1.6.

<sup>95</sup> Id. § 1.6(a); see also Navasky v. CIA, 499 F. Supp. 269, 275-76 (S.D.N.Y. 1980) (rejecting as irrelevant requester's claim of illegality under similar provision in prior executive order so long as information properly classified pursuant to order's substantive requirements; likewise rejecting defendant's claim of national security harm based upon possible loss of employment or damage to reputation for those persons cooperating with CIA's clandestine book-publishing activities), aff'd, 679 F.2d 873 (2d Cir. 1981) (table cite), cert. denied, 459 U.S. 822 (1982).

<sup>96</sup> Exec. Order No. 12,356, § 1.6(a); see also Wilson v. Department of Justice, No. 87-2415, slip op. at 3-4 (D.D.C. June 13, 1991) (rejecting requester's claim that information was classified to prevent embarrassment to foreign government official and holding that "even if some . . . information . . . were embarrassing to Egyptian officials, it would nonetheless be covered by Exemption 1 if, independent of any desire to avoid embarrassment, the information withheld [was] properly classified").

<sup>97</sup> Exec. Order No. 12,356, § 1.6(a).

<sup>98</sup> See id. § 5.2; see also FOIA Update, Winter 1985, at 1-2.

<sup>99</sup> See Presidential Review Directive 29 at 2.

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formation shall be classified as long as required by national security considerations" and time frames no longer trigger automatic declassification.<sup>100</sup> To be sure, the passage of time from the origination of the information to the classification review might cause a court to question the national security damage that could result from disclosure.<sup>101</sup> Accordingly, while the age of records has some bearing on whether they warrant continued protection under Exemption 1, numerous precedents stand firmly for the proposition that the passage of time does not, by itself, require that national security information be declassified automatically and disclosed.<sup>102</sup>

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<sup>100</sup> Exec. Order No. 12,356, § 1.4(a), 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 note (1988); see Branch v. FBI, 700 F. Supp. 47, 48 (D.D.C. 1988) ("Executive Order No. 12,356 does not create a presumption favoring disclosure of documents once they reach a certain age.").

<sup>101</sup> See King v. United States Dep't of Justice, 830 F.2d 210, 226 (D.C. Cir. 1987) (documents more than 35 years old); see also Silets v. FBI, 591 F. Supp. 490, 496 (N.D. Ill. 1984) (documents over 20 years old regarding Jimmy Hoffa); Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1517 (N.D. Cal. 1984) (fact that information is 22 to 35 years old and concerns "highly publicized treason and sedition case which has been closed for over twenty years" requires government to "address the significance of the age of the information"); cf. CIA v. Sims, 471 U.S. 159, 177 (1985) (Exemption 3 case upholding protection for documents over 20 years old the disclosure of which would reveal the identities of intelligence sources, including deceased, potential and unwitting sources); Fitzgibbon v. CIA, 911 F.2d 755, 764 (D.C. Cir. 1990) (holding that, in contrast to traditional Exemption 1 analysis, passage of time has no impact on releasability of information in Exemption 3 context involving intelligence sources and methods).

<sup>102</sup> See, e.g., McDonnell v. United States, No. 91-5916, slip op. at 25-26 (3d Cir. Sept. 21, 1993) (rejecting plaintiff's argument that cryptographic information classified as exempt in 1934 is no longer entitled to protection because of passage of time) (to be published); Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993) ("[P]assage of some thirty years does not, by itself, invalidate [agency's] showing under Exemption 1."); Afshar v. Department of State, 702 F.2d 1125, 1138 n.18 (D.C. Cir. 1983) (change in circumstances does not require review of original classification); Holland v. CIA, No. 91-1233, slip op. at 12 (D.D.C. Aug. 31, 1992) (fact that intelligence estimate is 25 years old held "of no consequence [where] plaintiff's speculation that . . . passage of time diminishes need for its secrecy . . . a 'mere hypothetical,' and because Executive Order 12356 establishes no presumption in favor of disclosure of [classified information] after a period of time"); Varelli v. FBI, No. 88-1865, slip op. at 9 (D.D.C. Oct. 4, 1991) (upholding application of Exemption 1 because "passage of time . . . does not dissipate . . . possibility of retribution being visited upon . . . intelligence sources and their families"); Siminoski v. FBI, No. 83-6499, slip op. at 17-18 (C.D. Cal. Jan. 16, 1990) (upholding classification of documents more than 40 years old because "age alone does not mandate release of otherwise sensitive documents"); Assassination Archives & Research Ctr., Inc. v. CIA, 720 F. Supp. 217, 222 (D.D.C. 1989) (permitting (continued...))

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In addition, the order prohibits any automatic declassification because of "unofficial publication or inadvertent or unauthorized disclosure" of classified information.<sup>103</sup> In fact, declassified and disclosed information may be reclassified if the information is classified and "may reasonably be recovered."<sup>104</sup> Moreover, it is well settled that information may be "classified or reclassified" after it has been requested under the FOIA.<sup>105</sup>

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<sup>102</sup>(...continued)

withholding of "old" information and distinguishing King v. United States Dep't of Justice on basis of involvement of intelligence agency and applicability of more "protective" executive order), aff'd in pertinent part, No. 89-5414 (D.C. Cir. Aug. 13, 1990); Oglesby v. United States Dep't of the Army, No. 87-3349, slip op. at 5 (D.D.C. May 23, 1989) (Exemption 1 properly applied to documents over 30 years old), aff'd on other grounds, 920 F.2d 57 (D.C. Cir. 1990); Southam News v. INS, No. 85-2721, slip op. at 10-11 (D.D.C. May 18, 1989) ("If the United States were to proceed unilaterally to declassify documents provided by Canada as secret merely because twenty years has passed, the value of a promise of confidentiality by the United States would be greatly diminished.").

<sup>103</sup> Exec. Order No. 12,356, § 1.3(d); see, e.g., Simmons v. United States Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (possible disclosure of classified documents by FBI agent was not in official capacity, hence did not require automatic declassification).

<sup>104</sup> Exec. Order No. 12,356, § 1.6(c).

<sup>105</sup> Id. § 1.6(d); see also Goldberg v. United States Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987) (fact that many cables sought under FOIA initially marked unclassified by ambassadors held "immaterial," as pertinent executive order allows agencies to reclassify records in response to FOIA requests), cert. denied, 485 U.S. 904 (1988); Miller v. United States Dep't of State, 779 F.2d 1378, 1388 (8th Cir. 1985) (16-year delay between origination and classification of documents held "insufficient to justify disclosure"); Lesar v. United States Dep't of Justice, 636 F.2d 472, 484-85 (D.C. Cir. 1980) (belated classification appropriate); National Sec. Archive v. FBI, No. 88-1507, slip op. at 3 n.2 (D.D.C. Apr. 14, 1993) (reclassification of portions of briefing book held proper) (appeal pending); Green v. United States Dep't of State, No. 85-504, slip op. at 4-5 (D.D.C. Apr. 17, 1990) (agency may reclassify documents "pursuant to executive orders issued subsequent to its initial classification decision"); cf. Nation Co. v. Archivist of the United States, No. 88-1939, slip op. at 8 (D.D.C. July 24, 1990) (reclassification after initiation of litigation not "fatal" unless "used to cover up embarrassing information") (FACA case); American Library Ass'n v. NSA, 631 F. Supp. 416, 422 (D.D.C. 1986) (no First Amendment right to access to documents classified subsequent to their inadvertent public disclosure), aff'd on other grounds, 818 F.2d 81 (D.C. Cir. 1987). But see Shanmugadhasan v. United States Dep't of the Navy, No. 84-6474, slip op. at 1 (9th Cir. Dec. 17, 1985) (remanding for in camera inspection due to belated classification and generalized affidavit).

Additional Considerations

Two additional considerations addressed by Executive Order No. 12,356 have already been recognized by the courts. First, the "Glomar" denial, discussed above, is incorporated into the order: "[A]n agency shall refuse to confirm or deny the existence or nonexistence of requested information whenever . . . its existence or nonexistence is itself classifiable under this Order."<sup>106</sup>

Second, the "mosaic" approach--the concept that apparently harmless pieces of information, when assembled together, could reveal a damaging picture--is recognized in the very definition of classified information: "Information . . . shall be classified when . . . its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security."<sup>107</sup> This approach was presaged by a decision of the Court of Appeals for the District of Columbia Circuit in 1980<sup>108</sup> and, after the issuance of the executive order, subsequently endorsed by the same court.<sup>109</sup> The D.C. Circuit has also reaffirmed that even if there

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<sup>106</sup> Exec. Order No. 12,356, § 3.4(f)(1), 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 note (1988); see, e.g., Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 417 (2d Cir. 1989) (fact of presence of nuclear weapons aboard particular naval ships is classified in itself); Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984) (whether CIA conducted covert activities in Albania following World War II is classified in itself); Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) (fact that, even under prior Executive order, "existence or non-existence" of intercept by NSA of cable purportedly sent by Jack Ruby's brother to Cuba prior to Kennedy assassination classified); D'Aleo v. Department of the Navy, No. 89-2347, slip op. at 4 (D.D.C. Mar. 27, 1991) (any confirmation or denial of existence of nondisclosure agreement allegedly signed by plaintiff would cause serious damage to national security); Nelson v. United States Dep't of Justice, No. 1:90-1119, slip op. at 1-3 (N.D. Ga. Sept. 12, 1990) (fact of existence of records agency might possess under Foreign Intelligence Surveillance Act itself classified), aff'd, 953 F.2d 650 (11th Cir.) (table cite), cert. denied, 112 S. Ct. 1955 (1992); Marrera v. United States Dep't of Justice, 622 F. Supp. 51, 53 (D.D.C. 1985) (same); see also Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982) (Exemptions 1 and 3); cf. Hunt v. CIA, 981 F.2d 1116, 1118-20 (9th Cir. 1992) (agency's refusal to confirm or deny existence of records pertaining to Iranian national requested by person on trial for murder of that Iranian held proper pursuant to Exemption 3).

<sup>107</sup> Exec. Order No. 12,356, § 1.3(b).

<sup>108</sup> Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) ("Each individual piece of intelligence information, much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.").

<sup>109</sup> See Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (explicitly acknowledging "mosaic-like nature of intelligence gathering"); ac-  
(continued...)

## EXEMPTION 1

is other information that if released "would pose a greater threat to the national security," Exemption 1 "bars the government from prying loose even the smallest bit of information that is properly classified."<sup>110</sup>

Another point to remember under Exemption 1 is the requirement that agencies segregate and release nonexempt information, unless the segregated information would have no meaning.<sup>111</sup> The duty to release information that is "reasonably segregable"<sup>112</sup> applies in cases involving classified information as well as cases involving nonclassified information.<sup>113</sup> During the past two

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<sup>109</sup>(...continued)

cord CIA v. Sims, 471 U.S. 159, 178 (1985) (Exemption 3); American Friends Serv. Comm. v. DOD, 831 F.2d 441, 444-45 (3d Cir. 1987) (recognizing "compilation" theory); Taylor v. Department of the Army, 684 F.2d 99, 105 (D.C. Cir. 1982) (upholding classification of compilation of information on army combat units); see also Varelli v. FBI, No. 88-1865, slip op. at 8 (D.D.C. Oct. 4, 1991) (upholding agency's determination that release of "such mundane information . . . as file numbers, code names and symbol source identifiers" would enable "hostile analyst to piece together information, which could, in aggregate with other information, lead to disclosure" of intelligence sources and activities); National Sec. Archive v. FBI, 759 F. Supp. 872, 877 (D.D.C. 1991) (disclosure of code names and designator phrases could provide hostile intelligence analyst with "common denominator" permitting analyst to piece together seemingly unrelated data into snapshot of specific FBI counter-intelligence activity); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 709-10 (W.D.N.Y. 1991) (upholding classification of any source-identifying word or phrase, which could by itself or in aggregate lead to disclosure of intelligence source).

<sup>110</sup> Abbotts v. NRC, 766 F.2d 604, 608 (D.C. Cir. 1985) (quoting Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)).

<sup>111</sup> See, e.g., Doherty v. United States Dep't of Justice, 775 F.2d 49, 53 (2d Cir. 1985); Paisley v. CIA, 712 F.2d 686, 700 (D.C. Cir. 1983); Bevis v. Department of the Army, No. 87-1893, slip op. at 2 (D.D.C. Sept. 16, 1988) (redaction not required when it would reduce balance of text to "unintelligible gibberish"); American Friends Serv. Comm. v. DOD, No. 83-4916, slip op. at 11-12 (E.D. Pa. Aug. 4, 1988) (very fact that records sought would have to be extensively "reformulated, re-worked and shuffled" prior to any disclosure established that nonexempt material was "inextricably intertwined" with exempt material), aff'd, 869 F.2d 587 (3d Cir. 1989) (table cite).

<sup>112</sup> 5 U.S.C. § 552(b) (final sentence) (1988).

<sup>113</sup> See, e.g., Oglesby v. United States Dep't of the Army, 920 F.2d 57, 66 n.12 (D.C. Cir. 1990) (dictum) (noting failure of Army affidavit to specify whether any reasonably segregable portions of 483-page document were withheld pursuant to Exemption 1); Ray v. Turner, 587 F.2d 1187, 1197 (D.C. Cir. 1978) (remanding for greater specificity in affidavit because agency may not rely on "exemption by document" approach even in Exemption 1 context); Branch v. FBI, 658 F. Supp. 204, 210 (D.D.C. 1987) (criticizing language in  
(continued...)

## EXEMPTION 2

years, the D.C. Circuit has reemphasized the FOIA's segregation requirement in a series of decisions,<sup>114</sup> one of which involved records withheld pursuant to Exemption 1.<sup>115</sup> In that Exemption 1 decision, the D.C. Circuit--although upholding the district court's substantive determination that the records contained information qualifying for Exemption 1 protection--nonetheless remanded the case to the district court because it had failed to "make specific findings of segregability for each of the withheld documents."<sup>116</sup>

As a final matter, agencies should be aware of the FOIA's "(c)(3) exclusion."<sup>117</sup> This special record exclusion applies to certain especially sensitive records maintained by the Federal Bureau of Investigation which pertain to foreign intelligence, counterintelligence or international terrorism matters. Where the existence of such records is itself a classified fact, the FBI may, so long as the existence of the records remains classified, treat the records as not subject to the requirements of the FOIA. (See discussion under Exclusions, below.)

## EXEMPTION 2

Exemption 2 of the FOIA exempts from mandatory disclosure records "related solely to the internal personnel rules and practices of an agency."<sup>1</sup> The courts have interpreted the exemption to encompass two distinct categories of information:

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<sup>113</sup>(...continued)

FBI affidavit regarding segregation); see also Holland v. CIA, No. 91-1233, slip op. at 22 (D.D.C. Aug. 31, 1992) (finding "sufficient showing of good faith" by agency in segregating exempt from nonexempt information, based on review of declarations, together with examination of redacted documents and fact that subsequent releases were made during litigation).

<sup>114</sup> See Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1068, 1071-72 (D.C. Cir. 1993); Krikorian v. Department of State, 984 F.2d 461, 466-67 (D.C. Cir. 1993); PHE, Inc. v. Department of Justice, 983 F.2d 248, 252-53 (D.C. Cir. 1993); Schiller v. NLRB, 965 F.2d 1205, 1210 (D.C. Cir. 1992).

<sup>115</sup> Krikorian v. Department of State, 984 F.2d at 466-67; see also Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, No. C89-1843, slip op. at 7-8, 11-12 (N.D. Cal. June 4, 1993) (applying Schiller standard in Exemption 1 case).

<sup>116</sup> Krikorian v. Department of State, 984 F.2d at 467.

<sup>117</sup> 5 U.S.C. § 552(c)(3) (1988); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 24-25 (Dec. 1987).

<sup>1</sup> 5 U.S.C. § 552(b)(2) (1988).

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- (a) internal matters of a relatively trivial nature--sometimes referred to as "low 2" information; and
- (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement--sometimes referred to as "high 2" information.<sup>2</sup>

There has long existed some confusion concerning the intended coverage of both aspects of Exemption 2. The case law interpreting the exemption has been divided, reflecting the differing ways in which Exemption 2 was addressed in the Senate and House Reports when the FOIA was enacted. The Senate Report stated:

Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.<sup>3</sup>

The House Report provided a more expansive interpretation of Exemption 2's coverage, stating that it was intended to include:

[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners . . . but [that] this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under present law.<sup>4</sup>

These two statements contain an evident conflict in their treatment of the first category of information encompassed by this exemption--routine internal matters. The Supreme Court confronted this conflict in a case in which a requester sought to obtain case summaries of Air Force Academy ethics hearings, and it found the Senate Report to be more authoritative, at least with regard to the coverage intended for routine internal matters.<sup>5</sup> In Department of the Air Force v. Rose, the Supreme Court construed Exemption 2's somewhat ambiguous language as protecting internal agency matters so routine or trivial that they could not be "subject to . . . a genuine and significant public interest."<sup>6</sup> The Supreme Court also declared that Exemption 2 was intended to relieve agencies of the burden of assembling and providing access to any "matter in which the public could not reasonably be expected to have an interest."<sup>7</sup> At the same time, the Court also suggested in Rose that the policy enunciated by the House

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<sup>2</sup> See FOIA Update, Summer 1989, at 3.

<sup>3</sup> S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

<sup>4</sup> H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

<sup>5</sup> Department of the Air Force v. Rose, 425 U.S. 352, 366-67 (1976).

<sup>6</sup> Id. at 369.

<sup>7</sup> Id. at 369-70.

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Report might permit an agency to withhold matters of some public interest "where disclosure may risk circumvention of agency regulation."<sup>8</sup>

### "Low 2": Trivial Matters

It is quite evident from its legislative history and the Supreme Court's decision in Department of the Air Force v. Rose that, with respect to its "low 2" aspect, Exemption 2 is the only exemption in the FOIA having a conceptual underpinning totally unrelated to any harm caused by disclosure per se.<sup>9</sup> Rather, this application of the exemption is based upon the unique rationale that the very task of processing and releasing some requested records would place a harmful administrative burden on the agency that would not be justified by any genuine public benefit.<sup>10</sup>

Although cases decided immediately subsequent to Rose demonstrated that a great deal of uncertainty existed as to the extent of coverage provided by this first aspect of Exemption 2, it now seems to be well established that routine internal personnel matters are properly included within its scope.<sup>11</sup> However, personnel matters of greater general public interest are not so protected.<sup>12</sup>

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<sup>8</sup> Id. at 369.

<sup>9</sup> See Department of the Air Force v. Rose, 425 U.S. 352, 369-70 (1976).

<sup>10</sup> See FOIA Update, Winter 1984, at 10-11 ("FOIA Counselor: The Unique Protection of Exemption 2"); see, e.g., Martin v. Lauer, 686 F.2d 24, 34 (D.C. Cir. 1982) (Exemption 2 "serves to relieve the agency from the administrative burden of processing FOIA requests when internal matters are not likely to be the subject of public interest."); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 10 n.8 (D.D.C. 1991) (citing Martin), aff'd, 968 F.2d 92 (D.C. Cir. 1992) (table cite).

<sup>11</sup> See, e.g., Small v. IRS, 820 F. Supp. 163, 168 (D.N.J. 1992) (employee service identification numbers); Pruner v. Department of the Army, 755 F. Supp. 362, 365 (D. Kan. 1991) (Army regulation concerning discharge of conscientious objectors); FBI Agents Ass'n v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,058, at 83,566-67 (D.D.C. Jan. 13, 1983) (information relating to performance ratings, recognition and awards, leave practices, transfers, travel expenses and allowances); National Treasury Employees Union v. United States Dep't of the Treasury, 487 F. Supp. 1321, 1324 (D.D.C. 1980) (bargaining history and IRS interpretation of labor contract provisions); Frank v. United States Dep't of Justice, 480 F. Supp. 596, 597-98 (D.D.C. 1979) (FBI special agents' complaints of mismanagement about personnel matters such as leave, work assignments and overtime, as well as information about ensuing investigation).

<sup>12</sup> See, e.g., Department of the Air Force v. Rose, 425 U.S. at 365-70 (Air Force Academy cadet honor code proceedings); Vaughn v. Rosen, 523 F.2d 1136, 1140-43 (D.C. Cir. 1975) (evaluations of how effectively agency policies were being implemented); Globe Newspaper Co. v. FBI, No. 91-13257, slip op. at 6-8 (D. Mass. Dec. 29, 1992) (amount paid to FBI informant found to be (continued...))



## EXEMPTION 2

Particularly significant to the coverage of "low 2" is its unique application to far more mundane, yet pervasive, administrative records. In a case whose Exemption 2 holding now appears completely undermined, the full Court of Appeals for the District of Columbia Circuit in Jordan v. United States Department of Justice ordered the local U.S. Attorney's Office's prosecutorial guidelines released on the ground that the documents did not fit the narrowly read exemption for "personnel" rules.<sup>13</sup> Subsequently, in Allen v. CIA, the D.C. Circuit ordered the release of such trivial internal information as filing and routing instructions, based upon the conclusion that Congress intended Exemption 2 protection for agency personnel records only, not for "trivial matters unrelated to personnel."<sup>14</sup> The court of appeals panel deciding Allen chose to perceive no conflict with several of the D.C. Circuit's own post-Jordan opinions which had upheld the withholding of items of information pursuant to Exemption 2 that clearly were not related to personnel matters.<sup>15</sup>

One year after Allen, though, the full D.C. Circuit, in Crooker v. Bureau of Alcohol, Tobacco & Firearms, revisited the issue involved in Jordan and adopted a distinctly broader view of Exemption 2, specifically with regard to its law enforcement aspect.<sup>16</sup> Then, in its decision in Founding Church of Scientology v. Smith,<sup>17</sup> the D.C. Circuit finally made it clear that Exemption 2 allows the withholding of a great variety of internal rules, procedures and guidelines, effectively overruling Allen. In Founding Church, the Department of Justice pointedly admitted that it had withheld routine administrative notations "indistinguishable from the filing and routing instructions that were held un-

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<sup>12</sup>(...continued)

personally involved in "ongoing criminal activities"); News Group Boston, Inc. v. National R.R. Passenger Corp., 799 F. Supp. 1264, 1266-68 (D. Mass. 1992) (disciplinary actions taken against Amtrak employees), appeal dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992); North v. Walsh, No. 87-2700, slip op. at 3 (D.D.C. June 25, 1991) (travel vouchers of senior officials of Office of Independent Counsel); Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 16, 18 (D. Ariz. July 9, 1987) (agency response to MSPB appeal and administrative inquiry memorandum concerning death of FBI agent), motion to vacate denied (D. Ariz. Dec. 22, 1987); FBI Agents Ass'n v. FBI, 3 Gov't Disclosure Serv. at 83,566-67 (standards of conduct, grievance procedures, EEO procedures); Ferris v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,084, at 82,363 (D.D.C. Dec. 23, 1981) (SES performance objectives).

<sup>13</sup> 591 F.2d 753, 767 (D.C. Cir. 1978) (en banc).

<sup>14</sup> 636 F.2d 1287, 1290 n.21 (D.C. Cir. 1980).

<sup>15</sup> See, e.g., Lesar v. United States Dep't of Justice, 636 F.2d 472, 485 (D.C. Cir. 1980) (informant symbol numbers held protectible under Exemption 2); Cox v. United States Dep't of Justice, 601 F.2d 1, 4 (D.C. Cir. 1979) (per curiam) (sensitive portions of Marshals Service manual held protectible under Exemption 2).

<sup>16</sup> 670 F.2d 1051, 1073-74 (D.C. Cir. 1981) (en banc).

<sup>17</sup> 721 F.2d 828 (D.C. Cir. 1983).

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protected under FOIA Exemption 2 in Allen," but it urged that Allen be abandoned in light of its discerned conflict with Crooker and Lesar v. United States Department of Justice.<sup>18</sup> Recognizing this conflict, and concluding that Crooker in fact "repudiated the narrow construction of exemption 2 that [had been] adopted in Jordan," the D.C. Circuit in Founding Church did exactly what was urged, expressly holding that Allen "no longer represents the law of this circuit."<sup>19</sup> Instead, it articulated an expanded test to include such routine material:

First, the material withheld should fall within the terms of the statutory language as a personnel rule or internal practice of the agency. Then, if the material relates to trivial administrative matters of no genuine public interest, exemption would be automatic under the statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.<sup>20</sup>

Consequently, agencies may consider a wide range of administrative information for possible withholding under Exemption 2, regardless of whether it is personnel-related, based upon the unique rationale that the very process of releasing such information would be an unwarranted administrative burden.<sup>21</sup> Trivial administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings may properly be withheld under "low 2."<sup>22</sup>

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<sup>18</sup> Id. at 829.

<sup>19</sup> Id. at 830.

<sup>20</sup> Id. at 830-31 n.4.

<sup>21</sup> See FOIA Update, Winter 1984, at 10-11.

<sup>22</sup> See, e.g., Hale v. United States Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) ("administrative markings and notations on documents; room numbers, telephone numbers, and FBI employees' identification numbers; a checklist form used to assist special agents in consensual monitoring; personnel directories containing the names and addresses of FBI employees; and the dissemination page of Hale's 'rap sheet'"), cert. granted, vacated & remanded on other grounds, 113 S. Ct. 3029 (1993); Lesar v. United States Dep't of Justice, 636 F.2d at 485-86 (informant codes held "a matter of internal significance in which the public has no substantial interest [and which] bear no relation to the substantive contents of the records released"); Scherer v. Kelley, 584 F.2d 170, 175-76 (7th Cir. 1978) ("file numbers, initials, signature and mail routing stamps, references to interagency transfers, and data processing references"), cert. denied, 440 U.S. 964 (1979); Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978) ("file numbers, routing stamps, cover letters and secretary initials"); Maroscia v. Levi, 569 F.2d 1000, 1001-02 (7th Cir. 1977) (markings used to maintain control of investigation); Engelking v. DEA, No. 91-165, slip op. at 5 (D.D.C. Nov. 30, 1992) ("The means by which DEA refers to its files (continued...)")

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In many instances, however, it can be less burdensome for an agency simply to release such information--and agencies should do so.<sup>23</sup>

Most significantly, Exemption 2 has been held to justify the withholding of more extensive and substantive portions of administrative records, even

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<sup>22</sup>(...continued)

(violator identifier and informant identifier codes) is a matter of internal significance in which the public has no substantial interest."); Allen v. Bureau of Alcohol, Tobacco & Firearms, No. 91-2640, slip. op. at 1-2 (D.D.C. June 30, 1992) (computer codes, symbols and Treasury Enforcement Communication System numbers are "clearly matters" of internal significance), summary affirmance granted, No. 92-5312 (D.C. Cir. May 25, 1993); Doe v. United States Dep't of Justice, 790 F. Supp. 17, 22 (D.D.C. 1992) (internal administrative codes and procedures); Gale v. FBI, 141 F.R.D. 94, 97 (N.D. Ill. 1992) (source symbol numbers relating only to internal procedures of the FBI); Sanders v. United States Dep't of Justice, No. 91-2263, slip op. at 5 (D. Kan. Apr. 21, 1992) (FBI computer codes used to access National Crime Information Center); Soto v. DEA, No. 90-1816, slip op. at 4 (D.D.C. Apr. 4, 1992) (informant identifier codes, G-DEP codes, NADDIS numbers, special agent group assignments and internal criminal case file numbers); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 10 (D.D.C. 1991) (internal symbols and markings); Rodriguez v. United States Postal Serv., No. 90-1886, slip op. at 7 (D.D.C. Oct. 2, 1991) (DEA informant and violator codes, computer codes, telephone numbers and other communications information); Spirovski v. DEA, No. 90-1633, slip op. at 9 (D.D.C. July 24, 1991) (Treasury Department computer database case and file numbers and other administrative markings); Beck v. United States Dep't of the Treasury, No. 88-493, slip op. at 19-20 (D.D.C. Nov. 8, 1989) (computer access codes, system identification numbers, and case and file numbers pertaining to maintenance and security of computer-based telecommunications system), aff'd, 946 F.2d 1563 (D.C. Cir. 1992) (table cite); Southam News v. INS, No. 85-2721, slip op. at 14 (D.D.C. May 18, 1989) (agency control numbers and cover sheet for classified material); Simpson v. United States Dep't of Justice, No. 87-2832, slip op. at 3-4 (D.D.C. Sept. 30, 1988) (routing markings to facilitate communication between DEA headquarters and field offices and other law enforcement agencies "clearly fall within the ambit of administrative trivia"); Branch v. FBI, 658 F. Supp. 204, 208 (D.D.C. 1987) ("There is no question that [source symbol and file numbers are] trivial and may be withheld as a matter of law under Exemption 2."). But see Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 57 (D.D.C. 1990) (applying Schwane to hold that administrative markings do not "relate to" an agency rule or practice).

<sup>23</sup> See, e.g., Fonda v. CIA, 434 F. Supp. 498, 503 (D.D.C. 1977) (where administrative burden is minimal and it would be easier to release material, policy underlying Exemption 2 does not permit withholding); see also FOIA Update, Winter 1984, at 11 (advising agencies to invoke exemption only where doing so truly avoids burden).

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entire documents.<sup>24</sup> As a matter of sound policy and administrative discretion, agencies should concentrate their attention on Exemption 2 withholdings of this latter variety.<sup>25</sup> (See Discretionary Disclosure and Waiver, below.)

One type of administrative record--federal personnel lists--has caused the

<sup>24</sup> See, e.g., Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (internal time deadlines and procedures, recordkeeping directions, instructions on contacting agency officials for assistance and guidelines on agency decision-making); Nix v. United States, 572 F.2d at 1005 (cover letters protected as matters of merely internal significance); Starkey v. IRS, No. C91-20040, slip op. at 10 (N.D. Cal. Dec. 6, 1991) (facsimile cover sheets, transcript, and employee travel information); Wilson v. Department of Justice, No. 87-2415, slip op. at 5-6 (D.D.C. June 13, 1991) (State Department transmittal slips from low-level officials); Barrett v. OSHA, No. C2-90-147, slip op. at 3-4 (S.D. Ohio Oct. 18, 1990) (administrative steps followed by OSHA prior to issuance of citation are internal); Benavides v. DEA, No. 88-427, slip op. at 4-5 (D.D.C. Feb. 9, 1989) (letters describing administrative procedures properly withheld as purely internal and of no public interest), summary affirmance granted in part sub nom. Benavides v. United States Marshals Serv., No. 89-5060 (D.C. Cir. Sept. 21, 1989); KTVY-TV v. United States Postal Serv., No. 87-1432, slip op. at 15 (W.D. Okla. May 4, 1989) (computerized list of evidence gathered during investigation of shooting incident), aff'd on other grounds, 919 F.2d 1465 (10th Cir. 1990); Destileria Serralles, Inc. v. Department of the Treasury, No. 85-837, slip op. at 6-7 (D.P.R. Sept. 22, 1988) (transmittal correspondence, materials outlining work assignments and time spent by ATF inspectors on assignments, documents reflecting evaluation of evidence compiled during inspection and recommending agency action, and materials describing procedures to be followed in conducting inspections properly withheld as "no more than internal and merely procedural determinations about whether and how to proceed with an investigation"); Cox v. United States Dep't of Justice, No. 87-158, slip op. at 3 (D.D.C. Nov. 17, 1987) (investigation code name, supervising unit, details of property and funding); Dickie v. Department of the Treasury, No. 86-649, slip op. at 3 (D.D.C. Mar. 31, 1987) (case-reporting procedures); Heller v. Marshals Serv., 655 F. Supp. 1088, 1092 (D.D.C. 1987) (brief and personal intra-agency memorandum); Martinez v. FBI, No. 82-1547, slip op. at 10-11 (D.D.C. Dec. 19, 1985) (43 pages of postal inspector caseload management and timekeeping records); Berkosky v. Department of Labor, No. 82-6464, slip op. at 2 (C.D. Cal. May 2, 1984) (routing slip and complaint time log); Ferri v. United States Dep't of Justice, 573 F. Supp. 852, 862 (W.D. Pa. 1983) (two entire documents dealing with an internal administrative matter); Associated Press v. Department of Justice, No. 82-803, slip op. at 44 (D.N.J. Dec. 6, 1982) (entire "closing form"); National Treasury Employees Union v. United States Dep't of the Treasury, 487 F. Supp. at 1324 (internal discussion of collective bargaining matters); Stassi v. Department of the Treasury, No. 78-533, slip op. at 11 (D.D.C. Mar. 30, 1979) (records concerning manhours and dollars spent on investigation).

<sup>25</sup> See FOIA Update, Winter 1984, at 11 (advising this approach given exemption's underlying rationale of avoiding administrative burden involved in processing such records).

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courts to struggle with the problem of determining when the threshold Exemption 2 requirement of being "related to" internal agency rules and practices is satisfied. The personal privacy protection of Exemption 6--successfully invoked to protect the names and home addresses of federal employees--is generally unavailable to protect the names and duty addresses of federal employees inasmuch as there ordinarily is no privacy interest in such information.<sup>26</sup>

In 1990, the D.C. Circuit dispositively addressed the possible protection of federal personnel lists under Exemption 2 in Schwanner v. Department of the Air Force.<sup>27</sup> In a two-to-one decision, it held that a list of the names and duty addresses of military personnel stationed at Bolling Air Force Base does not meet the threshold requirement of being "related solely to the internal rules and practices of an agency."<sup>28</sup> The panel majority ruled that "the list does not bear an adequate relation to any rule or practice of the Air Force as those terms are used in exemption 2."<sup>29</sup> In so doing, it gave a new, stricter interpretation to the term "related to" under Exemption 2--holding that if the information in question is not itself actually a "rule or practice," then it must "shed significant light" on a "rule or practice" in order to qualify.<sup>30</sup> The D.C. Circuit concluded that "lists do not necessarily (or perhaps even normally) shed significant light on a rule or practice; insignificant light is not enough."<sup>31</sup> Thus, under Schwanner, Exemption 2 is no longer available at the administrative level to protect agencies from the burdens of processing requests for federal personnel lists.<sup>32</sup>

The second part of the "low 2" analysis concerns whether there "is a genuine and significant public interest" in disclosure of the records requested.<sup>33</sup> A useful illustration of how this "public interest" delineation has been drawn in the past can be found in a decision in which large portions of an FBI administrative manual were ruled properly withholdable on a "burden" theory under Exemption 2, but other portions (because of a discerned "public interest"

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<sup>26</sup> See, e.g., FLRA v. United States Dep't of the Treasury, 884 F.2d 1446, 1452-53 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990); see also FOIA Update, Sept. 1982, at 3; FOIA Update, Summer 1986, at 3-4 (recognizing exceptions for law enforcement and certain military personnel).

<sup>27</sup> 898 F.2d 793 (D.C. Cir. 1990).

<sup>28</sup> Id. at 794.

<sup>29</sup> Id.

<sup>30</sup> Id. at 797.

<sup>31</sup> Id.

<sup>32</sup> See FOIA Update, Spring/Summer 1990, at 2 (modifying prior guidance in light of controlling nature of D.C. Circuit ruling, as circuit of "universal venue" under FOIA).

<sup>33</sup> See Department of the Air Force v. Rose, 425 U.S. at 369.

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in them) were not.<sup>34</sup> In making such delineations for administrative records in the wake of Founding Church, agencies must always bear in mind the D.C. Circuit's admonition in that case that "a reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interests."<sup>35</sup>

The nature of this "public interest" in "low 2" cases may be affected by the Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press.<sup>36</sup> In Reporters Committee, the Supreme Court rejected the argument that the "public interest" in the context of Exemption 7(C) requires an assessment of the specific purpose for which the document is sought.<sup>37</sup> Instead, the Court held that the "public interest" depended solely on the nature of the document sought and its relationship to "the basic purpose [of the FOIA] 'to open agency action to the light of public scrutiny.'"<sup>38</sup> The Court concluded that the FOIA's "core purposes" would not be furthered by disclosure of a record about a private individual, even if it "would provide details to include in a news story, [because] this is not the kind of public interest for which Congress enacted the FOIA."<sup>39</sup> It also emphasized that a particular FOIA requester's intended use of the requested information "has no bearing on the merits of his or her FOIA request" and that FOIA requesters therefore should be treated alike.<sup>40</sup> (See further discussion of the ramifications of Reporters Committee under Exemption 6, below.)

Although the Supreme Court's decision in Reporters Committee is based

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<sup>34</sup> FBI Agents Ass'n v. FBI, 3 Gov't Disclosure Serv. at 83,565-66; see also Church of Scientology v. IRS, 816 F. Supp. 1138, 1149 (W.D. Tex. 1993) ("public is entitled to know how IRS is allocating" taxpayers' money as it pertains to IRS advance of travel funds to employees); News Group Boston, Inc. v. National R.R. Passenger Corp., 799 F. Supp. at 1267 (finding legitimate public interest in disclosure of Case Handling Statements despite agency fear that information may be misunderstood or misinterpreted); Globe Newspaper Co. v. FBI, slip op. at 6 (amount paid to FBI informant personally involved in continuing criminal activity should be disclosed because it "falls squarely within the parameters set by Rose"); Singer v. Rourke, No. 87-1213, slip op. at 3-4 (D. Kan. Dec. 30, 1988) (holding Exemption 2 inapplicable to documents relating to investigation of sexual and racial harassment at Air Force facility, because public has "genuine and significant interest" in whether the government has engaged in "such noxious activity").

<sup>35</sup> 721 F.2d at 830-31 n.4.

<sup>36</sup> 489 U.S. 749 (1989).

<sup>37</sup> Id. at 771-72.

<sup>38</sup> Id. at 772 (quoting Department of the Air Force v. Rose, 425 U.S. at 372).

<sup>39</sup> Id. at 774.

<sup>40</sup> Id. at 771; see also FOIA Update, Spring 1989, at 5.

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on an analysis of Exemption 7(C), its interpretation of what constitutes "public interest" under the FOIA logically may be applicable under Exemption 2 as well.<sup>41</sup> Since Reporters Committee, courts have increasingly focused upon the lack of any "legitimate public interest" when applying this aspect of the exemption to information found to be related to an agency's internal practices.<sup>42</sup> Indeed, a number of courts had already been taking such an approach in analyzing "low 2" cases before Reporters Committee.<sup>43</sup> Nevertheless, agencies still

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<sup>41</sup> See Schwaner v. Department of the Air Force, 898 F.2d at 800-01 (Revercomb, J., dissenting on issue not reached by majority) (relying on Reporters Committee "core purposes" analysis and finding no "meaningful" public interest in disclosure of names and duty addresses of military personnel).

<sup>42</sup> See Hale v. United States Dep't of Justice, 973 F.2d at 902 (no public interest in administrative markings and notations, personnel directories containing names and addresses of FBI employees, room and telephone numbers, employee identification numbers, consensual monitoring checklist form, rap sheet-dissemination page); News Group Boston, Inc. v. National R.R. Passenger Corp., 799 F. Supp. at 1268 (no public interest in payroll and job title codes); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 390-93 (W.D.N.Y. 1992) (no public interest in "soundex" encoding of alien's family name, whether or not alien is listed in Border Patrol Lookout Book; codes used to identify deportability; narratives explaining circumstances of apprehension; internal routing information); McCoy v. Moschella, No. 89-2155, slip op. at 6 (D.D.C. Sept. 30, 1991) (no public interest in file numbers identifying bank robberies with similar patterns).

<sup>43</sup> See, e.g., Martin v. Lauer, 686 F.2d at 34 (Exemption 2 "designed to screen out illegitimate public inquiries into the functioning of an agency"); Lesar v. United States Dep't of Justice, 636 F.2d at 485-86 (public has "no legitimate interest" in FBI's mechanism for internal control of informant identities); Hall v. United States Dep't of Justice, No. 87-474, slip op. at 4-5 (D.D.C. Mar. 8, 1989) (magistrate's partial recommendation) (plaintiff failed to offer "a single legitimate interest" to justify public access to teletype routing symbols and data entry codes maintained by Marshals Service), adopted (D.D.C. July 31, 1989); Gonzalez v. United States Dep't of Justice, No. 88-913, slip op. at 2-3 (D.D.C. Oct. 25, 1988) (source symbol numbers); Lam Lek Chong v. DEA, No. 85-3726, slip op. at 11 (D.D.C. Mar. 14, 1988) (same), aff'd on other grounds, 929 F.2d 729 (D.C. Cir. 1991); Heller v. United States Marshals Serv., 655 F. Supp. at 1092; Struth v. FBI, 673 F. Supp. 949, 959 (E.D. Wis. 1987) (plaintiff offered no evidence of public interest in source symbol or source file numbers); White v. United States Dep't of Justice, slip op. at 6 ("Exemption 2 is designed . . . to screen out illegitimate public inquiries into the functioning of an agency."); Fiumara v. Higgins, 572 F. Supp. 1093, 1102 (D.N.H. 1983) (plaintiff failed to show legitimate public or private interest in disclosure of agency's law enforcement computer system information); Texas Instruments, Inc. v. United States Customs Serv., 479 F. Supp. 404, 406-07 (D.D.C. 1979) (internal access or report numbers of no value to plaintiff). But cf. Tax Analysts v. United States Dep't of Justice, 845 F.2d 1060, 1064 n.8 (D.C. Cir. 1988) (pre-Reporters Committee case finding (continued...))

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must be mindful of the fact that the special protection of "low 2" simply is not available for any information in which there is "a genuine and significant public interest."<sup>44</sup>

### "High 2": Risk of Circumvention

The second category of information withholdable under Exemption 2--internal matters of a more substantial nature the disclosure of which would risk the circumvention of a statute or agency regulation--has generated considerable controversy. In Department of the Air Force v. Rose<sup>45</sup> the Supreme Court specifically left open the question of whether such records fall within the coverage of Exemption 2. Most of the cases first developed this aspect of the exemption in the context of law enforcement manuals containing sensitive staff instructions. For example, the position adopted by the Court of Appeals for the Eighth Circuit on this subject is that Exemption 2 does not relate to such matters, but that section (a)(2)(C) of the FOIA,<sup>46</sup> which arguably excludes law enforcement manuals from the automatic disclosure provisions of the FOIA, bars disclosure of manuals whose release to the public would significantly impede the law enforcement process.<sup>47</sup> Although tacitly approving the Eighth Circuit's argument, the Courts of Appeals for the Fifth and Sixth Circuits have an alternative rationale for withholding law enforcement manuals: Disclosure would allow persons "simultaneously to violate the law and to avoid detection" by impeding law enforcement efforts.<sup>48</sup>

The majority of the courts in other circuits, however, have placed greater weight on the House Report in this respect and accordingly have held that Exemption 2 is applicable to a wide range of internal administrative and personnel matters, including law enforcement manuals, to the extent that disclosure would risk circumvention of an agency regulation or statute or impede the effectiveness of an agency's law enforcement activities.<sup>49</sup>

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<sup>43</sup>(...continued)

Exemption 2 inapplicable, without discussion, because of "public's obvious interest" in agency copies of court opinions), aff'd on other grounds, 492 U.S. 136 (1989).

<sup>44</sup> Department of the Air Force v. Rose, 425 U.S. at 369; see also FOIA Update, Winter 1984, at 11 (emphasizing "low threshold" for disclosure of such information).

<sup>45</sup> 425 U.S. 352, 364, 369 (1976).

<sup>46</sup> 5 U.S.C. § 552(a)(2)(C) (1988).

<sup>47</sup> See Cox v. Levi, 592 F.2d 460, 462-63 (8th Cir. 1979); Cox v. United States Dep't of Justice, 576 F.2d 1302, 1306-09 (8th Cir. 1978).

<sup>48</sup> Hawkes v. IRS, 467 F.2d 787, 795 (6th Cir. 1972); Sladek v. Bensinger, 605 F.2d 899, 902 (5th Cir. 1979).

<sup>49</sup> See, e.g., Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d (continued...)



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The Court of Appeals for the District of Columbia Circuit adopted this majority approach when the full court addressed the issue in Crooker v. Bureau of Alcohol, Tobacco & Firearms, a case involving a law enforcement agents' training manual.<sup>50</sup> Although not explicitly overruling the holding in Jordan v. United States Department of Justice that guidelines for the exercise of prosecutorial discretion were not properly withholdable,<sup>51</sup> the en banc decision in Crooker specifically rejected the rationale of Jordan that Exemption 2 cannot protect law enforcement manuals or other documents whose disclosure would risk circumvention of the law.<sup>52</sup>

In Crooker, the D.C. Circuit fashioned a two-part test for determining which sensitive materials are exempt from mandatory disclosure under Exemption 2. This test requires both:

- (1) that a requested document be "predominantly internal" and
- (2) that its disclosure "significantly risks circumvention of agency regulations or statutes."<sup>53</sup>

Of course, whether there is any public interest in disclosure is entirely irrelevant under this "circumvention" aspect of Exemption 2.<sup>54</sup> Rather, the concern in such a case is that a FOIA disclosure should not "benefit those attempting to

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<sup>49</sup>(...continued)

653, 656 (9th Cir. 1980); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 547 (2d Cir. 1978); Wilder v. IRS, 607 F. Supp. 1013, 1015 (M.D. Ala. 1985); Ferri v. Bell, No. 78-841, slip op. at 7-9 (M.D. Pa. Dec. 15, 1983); Fiumara v. Higgins, 572 F. Supp. 1093, 1102 (D.N.H. 1983); see also Watkins v. Commissioner, No. C81-0091J, slip op. at 1 (D. Utah Mar. 29, 1982) (criteria for administrative or judicial enforcement actions found protectible).

<sup>50</sup> 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc).

<sup>51</sup> 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc).

<sup>52</sup> See 670 F.2d at 1074.

<sup>53</sup> Id. at 1073-74.

<sup>54</sup> See Kaganove v. EPA, 856 F.2d 884, 888-89 (7th Cir. 1988), cert. denied, 448 U.S. 1011 (1989); Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. 3, 5 (D.D.C. 1987). But see Wilkinson v. FBI, 633 F. Supp. 336, 342 (C.D. Cal. 1986) (suggesting that charge that underlying investigation was conducted illegally might render exemption inapplicable); Kaganove v. EPA, 856 F.2d at 889 (suggesting that document may not meet Crooker test if its purpose were not "legitimate"); Oatley v. United States, 3 Gov't Disclosure Serv. (P-H) ¶ 83,274, at 84,065 (D.D.C. Aug. 16, 1983) (holding that civil service testing materials satisfy two-part Crooker test, but leaving open possibility that information would not be considered predominantly internal if grounds existed to suspect bias on the basis of race or sex in materials).

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violate the law and avoid detection."<sup>55</sup> As the D.C. Circuit recognized, this is simply a matter of "common sense."<sup>56</sup>

In the years since Crooker, a growing body of decisions has expressly applied both parts of this test, providing some guidance as to the kinds of information that will qualify for protection under these standards.<sup>57</sup> Courts in other circuits have followed similar tests, all containing an element similar to the "risk of circumvention" factor critical to the D.C. Circuit's Crooker analysis.<sup>58</sup>

With respect to the first part of the Crooker test, it is fairly easy in practice to meet the requirement that the materials be "predominantly internal." Although the standard initially appeared difficult to define, particularly in view of the implication in the majority opinion in Crooker that prosecutorial guidelines do not meet this requirement,<sup>59</sup> subsequent decisions have suggested otherwise. For example, the standard of "predominant internality" has been held not to exclude from protection even a document distributed to 1700 state, federal and foreign agencies when the dissemination was necessary for maximum law enforcement effectiveness and access to the general public was stringently denied.<sup>60</sup> Specific guidance on what constitutes an "internal" document may be found in Cox v. United States Department of Justice, which held protectible information which

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<sup>55</sup> Crooker, 670 F.2d at 1054.

<sup>56</sup> Id. at 1074.

<sup>57</sup> See, e.g., National Treasury Employees Union v. United States Customs Serv., 802 F.2d 525, 528 (D.C. Cir. 1986); Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. at 5; Wilder v. IRS, 607 F. Supp. at 1015; Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405, 411-13 (D.D.C. 1983).

<sup>58</sup> See, e.g., Dirksen v. HHS, 803 F.2d 1456, 1458 (9th Cir. 1986) (citing Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d at 657); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d at 547; Irons v. FBI, No. 82-1143, slip op. at 2 (D. Mass. Mar. 31, 1986), rev'd & remanded on other grounds, 811 F.2d 681 (1st Cir. 1987).

<sup>59</sup> See 670 F.2d at 1075.

<sup>60</sup> See Shanmugadhasan v. United States Dep't of Justice, No. 84-0079, slip op. at 31-34 (C.D. Cal. Feb. 18, 1986) (portions of DEA periodical discussing drug enforcement techniques and exchange of information held protectible); see also Kaganove v. EPA, 856 F.2d at 889 (EPA, like any employer, "reasonably would expect" an applicant rating plan to be internal); National Treasury Employees Union v. United States Customs Serv., 802 F.2d at 531 (appointment of individual members of the lower federal bureaucracy is primarily question of internal significance for agencies involved); Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. at 5 ("[I]t is difficult to conceive of a document that is more 'predominantly internal' than a guide by which agency personnel classify documents.").

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does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public. Differently stated, the unreleased information is not "secret law," the primary target of [the FOIA's] disclosure provisions.<sup>61</sup>

Last year, however, the District Court for the District of Columbia held that a computer algorithm used by the Department of Transportation to determine the safety rating for motor carriers is "not purely internal because its effect and the legal status it imposes on carriers are adopted by other agencies without further analysis or discretion."<sup>62</sup> In a second case, that same court held that documents relating to the procurement of telecommunications services by the federal government could not qualify as "primarily" internal given the project's "massive" scale and significance.<sup>63</sup>

No other court has declined to extend "high 2" protection to any document for its lack of "predominant internality," perhaps reflecting a measure of deference that is implicitly accorded to agencies under this substantive aspect of Exemption 2.<sup>64</sup> Courts have uniformly treated a wide variety of information pertaining to law enforcement activities as "internal," including:

- (1) general guidelines for conducting investigations;<sup>65</sup>

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<sup>61</sup> 601 F.2d 1, 5 (D.C. Cir. 1979) (per curiam).

<sup>62</sup> Don Ray Drive-A-Way Co. v. Skinner, 785 F. Supp. 198, 200 (D.D.C. 1992).

<sup>63</sup> MCI Telecommunications Corp. v. GSA, No. 89-746, slip op. at 11-12 (D.D.C. Mar. 25, 1992).

<sup>64</sup> See Schwaner v. Department of the Air Force, 898 F.2d 793, 796 (D.C. Cir. 1990) ("Judicial willingness to sanction a weak relation to 'rules and practices' may be greatest when the asserted government interest is relatively weighty.").

<sup>65</sup> See, e.g., PHE, Inc. v. United States Dep't of Justice, 983 F.2d 248, 251 (D.C. Cir. 1993) ("[R]elease of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts."); Becker v. IRS, No. 91-C-1203, slip op. at 15 n.1 (N.D. Ill. Mar. 27, 1992) (exemption protects operational rules, guidelines, and procedures for law enforcement investigations and examinations) (appeal pending); Wilder v. Commissioner, 601 F. Supp. 241, 242-43 (M.D. Ala. 1984) (agreement between state and federal agencies concerning when to exchange information relevant to potential violations of tax laws held "predominantly internal" because it did not interpret substantive law, but instead governed exchange of information); Goldsborough v. IRS, No. 81-1939, slip op. at 15-16 (D. Md. May 10, 1984) (protecting law enforcement manual setting out guidelines to be used in criminal investigation); Berkosky v. Department of Labor, No. 82-6464, slip op. at 3 (C.D. Cal. May (continued...))

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(2) guidelines for conducting post-investigation litigation;<sup>66</sup>

(3) guidelines for identifying law violators;<sup>67</sup>

(4) a study of agency practices and problems pertaining to undercover agents;<sup>68</sup> and

(5) sections of a Bureau of Prisons manual which summarize procedures for security of prison control centers, including escape prevention plans, control of keys and locks within a prison, instructions regarding transportation of federal prisoners and the arms and defensive equipment inventory maintained in the facility.<sup>69</sup>

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<sup>65</sup>(...continued)

2, 1984) (holding that guidance for proper conduct of investigation of government contractor is designed solely to instruct investigators and does not "regulate the public").

<sup>66</sup> See, e.g., Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (exemption protects litigation strategy pertaining to Equal Access to Justice Act because disclosure would render information "operationally useless"); Silber v. United States Dep't of Justice, No. 91-876, transcript at 21 (D.D.C. Aug. 13, 1992) (bench order) (disclosure of agency's fraud litigation monograph would allow access to strategies and theories of government litigation and its efforts to enforce False Claims Act).

<sup>67</sup> See, e.g., Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 393 (W.D.N.Y. 1992) (methods of apprehension and statement of ultimate disposition of case); Williston Basin Interstate Pipeline Co. v. Federal Energy Regulatory Comm'n, No. 88-592, slip op. at 3-4 (D.D.C. Apr. 17, 1989) (portions of audit report held to be "functional equivalent" of investigative techniques manual, and thus protectible under Exemptions 2 and 7(E), because disclosure would reveal techniques used by agency personnel to ascertain whether plaintiff was in compliance with federal law); Fund for a Conservative Majority v. Federal Election Comm'n, No. 84-1342, slip op. at 4 (D.D.C. Feb. 26, 1985) (audit criteria not "secret law" because they merely observe public behavior for illegal activity and do not define illegal activity); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. at 412 (computer program protected under Exemptions 2 and 7(E) because it merely instructs computer how to detect possible law violations, rather than modifying or regulating public behavior); Zorn v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,240, at 82,664 (D.D.C. Mar. 19, 1982) (guidelines for identifying tax protester churches held not "secret law").

<sup>68</sup> See Cox v. FBI, No. 83-3552, slip op. at 1 (D.D.C. May 31, 1984) (holding that report concerning undercover agents had no effect on public and contained no "secret law"), appeal dismissed, No. 84-5364 (D.C. Cir. Feb. 28, 1985).

<sup>69</sup> Miller v. Department of Justice, No. 87-533, slip op. at 1-2 (D.D.C. Jan. 31, 1989).

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More case law exists on what constitutes circumvention of legal requirements, because in many instances the "internality" of the documents is simply assumed. Most fundamentally, records that reveal the nature and extent of a particular investigation repeatedly have been held protectible on this "circumvention" basis.<sup>70</sup> On a point of increasing significance, the nondisclosure of computer codes used by law enforcement agencies that might provide the sophisticated requester with access to information concerning agency investigations stored in a computer system likewise has been upheld on this basis.<sup>71</sup>

<sup>70</sup> See, e.g., Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. 851, 854 (D.D.C. 1989) ("The public has no legitimate interest in gaining information [pertaining to violator and informant codes] that could lead to the impairment of DEA investigations."); Barkett v. United States Dep't of Justice, No. 86-2029, slip op. at 2-3 (D.D.C. July 18, 1989) (release of G-DEP and NADDIS index numbers might severely hamper DEA's enforcement and investigatory activities); Simpson v. United States Dep't of Justice, No. 87-2832, slip op. at 3-4 (D.D.C. Sept. 30, 1988) (disclosure of G-DEP and NADDIS numbers would allow suspects to evade apprehension by changing their criminal activity, while release of informant codes would "jeopardize . . . investigations by frightening away" and endangering the lives of potential DEA informants); Webster v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,195, at 83,876 (D.D.C. June 2, 1983) (G-DEP and NADDIS index numbers); Ferri v. Bell, No. 78-841, slip op. at 9, 11 (M.D. Pa. Dec. 15, 1983) (disclosure of charge-out cards for electronic surveillance devices would impede the FBI's law enforcement effectiveness; however, purchase records of electronic surveillance equipment must be released because FBI has not demonstrated that release would similarly frustrate its effectiveness); White v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,127, at 83,740 n.6 (D.D.C. Mar. 2, 1983) (release of Bureau of Prisons memorandum regarding telephone surveillance might risk circumvention of agency regulations). But see also KTVK-TV v. DEA, No. 89-379, slip op. at 1-3 (D. Ariz. Aug. 30, 1989) (ordering disclosure of tape of speech by local police chief, given at seminar sponsored by DEA, which contained remarks on police department programs used or contemplated to discourage illegal drug use--finding that "disclosure of any of these programs would tend to discourage illegal use of drugs").

<sup>71</sup> See, e.g., Dirksen v. HHS, 803 F.2d at 1459 (instructions for computer coding protected); Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 982 (1st Cir. 1985) (computer codes protected); Allen v. Bureau of Alcohol, Tobacco & Firearms, No. 91-2640, slip op. at 1-2 (D.D.C. June 30, 1992) (protection of computer codes, symbols and numbers used in law enforcement communications system), summary affirmance granted, No. 92-5312 (D.C. Cir. May 25, 1993); Hall v. United States Dep't of Justice, No. 87-474, slip op. at 4-5 (D.D.C. Mar. 8, 1989) (teletype routing symbols, access codes and data entry codes protected); Laroque v. United States Dep't of Justice, No. 86-2677, slip op. at 2 (D.D.C. July 12, 1988) (computer systems ID numbers and entry station numbers); Bennett v. Department of Justice, No. 86-891, slip op. at 1 (D.D.C. Oct. 28, 1986) (computer code); Rizzo v. United States Dep't of Justice, No. 84-2091, slip op. at 3-4 (D.D.C. Feb. 25, 1985) (teletype routing symbols).

(continued...)

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Exemption 2's "circumvention" protection also should be readily applicable to vulnerability assessments, which are perhaps the quintessential type of record warranting protection on that basis. Such records generally assess an agency's vulnerability (or that of another institution) to some form of outside interference or harm, by identifying those programs or systems deemed the most sensitive and describing specific security measures that can be used to counteract such vulnerabilities.<sup>72</sup> A prime example of vulnerability assessments warranting protection under "high 2" are the computer security plans that all federal agencies are now required by law to prepare.<sup>73</sup> In a recent decision involving such a document, Schreibman v. United States Department of Commerce,<sup>74</sup> Exemption 2 coverage was invoked to prevent unauthorized access to information which could result in "alteration [sic], loss, damage or destruction of data contained in the computer system."<sup>75</sup> It should be remembered, however, that even such a sensitive document must be reviewed to determine whether any "reasonably segregable" portion can be disclosed without harm.<sup>76</sup>

Affording Exemption 2 protection to vulnerability studies such as these would follow the line of cases in which courts have already applied the "circumvention" prong to items of sensitive computer-related information.<sup>77</sup> In one such case, involving a sensitive computer program found protectible under "high 2," the court observed that disclosure would be like "putting a fox inside

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<sup>71</sup>(...continued)

ing codes); Fiumara v. Higgins, 572 F. Supp. at 1102 (disclosure of access codes to the Treasury Enforcement Communication System "might enable outsiders to circumvent agency functions"); see also Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. at 412 (computer program withheld under Exemptions 2 and 7(E)); Kiraly v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 82,465, at 83,135 (N.D. Ohio Feb. 17, 1982) (computer codes withheld under a combination of Exemptions 2 and 7(E)), aff'd, 728 F.2d 273 (6th Cir. 1984).

<sup>72</sup> See FOIA Update, Summer 1989, at 3-4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two").

<sup>73</sup> See id. at 4 (citing Computer Security Act of 1987, Pub. L. No. 100-235, 101 Stat. 1724 (1988)).

<sup>74</sup> 785 F. Supp. 164 (D.D.C. 1991).

<sup>75</sup> Id. at 166.

<sup>76</sup> Id.; see also PHE, Inc. v. United States Dep't of Justice, 983 F.2d at 252 (remanding for "high 2" segregation; "district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability" (citing Schiller v. NLRB, 964 F.2d at 1210)); Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d at 982-83 (remanding for determination on segregability).

<sup>77</sup> See, e.g., Hall v. United States Dep't of Justice, slip op. at 4-5 (protecting various items that "could facilitate unauthorized access to [agency] communications systems").

## EXEMPTION 2

the chicken coop."<sup>78</sup> The "circumvention" protection of Exemption 2 is well designed to prevent such a result.<sup>79</sup> However, in an exceptional decision, one court refused to apply this aspect of Exemption 2 to procedures designed to protect against states "circumventing" federal audit criteria for welfare reimbursement.<sup>80</sup>

Release of various other categories of information also has been found likely to result in harmful circumvention:

- (1) information that would reveal the identities of informants;<sup>81</sup>
- (2) information that would reveal the identities of undercover agents;<sup>82</sup>

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<sup>78</sup> Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. at 413.

<sup>79</sup> See, e.g., Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. at 5 (according Exemption 2 protection to record revealing most sensitive portions of agency system which "could be used to seek out the [system's] vulnerabilities"); see also FOIA Update, Summer 1989, at 3-4.

<sup>80</sup> See Massachusetts v. HHS, 727 F. Supp. 35, 42 (D. Mass. 1989) ("The Act simply cannot be interpreted in such a way as to presumptively brand a sovereign state as likely to circumvent federal law. The second prong of Exemption 2 does not apply when it is [the state] itself that seeks the information.").

<sup>81</sup> See, e.g., Lesar v. United States Dep't of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980) (informant codes); Durham v. United States Dep't of Justice, No. 91-2636, slip op. at 3-4 (D.D.C. Aug. 17, 1993) (informant symbol numbers); Stone v. Defense Investigative Serv., 816 F. Supp. 782, 787 (D.D.C. 1993) (disclosure of code used to evaluate informants) (appeal pending); Curcio v. FBI, No. 89-941, slip op. at 4-5 (D.D.C. Nov. 2, 1990) (symbols identifying confidential informants and source-symbol file numbers); Faris v. United States Dep't of Justice, No. 88-2329, slip op. at 4 (D.D.C. June 16, 1989) (informant file numbers and codes); Gonzalez v. United States Dep't of Justice, No. 88-913, slip op. at 2-3 (D.D.C. Oct. 25, 1988) (informant symbols); Struth v. FBI, 673 F. Supp. 949, 959 (E.D. Wis. 1989) (informant file numbers and codes); Wilkinson v. FBI, 633 F. Supp. at 341-42 (informant codes); Rizzo v. FBI, No. 83-1924, slip op. at 3 (D.D.C. Feb. 10, 1984) (source symbols); Malizia v. United States Dep't of Justice, 519 F. Supp. 338, 344 (S.D.N.Y. 1981) (source numbers and identifying information). But see also Globe Newspaper Co. v. FBI, No. 91-13257, slip op. at 7-8 (D. Mass. Dec. 29, 1992) (amount paid to FBI informant personally involved in continuing criminal activity ordered released).

<sup>82</sup> See Cox v. FBI, slip op. at 2 (report concerning FBI's undercover agent program protected because of potential for discovering identities of agents).

## EXEMPTION 2

- (3) sensitive administrative notations in law enforcement files;<sup>83</sup>
- (4) security techniques used in prisons;<sup>84</sup>
- (5) agency audit guidelines;<sup>85</sup>

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<sup>83</sup> See, e.g., Founding Church of Scientology v. Smith, 721 F.2d 828, 831 (D.C. Cir. 1983) (protecting sensitive instructions regarding administrative handling of document); Curcio v. FBI, slip op. at 5 (protecting expense accounting in FBI criminal investigation); Meeropol v. Smith, No. 75-1121, slip op. at 47-48 (D.D.C. Feb. 29, 1984) (release of handling and dissemination instructions could jeopardize the means by which FBI has transmitted certain sensitive intelligence information), aff'd in part & remanded in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986).

<sup>84</sup> See, e.g., Cox v. United States Dep't of Justice, 601 F.2d at 4-5 (weapon, handcuff and transportation security procedures); Powell v. Department of Justice, No. 86-2020, slip op. at 4 (D.D.C. Oct. 31, 1989) (records relating to prisoner security procedures), summary affirmance granted, No. 89-5447 (D.C. Cir. June 28, 1991); Hall v. United States Dep't of Justice, slip op. at 4-5 (disclosure of teletype routing symbols, access codes and data entry codes maintained by the Marshals Service "could facilitate unauthorized access to information in law enforcement communications systems, and [thereby] jeopardize [prisoners' security]"); Miller v. Department of Justice, slip op. at 1-3 (disclosure of sections of Bureau of Prisons Custodial Manual describing procedures for security of prison control centers would "necessarily facilitate efforts by inmates to frustrate [BOP's] security precautions"); Crooker v. Federal Bureau of Prisons, No. 86-510, slip op. at 3-4 (D.D.C. Feb. 27, 1987) (general prison post orders, handcuff procedures, security and arming of officers, and alarm procedures); Cox v. Bureau of Prisons, No. 83-1032, slip op. at 1 (D.D.C. July 19, 1983) (release of Central Inmate Monitoring Manual would create significant risk of circumvention of agency regulations designed to safeguard security of inmates), appeal dismissed, No. 83-1859 (D.C. Cir. Oct. 20, 1983); cf. Thornburgh v. Abbott, 490 U.S. 401, 417 (1989) (rejecting constitutional challenge to Bureau of Prisons regulation excluding any publications that, although not necessarily likely to lead to violence, are determined by warden "to create an intolerable risk of disorder . . . at a particular prison at a particular time") (non-FOIA case).

<sup>85</sup> See, e.g., Dirksen v. HHS, 803 F.2d at 1458-59 (internal audit guidelines protected in order to prevent risk of circumvention of agency Medicare reimbursement regulations); Archer v. HHS, 710 F. Supp. 909, 911 (S.D.N.Y. 1989) (Medicare reimbursement-review criteria ordered disclosed, but with deletion of specific number that triggers audit); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. at 412-13 (computer program containing anti-dumping detection criteria properly withheld). But see Don Ray Drive-A-Way Co. v. Skinner, 785 F. Supp. at 200 (knowing agency's regulatory priorities would allow regulated carriers to concentrate efforts on correcting most serious safety breaches).



## EXEMPTION 2

(6) agency testing materials;<sup>86</sup> and

(7) an agency's unclassified manual detailing the categories of information that are classified and their corresponding classification levels.<sup>87</sup>

Under some circumstances, Exemption 2 may be applied to prevent potential circumvention through a "mosaic" approach: Information which would not by itself reveal sensitive law enforcement information can nonetheless be protected to prevent damage that could be caused by the assembly of different pieces of similar information by a requester.<sup>88</sup> This circumstance arose in three cases involving requests for "Discriminant Function Scores"--scores used by the Internal Revenue Service to select returns for examination. Although the IRS concedes that release of any one individual's tax score would not disclose how tax returns are selected for audit, it takes the position that the routine release of such scores would enable the sophisticated requester to discern, in the aggregate, its audit criteria, thus facilitating circumvention of the tax laws; all three courts accepted this rationale as an appropriate basis for affording protection under Exemption 2.<sup>89</sup> In a related case, one court upheld the denial of

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<sup>86</sup> See, e.g., Patton v. FBI, 626 F. Supp. 445, 447 (M.D. Pa. 1985) (testing materials withheld under Privacy Act Exemption (k)(6) and FOIA Exemption 2 because release would impair effectiveness of system and give future applicants unfair advantage), aff'd, 782 F.2d 1030 (3d Cir. 1986) (table cite); Oatley v. United States, 3 Gov't Disclosure Serv. at 84,065 (civil service testing materials satisfy the two-part Crooker test); see also Kaganove v. EPA, 856 F.2d at 890 (disclosure of applicant rating plan would render it ineffectual and allow future applicants to "embellish" job qualifications); National Treasury Employees Union v. United States Customs Serv., 802 F.2d at 528-29 (disclosure of hiring plan would give unfair advantage to some future applicants). But see also Commodity News Serv., Inc. v. Farm Credit Admin., No. 88-3146, slip op. at 13-15 (D.D.C. July 31, 1989) (steps to be taken in selecting receiver for liquidation of failed federal land bank, including sources agency might contact when investigating candidates, not protectible under "high 2" because agency did not demonstrate how disclosure would allow any applicant to "gain an unfair advantage in the . . . process").

<sup>87</sup> Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. at 5. But see Wilkinson v. FBI, 633 F. Supp. at 342 & n.13 (codes that identify law enforcement techniques not protectible under Exemption 2; instead must meet threshold requirement of compilation for law enforcement purposes for protection under Exemption 7(E)).

<sup>88</sup> See, e.g., Jan-Xin Zang v. FBI, 756 F. Supp. 705, 712 (W.D.N.Y. 1991) (source symbol and administrative identifiers withheld on basis that "accumulation of information" known to be from same source could lead to detection).

<sup>89</sup> See Burns v. IRS, No. 85-1027, slip op. at 8 (D. Ariz. Oct. 16, 1985), dismissed on procedural grounds, No. 85-2833 (9th Cir. Sept. 12, 1986); Ray v. United States Customs Serv., No. 83-1476, slip op. at 8-9 (D.D.C. Jan. 28, (continued...))

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access to an IRS memorandum containing tolerance criteria used by the agency in its investigations, finding that disclosure would "undermine the enforcement of . . . internal revenue laws."<sup>90</sup>

Although originally, as in Crooker, the "circumvention" protection afforded by Exemption 2 was applied almost exclusively to sensitive portions of criminal law enforcement manuals, it has since been extended to civil enforcement and regulatory matters.<sup>91</sup> Most significantly, "high 2" protection has further been extended to matters that have nothing to do with law enforcement in any ordinary sense. In a pivotal case in this regard, the National Treasury Employees Union sought documents known as "crediting plans," records used to evaluate the credentials of federal job applicants; the Customs Service successfully argued that disclosure of the plans would make it difficult to evaluate the applicants because they could easily exaggerate or even fabricate their qualifications, such falsifications would go undetected because the government lacked the resources necessary to verify each application, and unscrupulous future applicants could thereby gain an unfair competitive advantage.<sup>92</sup> The D.C. Circuit approved the withholding of such criteria under a refined application of Crooker, which focused directly on its second requirement, and held that the potential for circumvention of the selection program, as well as the general statutory and regulatory mandates to enforce applicable civil service laws, was sufficient to bring the information at issue within the protection of Exemption 2.<sup>93</sup> The agency demonstrated "circumvention" by showing that disclosure would either render the documents obsolete for their intended pur-

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<sup>89</sup>(...continued)

1985); Wilder v. Commissioner, 607 F. Supp. at 1015; accord Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. at 5 (classification guidelines could reveal which parts of sensitive communications system are most sensitive and enable foreign intelligence services to gather related unclassified records and seek out system's vulnerabilities); cf. Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) ("mosaic" analysis in Exemptions 1 and 3 context).

<sup>90</sup> O'Connor v. IRS, 698 F. Supp. 204, 206-07 (D. Nev. 1988). But see also Archer v. HHS, 710 F. Supp. at 911 (requiring careful segregation so that only truly sensitive portion of audit criteria is withheld).

<sup>91</sup> See, e.g., Dirksen v. HHS, 803 F.2d at 1458-59 (guidelines for processing Medicare claims properly withheld where disclosure could allow applicants to alter their claims to fit them into certain categories and guidelines would thus "lose the utility they were intended to provide"); Archer v. HHS, 710 F. Supp. at 911 (specific number of "nerve blocks" used by HHS contractor to determine whether health care providers' claims for reimbursement under Medicare should be subjected to greater scrutiny held protectible, because disclosure would allow providers "to avoid review and ensure automatic payment by submitting claims below the number . . . scrutinized [by agency's contractor]").

<sup>92</sup> National Treasury Employees Union v. United States Customs Serv., 802 F.2d at 528-29.

<sup>93</sup> Id. at 529-31.

## EXEMPTION 2

pose, make the plan's criteria "operationally useless" or compromise the utility of the selection program.<sup>94</sup>

This approach has been expressly followed by the Court of Appeals for the Seventh Circuit in Kaganove v. EPA to withhold from an unsuccessful job applicant the agency's merit promotion rating plan on the basis that disclosure of the plan "would frustrate the document's objective [and] render it ineffectual" for the very reasons noted in the National Treasury Employees Union v. United States Customs Service case.<sup>95</sup>

It is also quite noteworthy that the Seventh Circuit in Kaganove v. EPA,<sup>96</sup> the Court of Appeals for the Ninth Circuit in Dirksen v. HHS,<sup>97</sup> and the D.C. Circuit in National Treasury Employees Union v. United States Customs Service,<sup>98</sup> all reached their results even in the absence of any particular agency regulation or statute to be circumvented. Thus, it now seems clear that the second part of the Crooker test can properly be satisfied by a showing that disclosure would risk circumvention of legal requirements generally.<sup>99</sup>

Finally, with the enactment of the Freedom of Information Reform Act of 1986, many of the materials heretofore protectible only on a "high 2" basis now may also be protectible under Exemption 7(E).<sup>100</sup> Post-amendment cases have held such information to be exempt from disclosure under both Exemption 2

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<sup>94</sup> Id. at 530-31; cf. United States Dep't of Justice v. FLRA, 988 F.2d 1267, 1269 (D.C. Cir. 1993) (crediting plans also held exempt from disclosure under Federal Service Labor-Management Relations Act).

<sup>95</sup> Kaganove v. EPA, 856 F.2d at 889.

<sup>96</sup> Id.

<sup>97</sup> 803 F.2d at 1458-59.

<sup>98</sup> 802 F.2d at 529-31.

<sup>99</sup> See National Treasury Employees Union v. United States Customs Serv., 802 F.2d at 530-31 ("Where disclosure of a particular [record] would render [it] operationally useless, the Crooker analysis is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure."); see, e.g., Knight v. DOD, No. 87-480, slip op. at 4 (D.D.C. Feb. 11, 1988) (memorandum detailing specific inventory audit guidelines held protectible because disclosure "would reveal Department of Defense rationale and strategy" for audit and would "create a significant risk that this information would be used by interested parties to frustrate ongoing or future audits"); Boyce v. Department of the Navy, No. 86-2211, slip op. at 2 (C.D. Cal. Feb. 17, 1987) (withholding routine hearing transcript under Exemption 2 where disclosure would circumvent terms of mere contractual agreement entered into under labor-relations statutory scheme); see also FOIA Update, Summer 1989, at 4.

<sup>100</sup> See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 16-17 & n.32 (Dec. 1987); see also Kaganove v. EPA, 856 F.2d at 888-89.

### EXEMPTION 3

and Exemption 7(E).<sup>101</sup> While Exemption 2 must still be used if any information fails to meet Exemption 7's "law enforcement" threshold, Exemption 2's history and judicial interpretations should be helpful in applying Exemption 7(E). (See discussion of Exemption 7(E), below.)

### EXEMPTION 3

Exemption 3 of the FOIA incorporates the disclosure prohibitions that are contained in various other federal statutes. As originally enacted in 1966, Exemption 3 protected information "specifically exempted from disclosure by statute."<sup>1</sup> The Supreme Court, in FAA v. Robertson, interpreted this language as evincing a congressional intent to allow statutes which permitted the withholding of confidential information, and which were enacted prior to the FOIA, to remain unaffected by the disclosure mandate of the FOIA. In so reading the exemption, the Court held that a withholding provision in the Federal Aviation Act which delegated almost unlimited discretion to agency officials to withhold specific documents in the "interest of the public" was incorporated within Exemption 3.<sup>2</sup> Fearing that this interpretation would allow agencies to evade the Act's disclosure intent, Congress in effect overruled Robertson by amending Exemption 3 in 1976.<sup>3</sup>

As amended, Exemption 3 allows the withholding of information prohibited from disclosure by another statute if one of two disjunctive requirements are met: that the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."<sup>4</sup> A statute thus falls within the exemption's coverage if it satis-

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<sup>101</sup> See PHE, Inc. v. United States Dep't of Justice, 983 F.2d at 251 (release of "who would be interviewed, what could be asked, and what records or other documents would be reviewed" in FBI investigatory guidelines would risk circumvention of law); Silber v. United States Dep't of Justice, transcript at 21 (disclosure of agency litigation tactics and strategy would create a significant risk of circumvention of agency regulations by enhancing adversary's posture); Williston Basin Interstate Pipeline Co. v. Federal Energy Regulatory Comm'n, slip op. at 4-5 (identities of auditors, "purpose, source and conclusion" portions of audit reports and section abstracts consisting of auditors' discussions of investigative techniques protectible under both exemptions); O'Connor v. IRS, 698 F. Supp. at 206-07 (memorandum containing criteria used internally by IRS in investigations).

<sup>1</sup> 5 U.S.C. § 552(b)(3) (1966) (amended 1976).

<sup>2</sup> 422 U.S. 255, 266 (1975).

<sup>3</sup> Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241, 1247 (1976).

<sup>4</sup> 5 U.S.C. § 552(b)(3) (1988) (emphasis added).

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fies any one of its disjunctive requirements.<sup>5</sup>

#### Initial Considerations

The determination as to whether a statute meets the threshold requirement of being a nondisclosure statute is subject to strict scrutiny. The Court of Appeals for the District of Columbia Circuit has held that records may be withheld under the authority of another statute pursuant to Exemption 3 "if--and only if--that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure."<sup>6</sup> The D.C. Circuit emphasized that:

a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. We must find a congressional purpose in the actual words of the statute (or at least in the legislative history of FOIA)--not in the legislative history of the claimed withholding statute, nor in an agency's interpretation of the statute.<sup>7</sup>

That is not to say that the breadth and reach of the disclosure prohibition must be found on the face of the statute, but that the statute must at least "explicitly deal with public disclosure."<sup>8</sup> (Previously, the D.C. Circuit had found legislative history probative on the issue of whether an enactment was intended to serve as a withholding statute within the meaning of Exemption 3.<sup>9</sup>) In any event, though, the legislative history of a newly enacted Exemption 3

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<sup>5</sup> See American Jewish Congress v. Kreps, 574 F.2d 624, 628 (D.C. Cir. 1978); see also Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984); Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980).

<sup>6</sup> Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); see also Cal-Almond, Inc. v. United States Dep't of Agric., 960 F.2d 105, 108 (9th Cir. 1992) (language must specifically prohibit disclosure, not merely prohibit expenditure of funds used in releasing information).

<sup>7</sup> Reporters Comm., 816 F.2d at 735; see also Anderson v. HHS, 907 F.2d 936, 951 n.19 (10th Cir. 1990) (agency interpretation of statute not entitled to deference in determining whether statute qualifies under Exemption 3). But see also Meyerhoff v. EPA, 958 F.2d 1498, 1501-02 (9th Cir. 1992) (looking to legislative history of withholding statute to determine that statutory amendment clarified rather than changed it).

<sup>8</sup> Reporters Comm., 816 F.2d at 736. But see also Cal-Almond, Inc. v. United States Dep't of Agric., 960 F.2d at 108 (disclosure prohibition sought to be effectuated through appropriations limitation held inadequate under Exemption 3).

<sup>9</sup> See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1284 (D.C. Cir. 1983).

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statute may be considered in determining whether the statute is applicable to matters that are already pending.<sup>10</sup>

Exemption 3 generally is triggered only by federal statutes.<sup>11</sup> Federal rules of procedure, which are promulgated by the Supreme Court, ordinarily do not qualify under Exemption 3.<sup>12</sup> However, when a rule of procedure is subsequently modified and thereby specifically enacted into law by Congress, it may qualify under the exemption.<sup>13</sup> While the issue of whether a treaty can qualify as a statute under Exemption 3 has not yet been ruled upon in any FOIA case, there is a sound policy basis for concluding that a treaty can so qualify.<sup>14</sup>

Once it is established that a statute is a nondisclosure statute and that it meets at least one of the disjunctive requirements of Exemption 3, an agency must also establish that the records in question fall within the protective ambit of the exempting statute.<sup>15</sup> With respect to subpart (B) statutes--which permit agencies some discretion to withhold or disclose records--review under the FOIA of agency action is limited to the determination that the withholding statute qualifies as an Exemption 3 statute and that the records fall within the stat-

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<sup>10</sup> See Long v. IRS, 742 F.2d 1173, 1183-84 (9th Cir. 1984).

<sup>11</sup> See Washington Post Co. v. HHS, 2 Gov't Disclosure Serv. (P-H) ¶ 81,047, at 81,127 n.2 (D.D.C. Dec. 4, 1980) ("an Executive Order . . . is clearly inadequate to support reliance on exemption 3"), rev'd on other grounds, 690 F.2d 252 (D.C. Cir. 1982).

<sup>12</sup> See Founding Church of Scientology v. Bell, 603 F.2d 945, 952 (D.C. Cir. 1979) (Rule 26(c) of the Federal Rules of Civil Procedure, governing issuance of protective orders, held not a statute under Exemption 3).

<sup>13</sup> See, e.g., Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981) (Rule 6(e) of Federal Rules of Criminal Procedure, regulating disclosure of matters occurring before a grand jury, satisfies Exemption 3's "statute" requirement because it was specially amended by Congress in 1977); Berry v. Department of Justice, 612 F. Supp. 45, 49 (D. Ariz. 1985) (Rule 32 of the Federal Rules of Criminal Procedure, governing disclosure of presentence reports, is "statute" for Exemption 3 purposes as it was affirmatively enacted into law by Congress in 1975).

<sup>14</sup> Cf. Whitney v. Robertson, 124 U.S. 190, 194 (1887) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation."); Public Citizen v. Office of the United States Trade Representative, 804 F. Supp. 385, 388 (D.D.C. 1992) (trade agreement not ratified by Senate does not have status of "statutory law" and thus does not provide Exemption 3 protection).

<sup>15</sup> See, e.g., Public Citizen Health Research Group v. FDA, 704 F.2d at 1284; Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d at 868; Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

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ute's scope.<sup>16</sup> Beyond this determination, the agency's exercise of its discretion under the withholding statute is governed not by the FOIA, but by the withholding statute itself;<sup>17</sup> judicial review of that should not be within the FOIA's jurisdiction.<sup>18</sup>

#### Subpart (A)

Rule 6(e) of the Federal Rules of Criminal Procedure,<sup>19</sup> which regulates disclosure of matters occurring before a grand jury, has been held to satisfy the "statute" requirement of Exemption 3 because it was specially amended by Congress in 1977.<sup>20</sup> It is well established that "Rule 6(e) embodies a broad sweeping policy of preserving the secrecy of grand jury material regardless of the substance in which the material is contained."<sup>21</sup> However, defining the parameters of Rule 6(e) protection is not always a simple task and has been the subject of much litigation. In Fund for Constitutional Government v. National Archives & Records Service, the Court of Appeals for the District of Columbia Circuit stated that the scope of the secrecy that must be afforded grand jury material "is necessarily broad" and, consequently, that "it encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal the 'identities of witnesses or jurors, the substance of the testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like.'"<sup>22</sup>

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<sup>16</sup> See Aronson v. IRS, 973 F.2d 962, 967 (1st Cir. 1992); Association of Retired R.R. Workers v. United States R.R. Retirement Bd., 830 F.2d 331, 335 (D.C. Cir. 1987). But see Long v. IRS, 742 F.2d at 1181.

<sup>17</sup> See Aronson v. IRS, 973 F.2d at 966; Association of Retired R.R. Workers, 830 F.2d at 336.

<sup>18</sup> Cf. Roley v. Assistant Attorney Gen., No. 89-2774, slip op. at 8 (D.D.C. Mar. 9, 1990) (court's grant of permission to disclose grand jury records pursuant to Rule 6(e)(C)(i) of the Federal Rules of Criminal Procedure does not govern disposition of same records in FOIA suit); Garside v. Webster, 733 F. Supp. 1142, 1147 (S.D. Ohio 1989) (same). But cf. Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992) (court's disclosure order pursuant to 38 U.S.C. § 7332(b) (1988) requires VA to disclose records under FOIA).

<sup>19</sup> Fed. R. Crim. P. 6(e).

<sup>20</sup> Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981); see also Watson v. United States Dep't of Justice, 799 F. Supp. 193, 195 (D.D.C. 1992).

<sup>21</sup> Iglesias v. CIA, 525 F. Supp. 547, 556 (D.D.C. 1981).

<sup>22</sup> 656 F.2d at 869 (quoting SEC v. Dresser Indus., 628 F.2d 1368, 1382 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980)); see also McDonnell v. United States, No. 91-5916, slip op. at 30-31 (3d Cir. Sept. 21, 1993) ("[i]nformation and records presented to a federal grand jury . . . names of individuals sub-  
(continued...)

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However, neither the fact that information was obtained pursuant to a grand jury subpoena nor the fact that the information was submitted to the grand jury is sufficient, in and of itself, to warrant the conclusion that disclosure is necessarily prohibited by Rule 6(e).<sup>23</sup> Rather, an agency must establish a nexus between the release of that information and "revelation of a protected aspect of the grand jury's investigation."<sup>24</sup> This requirement is particularly pertinent to "extrinsic" documents that were created entirely independently of the grand jury process; for such a document, the D.C. Circuit emphasized in Washington Post Co. v. United States Department of Justice, the required nexus must be apparent from the information itself and "the government cannot immu-

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<sup>22</sup>(...continued)

poenaed . . . federal grand jury transcripts of testimony") (to be published); Silets v. United States Dep't of Justice, 945 F.2d 227, 230 (7th Cir. 1991) ("identity of witness before grand jury and discussion of that witness's testimony . . . falls squarely within" Rule 6(e)'s prohibition); Helmsley v. United States Dep't of Justice, No. 90-2413, slip op. at 4-6 (D.D.C. Sept. 25, 1992) (records identifying witnesses who testified or were consulted, documents and evidence not presented but obtained through grand jury subpoenas, immunity applications and orders, exhibit lists, reports and memoranda discussing evidence, correspondence regarding compliance with subpoenas, documents, notes and research relating to litigation regarding compliance with subpoenas, and letters among lawyers discussing grand jury proceedings, all protected by Rule 6(e)); Senate of P.R. v. United States Dep't of Justice, No. 84-1829, slip op. at 13-14 (D.D.C. Apr. 15, 1991) ("charts, maps or documents that were actually created in their entireties in the grand jury room during testimony by witnesses . . . are the closest thing imaginable to an actual transcript of grand jury testimony" and thus are protected).

<sup>23</sup> See Washington Post Co. v. United States Dep't of Justice, 863 F.2d 96, 100 (D.C. Cir. 1988); Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987); see also John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) ("A document that is otherwise available to the public does not become confidential simply because it is before a grand jury."), rev'd on other grounds, 493 U.S. 146 (1989); Astley v. Lawson, No. 89-2806, slip op. at 3-4 (D.D.C. Jan. 11, 1991) (documents ordered released even though requester might have been able to deduce purpose for which records were subpoenaed, because records on their face did not reveal inner workings of grand jury).

<sup>24</sup> Senate of P.R., 823 F.2d at 584; see also Wilson v. Department of Justice, No. 87-2415, slip op. at 4 (D.D.C. June 30, 1993) (Exemption 3 protects from disclosure not only documents presented to grand jury but also those which would reveal government's "audit trail" leading to those documents); Karu v. United States Dep't of Justice, No. 86-771, slip op. at 4-5 (D.D.C. Dec. 1, 1987) (nexus established because "[w]here this information to be released the very substance of the grand jury proceedings would be discernible"). But see LaRouche v. United States Dep't of Justice, No. 90-2753, slip op. at 9-10 (D.D.C. June 24, 1993) (letter prepared by AUSA discussing upcoming grand jury proceedings held not to reveal inner workings of grand jury).



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nize [it] by publicizing the link."<sup>25</sup>

The Supreme Court in Baldrige v. Shapiro,<sup>26</sup> while not actually distinguishing between the two subparts, held that the Census Act<sup>27</sup> is an Exemption 3 statute because it requires that certain data be withheld in such a manner as to leave the Census Bureau with no discretion whatsoever.<sup>28</sup> The Court of Appeals for the Ninth Circuit held that a provision of the Ethics in Government Act of 1978,<sup>29</sup> protecting the financial disclosure reports of special government employees, meets the requirements of subpart (A).<sup>30</sup>

Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964<sup>31</sup> have also been held to meet the subpart (A) requirement because they allow the EEOC no discretion to publicly disclose matters pending before the Commission.<sup>32</sup> Similarly, the statute governing records pertaining to Currency Transaction Reports<sup>33</sup> has been found to meet the requirements of subpart (A).<sup>34</sup> The International Investment Survey Act of 1976<sup>35</sup> has been held to be a subpart (A) statute<sup>36</sup> and certain portions of the overall public disclosure provisions of the Consumer Product Safety Act<sup>37</sup> likewise have been found to amply

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<sup>25</sup> 863 F.2d at 100.

<sup>26</sup> 455 U.S. 345 (1982).

<sup>27</sup> 13 U.S.C. §§ 8(b), 9(a) (1988).

<sup>28</sup> 455 U.S. at 355.

<sup>29</sup> 5 U.S.C. app. § 207(a)(1) (1988 & Supp. IV 1992).

<sup>30</sup> Meyerhoff v. EPA, 958 F.2d 1498, 1502 (9th Cir. 1992) (construing 1978 version of statute). But see Church of Scientology v. IRS, 816 F. Supp. 1138, 1152 (W.D. Tex. 1993) (implying that Ethics in Government Act is subpart (B) statute because FOIA disclosure can be made only if requester meets statute's disclosure requirements) (appeal pending).

<sup>31</sup> 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (1988 & Supp. III 1991).

<sup>32</sup> American Centennial Ins. Co. v. EEOC, 722 F. Supp. 180, 183 (D.N.J. 1989).

<sup>33</sup> 31 U.S.C. § 5319 (1988).

<sup>34</sup> Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992); Vennes v. IRS, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988), aff'd, 890 F.2d 419 (8th Cir. 1989) (table cite).

<sup>35</sup> 22 U.S.C. § 3104(c) (1988).

<sup>36</sup> Young Conservative Found. v. United States Dep't of Commerce, No. 85-3982, slip op. at 10-11 (D.D.C. Mar. 25, 1987).

<sup>37</sup> 15 U.S.C. § 2055(a)(2) (1988).

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satisfy subpart (A)'s nondisclosure requirements).<sup>38</sup>

Additionally, the Hart-Scott-Rodino Antitrust Improvement Amendments to the Clayton Antitrust Act, prohibiting disclosure of premerger notification materials submitted to the Department of Justice or the FTC,<sup>39</sup> have been held to qualify as a subpart (A) statute,<sup>40</sup> as has a provision of the Antitrust Civil Process Act,<sup>41</sup> which explicitly exempts from the FOIA transcripts of oral testimony taken in the course of investigations under that Act,<sup>42</sup> and section 21(f) of the FTC Act,<sup>43</sup> which expressly exempts from disclosure any material received by the FTC in the course of an FTC investigation authorized by that Act.<sup>44</sup> Likewise, information contained in the Social Security Administration's "Numident system," which was obtained from death certificates provided by state agencies, has been held exempt on the basis of subpart (A) on the grounds that the language of the statute, 42 U.S.C. § 405(r), "leaves no room for agency discretion."<sup>45</sup>

The D.C. Circuit, in a recent decision construing the application of the identical Exemption 3 language of the Government in the Sunshine Act<sup>46</sup> to the Defense Nuclear Facilities Safety Board Act<sup>47</sup> held that the latter statute allows no discretion with regard to the release of the Board's proposed recommendations, thus meeting the requirement of subpart (A).<sup>48</sup> By contrast, the D.C. Circuit found that the statute governing release by the FBI of criminal record

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<sup>38</sup> Mulloy v. Consumer Prod. Safety Comm'n, No. C-2-85-645, slip op. at 2-4 (S.D. Ohio Aug. 2, 1985).

<sup>39</sup> 15 U.S.C. § 18a(h) (1988).

<sup>40</sup> Lieberman v. FTC, 771 F.2d 32, 38 (2d Cir. 1985); Mattox v. FTC, 752 F.2d 116, 121 (5th Cir. 1985).

<sup>41</sup> 15 U.S.C. § 1314(g) (1988).

<sup>42</sup> Motion Picture Ass'n of America v. United States Dep't of Justice, No. 80 Civ. 6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981).

<sup>43</sup> 15 U.S.C. § 57b-2(f) (1988).

<sup>44</sup> A. Michael's Piano, Inc. v. FTC, No. 2:92 CV 00603, slip op. at 1 (D. Conn. Jan. 29, 1993) (appeal pending).

<sup>45</sup> International Diatomite Producers Assoc. v. United States Social Sec. Admin., No. C-92-1634, slip op. at 8-9 (N.D. Cal. Apr. 28, 1993) (appeal pending).

<sup>46</sup> 5 U.S.C. § 552b (1988).

<sup>47</sup> 42 U.S.C. §§ 2286-2286i (1988 & Supp. III 1991).

<sup>48</sup> Natural Resources Defense Council v. Defense Nuclear Facilities Safety Bd., 969 F.2d 1248, 1249 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 2332 (1993).

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information ("rap sheets")<sup>49</sup> fails to fulfill subpart (A)'s requirement of absolute withholding because the statute implies that the FBI has discretion to withhold records and, in fact, the FBI had exercised such discretion by its inconsistent manner of releasing "rap sheets" to the public.<sup>50</sup>

In a most extraordinary decision, the Ninth Circuit held that language in an appropriations act specifying that "[n]one of the funds provided in this Act may be expended to release information acquired from any handler" under a particular agricultural program,<sup>51</sup> does not satisfy the requirement of subpart (A) because through such language Congress prohibited only "the expenditure of funds" for releasing the information, not release of the information under the FOIA itself.<sup>52</sup>

#### Subpart (B)

Most Exemption 3 cases involve subpart (B), either explicitly or implicitly. For example, a provision of the Consumer Product Safety Act<sup>53</sup> has been held to set forth sufficiently definite withholding criteria for it to fall within the scope of subpart (B),<sup>54</sup> and the provision which prohibits the Commission from disclosing any information that is submitted to it pursuant to section 15(b) of the Act<sup>55</sup> has been held to meet the requirements of subpart (B) by referring to particular types of matters to be withheld.<sup>56</sup>

Section 777 of the Tariff Act,<sup>57</sup> governing the withholding of "proprietary information," has been held to refer to particular types of information to be

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<sup>49</sup> 28 U.S.C. § 534 (1988).

<sup>50</sup> Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 736 n.9 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); see also Dayton Newspapers, Inc. v. FBI, No. C-3-85-815, slip op. at 6 (S.D. Ohio Feb. 9, 1993) (motion for reconsideration pending).

<sup>51</sup> Agricultural, Rural Development, and Related Agencies Appropriations Act of 1988, Pub. L. No. 100-460, § 630, 102 Stat. 2229, 2262 (1988).

<sup>52</sup> Cal-Almond, Inc. v. United States Dep't of Agric., 960 F.2d 105, 108 (9th Cir. 1992).

<sup>53</sup> 15 U.S.C. § 2055(b)(1) (1988).

<sup>54</sup> Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 122 (1980).

<sup>55</sup> 15 U.S.C. § 2055(b)(5) (1988).

<sup>56</sup> Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, No. 87-1478, slip op. at 16-17 (D.D.C. Sept. 19, 1989).

<sup>57</sup> 19 U.S.C. § 1677f (1988 & Supp. IV 1992).

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withheld and thus to be a subpart (B) statute.<sup>58</sup> Section 12(d) of the Railroad Unemployment Insurance Act<sup>59</sup> refers to particular types of matters to be withheld--information which would reveal employees' identities--and thus has been held to satisfy subpart (B).<sup>60</sup>

Similarly, it has been held that section 12(c)(1) of the Export Administration Act, governing the disclosure of export licenses and applications,<sup>61</sup> authorizes the withholding of a sufficiently narrow class of information to satisfy the requirements of subpart (B) and thus qualifies as an Exemption 3 statute.<sup>62</sup> Likewise, the Collection and Publication of Foreign Commerce Act,<sup>63</sup> which explicitly provides for nondisclosure of shippers' export declarations, qualifies as an Exemption 3 statute under subpart (B).<sup>64</sup>

The Supreme Court has held that section 102(d)(3) of the National Security Act of 1947,<sup>65</sup> which requires the Director of the CIA to protect "intelligence sources and methods," clearly refers to particular types of matters to be withheld and thus comes within the ambit of subpart (B).<sup>66</sup> Likewise, section

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<sup>58</sup> Mudge Rose Guthrie Alexander & Ferdon v. United States Int'l Trade Comm'n, 846 F.2d 1527, 1530 (D.C. Cir. 1988).

<sup>59</sup> 45 U.S.C. § 362(d) (1988 & Supp. III 1991).

<sup>60</sup> Association of Retired R.R. Workers v. United States R.R. Retirement Bd., 830 F.2d 331, 334 (D.C. Cir. 1987); National Ass'n of Retired & Veteran Ry. Employees v. Railroad Retirement Bd., No. 87-117, slip op. at 5 (N.D. Ohio Feb. 20, 1991).

<sup>61</sup> 50 U.S.C. app. § 2411(c)(1) (1988).

<sup>62</sup> Africa Fund v. Mosbacher, No. 92 Civ. 289, slip op. at 14 (S.D.N.Y. May 26, 1993) (Export Administration Act protection held to apply to agency denial made after Act expired and before subsequent reextension); Lessner v. United States Dep't of Commerce, 827 F.2d 1333, 1336-37 (9th Cir. 1987) (construing statute as effective in 1987).

<sup>63</sup> 13 U.S.C. § 301(g) (1988).

<sup>64</sup> Africa Fund v. Mosbacher, slip op. at 13; Young Conservative Found. v. United States Dep't of Commerce, No. 85-3982, slip op. at 8 (D.D.C. Mar. 25, 1987).

<sup>65</sup> 50 U.S.C. § 403(d)(3) (1988).

<sup>66</sup> CIA v. Sims, 471 U.S. 159, 167 (1985); see also Maynard v. CIA, 986 F.2d 547, 554 (1st Cir. 1993) (under § 403(d)(3) it is responsibility of Director of Central Intelligence to determine whether sources or methods should be disclosed); Krikorian v. Department of State, 984 F.2d 461, 465 (D.C. Cir. 1993 (same)); Hunt v. CIA, 981 F.2d 1116, 1118 (9th Cir. 1992) (same); Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990) (same); Knight v. CIA, 872 F.2d 660, 663 (8th Cir. 1989) (same), cert. denied, 494 U.S. 1004 (1990).

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6 of the Central Intelligence Agency Act of 1949<sup>67</sup>--protecting from disclosure "the organization, functions, names, official titles, salaries or numbers of personnel" employed by the CIA--meets the requirements of subpart (B).<sup>68</sup> Similarly, section 6 of Public Law No. 86-36,<sup>69</sup> pertaining to the organization, functions, activities and personnel of the NSA, has been held to qualify as an subpart (B) statute,<sup>70</sup> as has 18 U.S.C. § 798(a), which criminalizes the disclosure of any classified information "concerning the nature, preparation, or use of any code, cipher or cryptographic system of the United States."<sup>71</sup> A provision of the Atomic Energy Act, prohibiting the disclosure of "Restricted Data" to the public,<sup>72</sup> refers to particular types of matters and thus has been held to qualify as a subpart (B) statute as well.<sup>73</sup>

Section 7332 of the Veterans Health Administration Patient Rights Statute<sup>74</sup> generally prohibits disclosure of even the abstract fact that medical records on named individuals are maintained pursuant to that section, but it provides specific criteria under which particular medical information may be released, and thus has been found to satisfy the requirements of subpart (B).<sup>75</sup>

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<sup>67</sup> 50 U.S.C. § 403g (1988).

<sup>68</sup> See, e.g., Rothschild v. CIA, No. 91-1314, slip op. at 6 (D.D.C. Mar. 25, 1992); Carney v. CIA, No. 88-602, slip op. at 11 (C.D. Cal. Apr. 30, 1991); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 567 (S.D.N.Y. 1989); Pfeiffer v. CIA, 721 F. Supp. 337, 341-42 (D.D.C. 1989).

<sup>69</sup> 50 U.S.C. § 402 note (1988).

<sup>70</sup> Founding Church of Scientology v. NSA, 610 F.2d 824, 828 (D.C. Cir. 1979); Hayden v. NSA, 452 F. Supp. 247, 252 (D.D.C. 1978), aff'd, 608 F.2d 1381 (D.C. Cir. 1979), cert. denied, 466 U.S. 937 (1980). But see Weberman v. NSA, 490 F. Supp. 9, 14-15 (S.D.N.Y. 1980) (confirming or denying existence of intercepted telegram does not reveal information integrally related to specific NSA activity), rev'd on other grounds & remanded, 646 F.2d 563 (2d Cir. 1980).

<sup>71</sup> Winter v. NSA, 569 F. Supp. 545, 548 (S.D. Cal. 1983); see also Gilmore v. NSA, No. C 92-3646, slip op. at 20-21 (N.D. Cal. May 3, 1993) (information on cryptography currently used by NSA "integrally related" to function and activity of intelligence gathering and thus protected).

<sup>72</sup> 42 U.S.C. § 2162(a) (1988).

<sup>73</sup> Meeropol v. Smith, No. 75-1121, slip op. at 53-55 (D.D.C. Feb. 29, 1984), aff'd in relevant part & remanded in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986). But see General Elec. Co. v. NRC, 750 F.2d 1394, 1401 (7th Cir. 1984) (42 U.S.C. § 2133(b)(3) (1988), concerning technical information furnished by license applicants, lacks sufficient specificity to qualify as Exemption 3 statute).

<sup>74</sup> 38 U.S.C. § 7332 (1988 & Supp. III 1991).

<sup>75</sup> Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992).

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One court has suggested that section 5038 of the Juvenile Delinquency Records Statute,<sup>76</sup> which generally prohibits disclosure of the existence of records compiled pursuant to that section, but which does provide specific criteria for releasing the information, qualifies as a subpart (B) statute.<sup>77</sup>

The Court of Appeals for the District of Columbia Circuit has held that a portion of the Patent Act<sup>78</sup> satisfies subpart (B) because it identifies the types of matters--patent applications and information concerning them--intended to be withheld.<sup>79</sup> As well, the portion of the Civil Service Reform Act concerning the confidentiality of certain labor relations training and guidance materials,<sup>80</sup> has been held to qualify as a subpart (B) withholding statute.<sup>81</sup>

The Commodity Exchange Act,<sup>82</sup> which prohibits the disclosure of business transactions, market positions, trade secrets, or customer names of persons under investigation under the Act, has been held to refer to particular types of matters and thus to satisfy subpart (B).<sup>83</sup> The D.C. Circuit has recently held that section 316(d)(2) of the Federal Aviation Act,<sup>84</sup> relating to security data the disclosure of which would be detrimental to the safety of airline travelers, similarly shields that particular data from disclosure under the FOIA.<sup>85</sup> Finally, it also has been held that the DOD's "technical data" statute,<sup>86</sup> which protects technical information with "military or space application" for which a license is required for export, satisfies subpart (B) because it refers to suffi-

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<sup>76</sup> 18 U.S.C. § 5038 (1988).

<sup>77</sup> McDonnell v. United States, No. 91-5916, slip op. at 35-40 (3d Cir. Sept. 21, 1993) (holding state juvenile delinquency records not within scope of statute) (to be published).

<sup>78</sup> 35 U.S.C. § 122 (1988).

<sup>79</sup> Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980); accord Leeds v. Quigg, 720 F. Supp. 193, 194 (D.D.C. 1989).

<sup>80</sup> 5 U.S.C. § 7114(b)(4) (1988).

<sup>81</sup> Dubin v. Department of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981), aff'd, 697 F.2d 1093 (11th Cir. 1983) (table cite); National Treasury Employees Union v. OPM, No. 76-695, slip op. at 4 (D.D.C. July 9, 1979).

<sup>82</sup> 7 U.S.C. § 12 (1988 & Supp. IV 1992).

<sup>83</sup> Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47, 49 (D.D.C. 1979).

<sup>84</sup> 49 U.S.C. app. § 1357(d)(2) (1988).

<sup>85</sup> Public Citizen, Inc. v. FAA, 988 F.2d 186, 194 (D.C. Cir. 1993).

<sup>86</sup> 10 U.S.C. § 130 (1988 & Supp. IV 1992).

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ciently particular types of matters.<sup>87</sup>

#### Alternative Analyses

Some statutes have been found to satisfy both Exemption 3 subparts. For example, while the Court of Appeals for the Third Circuit has held that section 222(f) of the Immigration and Nationality Act<sup>88</sup> sufficiently limits the category of information it covers--records pertaining to the issuance or refusal of visas and permits to enter the United States--to qualify as an Exemption 3 statute under subpart (B),<sup>89</sup> the Court of Appeals for the District of Columbia Circuit has specifically held that the section satisfies subpart (A) as well as subpart (B).<sup>90</sup>

Similarly, Exemption 3 protection for information pertaining to court-ordered wiretaps<sup>91</sup> has been recognized by district courts on a variety of bases.<sup>92</sup> However, in Lam Lek Chong v. DEA,<sup>93</sup> the D.C. Circuit, finding that "on its face, Title III clearly identifies intercepted communications as the subject of its disclosure limitations," held that "Title III falls squarely within the scope of subsection (B)'s second prong, as a statute referring to particular matters to be withheld."<sup>94</sup> Recently, "pen register" applications and orders, ob-

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<sup>87</sup> Colonial Trading Corp. v. Department of the Navy, 735 F. Supp. 429, 431 (D.D.C. 1990); see also American Friends Serv. Comm. v. DOD, No. 83-4916, slip op. at 10 (E.D. Pa. Sept. 25, 1986), rev'd on other grounds, 831 F.2d 441 (3d Cir. 1987).

<sup>88</sup> 8 U.S.C. § 1202(f) (1988).

<sup>89</sup> DeLaurentiis v. Haig, 686 F.2d 192, 194 (3d Cir. 1982); accord Smith v. Department of Justice, No. 81-CV-813, slip op. at 10-11 (N.D.N.Y. Dec. 13, 1983).

<sup>90</sup> Medina-Hincapie v. Department of State, 700 F.2d 737, 741-42 (D.C. Cir. 1983).

<sup>91</sup> 18 U.S.C. §§ 2510-2520 (1988 & Supp. IV 1992).

<sup>92</sup> See Gonzalez v. United States Dep't of Justice, No. 88-913, slip op. at 3-4 (D.D.C. Oct. 25, 1988) (holding that 18 U.S.C. § 2511(2)(a)(ii), which regulates disclosure of existence of wiretap intercepts, meets requirements of subpart (A)); Docal v. Benninger, 543 F. Supp. 38, 43-44 (M.D. Pa. 1981) (relying upon entire statutory scheme of Title III, 18 U.S.C. §§ 2510-2520, but not distinguishing between Exemption 3 subparts); Carroll v. United States Dep't of Justice, No. 76-2038, slip op. at 2-3 (D.D.C. May 26, 1978) (holding that 18 U.S.C. § 2518(8), which regulates disclosure of contents of wiretap intercepts, meets requirements of subpart (A)).

<sup>93</sup> 929 F.2d 729 (D.C. Cir. 1991).

<sup>94</sup> Id. at 733; see also Manchester v. DEA, No. 91-2498, slip op. at 14 (E.D. Pa. June 11, 1993) (wiretap applications and derivative information fall within purview of statute).

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tained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, have been held to be protected from disclosure by a provision of that statute<sup>95</sup> and Exemption 3.<sup>96</sup>

The withholding of tax return information has been approved under three different theories. The United States Supreme Court and most appellate courts to have considered the matter have held either explicitly or implicitly that § 6103 of the Internal Revenue Code<sup>97</sup> satisfies subpart (B) of Exemption 3.<sup>98</sup> The Courts of Appeals for the D.C., Fifth, Sixth and Tenth Circuits have further reasoned that § 6103 is a subpart (A) statute to the extent that a person is not entitled to access to tax returns or return information of other taxpayers.<sup>99</sup> It should be noted that pursuant to § 6103(b)(2), individuals are not entitled to tax return information on themselves if it is determined that release would impair enforcement by the IRS.<sup>100</sup> Of course, it also must be remembered that

<sup>95</sup> 18 U.S.C. § 3123(d) (1988).

<sup>96</sup> Manna v. United States Dep't of Justice, 815 F. Supp. 798, 812 (D.N.J. 1993).

<sup>97</sup> 26 U.S.C. § 6103 (1988 & Supp. III 1991).

<sup>98</sup> See, e.g., Church of Scientology v. IRS, 484 U.S. 9, 15 (1987); Aronson v. IRS, 973 F.2d 962, 964-65 (1st Cir. 1992) (IRS lawfully exercised discretion to withhold street addresses pursuant to 26 U.S.C. § 6103(m)(1)); Long v. IRS, 891 F.2d 222, 224 (9th Cir. 1989) (deletion of taxpayers' identification does not alter confidentiality of § 6103 information); DeSalvo v. IRS, 861 F.2d 1217, 1221 (10th Cir. 1988); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986); Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984); Ryan v. Bureau of Alcohol, Tobacco & Firearms, 715 F.2d 644, 645 (D.C. Cir. 1983); Currie v. IRS, 704 F.2d 523, 527-28 (11th Cir. 1983); Willamette Indus. v. United States, 689 F.2d 865, 867 (9th Cir. 1982), cert. denied, 460 U.S. 1052 (1983); Barney v. IRS, 618 F.2d 1268, 1274 n.15 (8th Cir. 1980) (dictum); Chamberlain v. Kurtz, 589 F.2d 827, 843 (5th Cir.), cert. denied, 444 U.S. 842 (1979).

<sup>99</sup> D.C. Circuit: Stebbins v. Sullivan, No. 90-5361, slip op. at 1 (D.C. Cir. July 22, 1992); Fifth Circuit: Linsteadt v. IRS, 729 F.2d 998, 1000 (5th Cir. 1984); Sixth Circuit: Fruehauf Corp. v. IRS, 566 F.2d 574, 578 n.6 (6th Cir. 1977); Tenth Circuit: DeSalvo v. IRS, 861 F.2d at 1221 n.4; see also Kamman v. IRS, No. 91-1352, slip op. at 7 (D. Ariz. Mar. 13, 1992) (deletion of taxpayer name from appraisals of property does not remove documents from protection under § 6103(b)); Stephenson v. IRS, No. C78-1071A, slip op. at 3 (N.D. Ga. Sept. 21, 1981). But see Gray, Plant, Mooty, Mooty & Bennett v. IRS, No. 4-90-210, slip op. at 7 (D. Minn. Dec. 12, 1990) (public report must be released because it does not qualify as "return information" as it does not include data in form which can be associated with particular taxpayer).

<sup>100</sup> See Gillin v. IRS, 980 F.2d 819, 822 (1st Cir. 1992) (per curiam) (differential function scores used to identify returns most in need of examination or audit held exempt from disclosure); Long v. IRS, 891 F.2d at 224 (computer tapes used to develop discriminant function formulas protected); In re Church (continued...)



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§ 6103 applies only to tax return information obtained by the Department of the Treasury, not to such information maintained by other agencies which was obtained by means other than through the provisions of the Internal Revenue Code.<sup>101</sup>

At least one court of appeals and several district courts have explicitly embraced a third theory based upon the reasoning of Zale Corp. v. IRS.<sup>102</sup> These courts have held that it is not necessary to view § 6103 as an Exemption 3 statute in order to withhold tax return information because the provisions of this tax code section are intended to operate as the sole standard governing the disclosure or nondisclosure of such information, thereby "displacing" the FOIA.<sup>103</sup>

Viewing § 6103 as a "displacement" statute permits the courts to avoid the de novo review required by the FOIA and to apply instead less stringent standards of review pursuant to the Administrative Procedure Act,<sup>104</sup> and can relieve agencies from certain procedural requirements of the FOIA, such as the time limitations for responding to requests and the duty to segregate and release

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<sup>100</sup>(...continued)

of Scientology Flag Serv. Org./IRS FOIA Litigation, No. 91-423, slip op. at 3-4 (M.D. Fla. May 19, 1993) ("tolerance criteria" and "discriminant function scores" properly withheld) (multidistrict litigation case); Rollins v. United States Dep't of Justice, No. 90-3170, slip op. at 11 (S.D. Tex. June 30, 1992) (IRS memoranda revealing scope and direction of investigation properly withheld); Starkey v. IRS, No. 91-20040, slip op. at 5 (N.D. Cal. Dec. 6, 1991) (same); Church of Scientology v. IRS, No. 89-5894, slip op. at 3 (C.D. Cal. Mar. 3, 1991) (release of document referring to information obtainable under various treaties would chill future cooperation of foreign governments and tax-treaty partners); Ferguson v. IRS, No. C-89-4048, slip op. at 4 (N.D. Cal. Oct. 31, 1990) (standards and data used in selection and examination of returns are exempt from disclosure where they would impair IRS enforcement); Casa Investors, Ltd. v. Gibbs, No. 88-2485, slip op. at 5-6 (D.D.C. Oct. 11, 1990) (recommendation for settlement of tax controversies prepared by low-level IRS employees require protection). But see LeMaine v. IRS, No. 89-2914, slip op. at 12 (D. Mass. Dec. 10, 1991) (release of information commonly revealed to public in tax enforcement proceedings would not "seriously impair Federal tax administration" overall).

<sup>101</sup> See FOIA Update, Spring 1988, at 5.

<sup>102</sup> 481 F. Supp. 486, 490 (D.D.C. 1979).

<sup>103</sup> See, e.g., Cheek v. IRS, 703 F.2d 271, 271 (7th Cir. 1983) (§ 6103 also "displaces" Privacy Act of 1974); King v. IRS, 688 F.2d 488, 495 (7th Cir. 1982); Kuzma v. IRS, No. 81-600E, slip op. at 7-8 (W.D.N.Y. Dec. 31, 1984); Hosner v. IRS, 3 Gov't Disclosure Serv. (P-H) ¶ 83,164, at 83,816 (D.D.C. Mar. 31, 1983); Hulsey v. IRS, 497 F. Supp. 617, 618 (N.D. Tex. 1980); see also White v. IRS, 707 F.2d 897, 900 (6th Cir. 1983) (indicating approval of Zale).

<sup>104</sup> 5 U.S.C. §§ 701-706 (1988).

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nonexempt information.<sup>105</sup> Nevertheless, even under this approach the government may be required to provide detailed Vaughn Indexes of the information being withheld, rather than general affidavits; the Sixth Circuit required this despite the fact that the court below had relied solely on the "displacement" theory for its decision.<sup>106</sup>

However, other courts have specifically refused to adopt this "displacement" analysis on the ground that to do so, once it is already evident that § 6103 is an Exemption 3 statute, "would be an exercise in judicial futility [requiring district courts] to engage in both FOIA and Zale analyses when confronted" with such cases.<sup>107</sup> Most significantly, the D.C. Circuit in 1986 squarely rejected the "displacement" argument on the basis that the procedures in § 6103 for members of the public to obtain access to IRS documents do not duplicate, and thus do not "displace," those of the FOIA.<sup>108</sup>

The D.C. Circuit's rejection of the "displacement" theory in relation to § 6103 is consistent with previous D.C. Circuit decisions involving similar "displacement" arguments. For example, it had previously rejected a "displacement" argument involving the Department of State's Emergency Fund statutes<sup>109</sup> when it held that inasmuch as Exemption 3 is not satisfied by these statutes, information cannot be withheld pursuant to them, even though they were enacted after the FOIA.<sup>110</sup>

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<sup>105</sup> See Grasso v. IRS, 785 F.2d at 73-74; White v. IRS, 707 F.2d at 900; Goldsborough v. IRS, No. Y-81-1939, slip op. at 12 (D. Md. May 10, 1984); Green v. IRS, 556 F. Supp. 79, 84 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984) (table cite); Meyer v. Department of the Treasury, 82-2 U.S. Tax Cas. (CCH) ¶ 9678, at 85,448 (W.D. Mich. Oct. 2, 1982).

<sup>106</sup> See Osborn v. IRS, 754 F.2d 195, 197-98 (6th Cir. 1985).

<sup>107</sup> Currie v. IRS, 704 F.2d at 528; accord Grasso v. IRS, 785 F.2d at 74; Long v. IRS, 742 F.2d at 1177 (also rejecting ERTA Amendment as "displacement" statute); Linsteadt v. IRS, 729 F.2d at 1001-02; see also Britt v. IRS, 547 F. Supp. 808, 813 (D.D.C. 1982); Tigar & Buffone v. CIA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,172, at 81,461 (D.D.C. Feb. 23, 1981).

<sup>108</sup> Church of Scientology v. IRS, 792 F.2d 146, 148-50 (D.C. Cir. 1986).

<sup>109</sup> 22 U.S.C. § 2671 (1988); 31 U.S.C. § 107 (1988).

<sup>110</sup> See Washington Post Co. v. United States Dep't of State, 685 F.2d 698, 703-04 & n.9 (D.C. Cir. 1982), cert. granted, 464 U.S. 812, vacated & remanded, 464 U.S. 979 (1983). (After the Supreme Court granted the government's petition for certiorari, the Washington Post Company withdrew its FOIA request, which had the procedural effect of nullifying the D.C. Circuit's decision. Thus, the Supreme Court has never substantively reviewed this issue.) See also FOIA Update, Fall 1983, at 11; cf. United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 153-54 (1989) (FOIA, not 28 U.S.C. § 1914 (1988), governs disclosure of court records in possession of government agencies); Paisley v. CIA, 712 F.2d 686, 697 (D.C. Cir. 1983) (FOIA, not Speech (continued...))

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Yet the D.C. Circuit has held that the procedures of the Presidential Recordings and Materials Preservation Act<sup>111</sup> exclusively govern the disclosure of transcripts of the tape recordings of President Nixon's White House conversations, based upon the Act's comprehensive, carefully tailored procedure for releasing Presidential materials to the public.<sup>112</sup> Thus, the "displacement" theory may still be advanced for statutes which provide procedures for the release of information to the public that, in essence, duplicate the procedures provided by the FOIA,<sup>113</sup> or for statutes which comprehensively override the FOIA's access scheme.<sup>114</sup> In this connection, it should be noted that the FOIA's specific fee provision referring to other statutes that set fees for particular types of records<sup>115</sup> has the effect of causing those statutes to "displace" the FOIA's basic fee provisions. (For a further discussion of this point, see Fees and Fee Waivers, below.)

#### Additional Considerations

Certain statutes fail to meet the requisites of either Exemption 3 prong. For instance, the Court of Appeals for the District of Columbia Circuit, in holding that provisions governing the FBI's sharing of "rap sheets"<sup>116</sup> do not qualify as an Exemption 3 statute because they do not expressly prohibit the disclosure of "rap sheets," explained that even if the provisions met the exemption's threshold requirement, they would not qualify as an Exemption 3 statute as they fail to satisfy either of its subparts.<sup>117</sup> Similarly, the Copyright Act of 1976<sup>118</sup> has been held to satisfy neither Exemption 3 subpart because rather than prohibiting disclosure, it specifically permits public inspection of copy-

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<sup>110</sup>(...continued)

or Debate Clause, is definitive word on disclosure of information within government's possession); Church of Scientology v. United States Postal Serv., 633 F.2d 1327, 1333 (9th Cir. 1980) (postal statute does not displace more detailed and later-enacted FOIA absent specific indication of congressional intent to the contrary).

<sup>111</sup> 44 U.S.C. § 2111 (1988).

<sup>112</sup> Ricchio v. Kline, 773 F.2d 1389, 1395 (D.C. Cir. 1985).

<sup>113</sup> See Church of Scientology v. IRS, 792 F.2d at 149 (dictum).

<sup>114</sup> See Ricchio v. Kline, 773 F.2d at 1395; cf. SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by National Library of Medicine Act, 42 U.S.C. § 275 (1988)); FOIA Update, Fall 1990, at 7-8 n.32.

<sup>115</sup> 5 U.S.C. § 552(a)(4)(A)(vi) (1988).

<sup>116</sup> 28 U.S.C. § 534 (1988).

<sup>117</sup> Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 736 n.9 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989).

<sup>118</sup> 17 U.S.C. § 705(b) (1988).

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righted documents.<sup>119</sup> It has also been held that section 360j(h) of the Medical Device Amendments of 1976<sup>120</sup> is not an Exemption 3 statute because it does not specifically prohibit disclosure of records,<sup>121</sup> nor is section 410(c)(6) of the Postal Reorganization Act<sup>122</sup> because the broad discretion afforded the Postal Service to release or withhold records is not sufficiently specific.<sup>123</sup>

A particularly difficult Exemption 3 issue was finally put to rest by the Supreme Court in 1988. In analyzing the applicability of Exemption 3 to the Parole Commission and Reorganization Act<sup>124</sup> and Rule 32 of the Federal Rules of Criminal Procedure, each of which governs the disclosure of presentence reports, the Supreme Court decisively held that they are Exemption 3 statutes in part.<sup>125</sup> The Court found that they do not permit the withholding of an entire presentence report, but rather only those portions of a presentence report pertaining to a probation officer's sentencing recommendations, certain diagnostic opinions, information obtained upon a promise of confidentiality, and information which, if disclosed, might result in harm to any person, and that "the remaining parts of the reports are not covered by this exemption, and thus must be disclosed unless there is some other exemption which applies to them."<sup>126</sup>

Another Exemption 3 issue concerns the Trade Secrets Act<sup>127</sup> which prohibits the unauthorized disclosure of commercial and financial information. Although the Supreme Court declined to decide whether the Trade Secrets Act is an Exemption 3 statute,<sup>128</sup> most courts confronted with the issue have held that it is not.<sup>129</sup>

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<sup>119</sup> See St. Paul's Benevolent Educ. & Missionary Inst. v. United States, 506 F. Supp. 822, 830 (N.D. Ga. 1980); see also FOIA Update, Fall 1983, at 3-5 ("OIP Guidance: Copyrighted Materials and the FOIA").

<sup>120</sup> 21 U.S.C. § 360j(h) (1988).

<sup>121</sup> Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1286 (D.C. Cir. 1983).

<sup>122</sup> 39 U.S.C. § 410(c)(6) (1988).

<sup>123</sup> Church of Scientology v. United States Postal Serv., 633 F.2d 1327, 1333 (9th Cir. 1980).

<sup>124</sup> 18 U.S.C. § 4208 (1988).

<sup>125</sup> United States Dep't of Justice v. Julian, 486 U.S. 1, 9 (1988).

<sup>126</sup> Id. at 11; see also FOIA Update, Spring 1988, at 1-2.

<sup>127</sup> 18 U.S.C. § 1905 (1988).

<sup>128</sup> Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979).

<sup>129</sup> See, e.g., Anderson v. HHS, 907 F.2d 936, 949 (10th Cir. 1990) ("[T]he broad and ill-defined wording of § 1905 fails to meet either of the requirements of Exemption 3."); Acumenics Research & Technology v. United (continued...)

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In 1987, the D.C. Circuit issued a long-awaited decision which "definitively" resolved the issue by holding that the Trade Secrets Act does not satisfy either of amended Exemption 3's requirements and thus does not qualify as a separate withholding statute.<sup>130</sup> First, its prohibition against disclosure is not absolute, as it prohibits only those disclosures that are "not authorized by law."<sup>131</sup> Because duly promulgated agency regulations can provide the necessary authorization for release, the agency "possesses discretion to control the applicability" of the Act.<sup>132</sup> The existence of this discretion precludes the Trade Secrets Act from satisfying subpart (A) of Exemption 3.<sup>133</sup> Moreover, the court held that the Trade Secrets Act fails to satisfy the first prong of subpart (B) because it "in no way channels the discretion of agency decision-makers."<sup>134</sup> Indeed, the court concluded, this utter lack of statutory guidance renders the Trade Secrets Act susceptible to invocation at the "whim of an administrator."<sup>135</sup> Finally, it was held that the Act also fails to satisfy the second prong of subpart (B) because of the "encyclopedic character" of the material within its scope and the absence of any limitation on the agencies covered or the sources of data included.<sup>136</sup> Given all these elements, the court held that the Trade Secrets Act simply does not qualify as an Exemption 3 statute.<sup>137</sup>

The D.C. Circuit's decision on this issue is entirely consistent with the legislative history of the 1976 amendment to Exemption 3, which states that the

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<sup>129</sup>(...continued)

States Dep't of Justice, 843 F.2d 800, 805 n.6, 806 (4th Cir. 1988) (finding "no basis" for argument that Exemption 3 and § 1905 prevent disclosure of information that is outside scope of Exemption 4); General Elec. Co. v. NRC, 750 F.2d 1394, 1401-02 (7th Cir. 1984) (same); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 686-87 (D.C. Cir. 1976) (implying that § 1905's prohibition is too general to be incorporated into Exemption 3); see also 9 to 5 Org. of Women Office Workers v. Board of Governors of the Fed. Reserve Sys., 721 F.2d 1, 12 (1st Cir. 1983) (specifically declining to address issue); United Technologies Corp. v. Marshall, 464 F. Supp. 845, 851 (D. Conn. 1979); St. Mary's Hosp., Inc. v. Califano, 462 F. Supp. 315, 317 (S.D. Fla. 1978), aff'd sub nom. St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407 (5th Cir. 1979); accord FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

<sup>130</sup> CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1137-43 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988).

<sup>131</sup> Id. at 1138.

<sup>132</sup> Id. at 1139.

<sup>133</sup> Id. at 1138.

<sup>134</sup> Id. at 1139.

<sup>135</sup> Id.

<sup>136</sup> Id. at 1140-41.

<sup>137</sup> Id. at 1141.

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Trade Secrets Act was not intended to qualify as a nondisclosure statute within the exemption's purview and that any analysis of trade secrets and commercial or financial information should focus instead on the applicability of Exemption 4.<sup>138</sup> It also followed the Department of Justice's stated policy position on the issue.<sup>139</sup>

Lastly, a particularly controversial issue at one time was whether the Privacy Act of 1974<sup>140</sup> could serve as an Exemption 3 statute. The Privacy Act authorizes an individual to obtain access to those federal records maintained under the individual's name or personal identifier, subject to certain broad, system-wide exemptions.<sup>141</sup> If the Privacy Act had been regarded as an Exemption 3 statute, records exempt from disclosure to first-party requesters under the Privacy Act also would have been exempt under the FOIA; if not, requesters would have been able to obtain information on themselves under the FOIA notwithstanding that such information was exempt under the Privacy Act. In the early 1980's, the Department of Justice took the position that the Privacy Act was an Exemption 3 statute within the first-party requester context.<sup>142</sup> When a conflict subsequently arose among the circuits which considered the proper relationship between these two access statutes, the Supreme Court agreed to resolve the issue.<sup>143</sup> However, these cases became moot when Congress, upon enacting the Central Intelligence Agency Information Act in 1984, explicitly provided that the Privacy Act is not an Exemption 3 statute.<sup>144</sup> Thus, the Supreme Court dismissed the appeals in these cases and this issue has been placed entirely to rest.<sup>145</sup>

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<sup>138</sup> H.R. Rep. No. 880, 94th Cong., 2d Sess. 23 (1976), reprinted in 1976 U.S.C.C.A.N. 2191, 2205; see *Anderson v. HHS*, 907 F.2d at 949-50; *CNA Fin. Corp. v. Donovan*, 830 F.2d at 1142 n.70; see also *Acumenics Research & Technology v. United States Dep't of Justice*, 843 F.2d at 805 n.6; *General Elec. Co. v. NRC*, 750 F.2d at 1401-02; *General Dynamics Corp. v. Marshall*, 607 F.2d 234, 236-37 (8th Cir. 1979).

<sup>139</sup> See FOIA Update, Summer 1986, at 6 (advising agencies that Trade Secrets Act should not be regarded as Exemption 3 statute).

<sup>140</sup> 5 U.S.C. § 552a (1988 & Supp. IV 1992).

<sup>141</sup> See, e.g., 5 U.S.C. § 552a(j)(2).

<sup>142</sup> See FOIA Update, Spring 1983, at 3.

<sup>143</sup> See *Provenzano v. United States Dep't of Justice*, 717 F.2d 799 (3d Cir. 1983), cert. granted, 466 U.S. 926 (1984); *Shapiro v. DEA*, 721 F.2d 215 (7th Cir. 1983), cert. granted, 466 U.S. 926 (1984).

<sup>144</sup> Pub. L. No. 98-477, § 2(c), 98 Stat. 2209, 2212 (1984) (amending what is now subsection (t) of the Privacy Act).

<sup>145</sup> See *United States Dep't of Justice v. Provenzano*, 469 U.S. 14 (1984); FOIA Update, Fall 1984, at 4.

## EXEMPTION 4

### EXEMPTION 4

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."<sup>1</sup> This exemption is intended to protect the interests of both the government and submitters of information. It encourages the voluntary submission of useful commercial or financial information to the government and provides assurance that such information will be reliable. The exemption also protects those who are required to submit such commercial or financial information from the competitive disadvantages that could result from disclosure. The exemption covers two broad categories of information in federal agency records: (1) trade secrets; and (2) information which is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

#### Trade Secrets

For purposes of Exemption 4, the Court of Appeals for the District of Columbia Circuit in Public Citizen Health Research Group v. FDA,<sup>2</sup> has adopted a narrow "common law" definition of the term "trade secret" that differs from the broad definition used in the Restatement of Torts. The D.C. Circuit's decision in Public Citizen represented a distinct departure from what until then had been almost universally accepted by the courts--that "trade secret" is a broad term extending to virtually any information that provides a competitive advantage. In Public Citizen, the term "trade secret" was narrowly defined as "a 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."<sup>3</sup> This definition requires that there be a "direct relationship" between the trade secret and the productive process.<sup>4</sup>

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<sup>1</sup> 5 U.S.C. § 552(b)(4) (1988).

<sup>2</sup> 704 F.2d 1280, 1288 (D.C. Cir. 1983).

<sup>3</sup> Id.

<sup>4</sup> Id.; see, e.g., Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 14 (C.D. Cal. May 10, 1993) ("information about how a pioneer drug product is formulated, chemically composed, manufactured, and quality controlled" held protectible as trade secrets); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 1-2 (D.D.C. Nov. 20, 1987) (design drawings of airplane fuel pumps developed by private company and used by Air Force held protectible as trade secrets), modifying (D.D.C. Sept. 29, 1987), motion to amend judgment denied (D.D.C. Dec. 16, 1987); Yamamoto v. IRS, No. 83-2160, slip op. at 2 (D.D.C. Nov. 16, 1983) (report on computation of standard mileage rate prepared by private company and used by IRS held protectible as trade secret); cf. Myers v. Williams, No. 92-1609 (D. Or. Apr. 21, 1993) (preliminary injunction granted to prevent FOIA requester from disclosing trade secret acquired through mistaken, but nonetheless official, FOIA release) (non-FOIA case).

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Three years ago, the Court of Appeals for the Tenth Circuit expressly adopted the D.C. Circuit's narrow definition of the term "trade secret," finding it "more consistent with the policies behind the FOIA than the broad Restatement definition."<sup>5</sup> In so doing, the Tenth Circuit noted that adoption of the broader Restatement definition "would render superfluous" the remaining category of Exemption 4 information "because there would be no category of information falling within the latter" category that would be "outside" the reach of the trade secret category.<sup>6</sup> Like the D.C. Circuit, the Tenth Circuit was "reluctant to construe the FOIA in such a manner."<sup>7</sup>

### Commercial or Financial Information

The overwhelming bulk of Exemption 4 cases focus on whether the withheld information falls within its second, much larger category. To do so, the information must be commercial or financial, obtained from a person, and privileged or confidential.<sup>8</sup>

If information relates to business or trade, courts have little difficulty in considering it "commercial or financial."<sup>9</sup> The Court of Appeals for the District of Columbia Circuit has firmly held that these terms should be given their "ordinary meanings," and has specifically rejected the argument that the term "commercial" be confined to records that "reveal basic commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them.<sup>10</sup> Similarly, in a case involving information

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<sup>5</sup> Anderson v. HHS, 907 F.2d 936, 944 (10th Cir. 1990).

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> See, e.g., Gulf & Western Indus. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1979); Consumers Union v. VA, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

<sup>9</sup> See, e.g., RMS Indus. v. DOD, No. C-92-1545, slip op. at 6 (N.D. Cal. Nov. 24, 1992) (requested "information is all financial because it directly reflects the financial capability of the companies to perform" a government contract and was obtained "in the bidding and award process").

<sup>10</sup> Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing Washington Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982); Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir. 1980)); see, e.g., Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) (appeal pending); ISC Group v. DOD, No. 88-631, slip op. at 7 (D.D.C. May 22, 1989); M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (settlement negotiation documents reflecting "accounting and other internal procedures" deemed "commercial" as submitter had "commercial interest" in them); see also FOIA Update, Winter 1985, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value"); FOIA Update, Fall 1983, at 3-5 ("OIP Guidance: Copyrighted Mate-

(continued...)



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submitted by a labor union, the Court of Appeals for the Second Circuit held that the term "commercial" includes anything "pertaining or relating to or dealing with commerce."<sup>11</sup> Indeed, commercial information can include even material submitted by a nonprofit entity.<sup>12</sup>

Moreover, protection for financial information is not limited to economic data generated solely by corporations or other business entities, but rather has been held to apply to personal financial information as well.<sup>13</sup> Examples of items generally regarded as commercial or financial information include: business sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial condition.<sup>14</sup>

#### Obtained from a "Person"

The second of Exemption 4's specific criteria, that the information be "obtained from a person," is quite easily met in almost all circumstances. The term "person" refers to a wide range of entities, including corporations, state

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<sup>10</sup>(...continued)

erials and the FOIA"). But see also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 244-45 (D.C. Cir. 1974) (scientific research designs submitted in grant applications not "commercial" absent showing that the research itself had any commercial character), cert. denied, 421 U.S. 963 (1975).

<sup>11</sup> American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978); see also Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) ("information relating to the employment and unemployment of workers constitutes commercial or financial information"); Brockway v. Department of the Air Force, 370 F. Supp. 738, 740 (N.D. Iowa 1974) (reports generated by a commercial enterprise "must generally be considered commercial information"), rev'd on other grounds, 518 F.2d 1184 (8th Cir. 1975).

<sup>12</sup> Critical Mass Energy Project v. NRC, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc) (finding that safety reports submitted by nonprofit consortium of nuclear power plants were "commercial in nature"), cert. denied, 113 S. Ct. 1579 (1993); see also Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 398 (5th Cir.) (nonprofit water supply company's audit reports deemed "clearly commercial"), cert. denied, 471 U.S. 1137 (1985); American Airlines, Inc. v. National Mediation Bd., 588 F.2d at 870 (nonprofit union's information deemed "commercial").

<sup>13</sup> See Washington Post Co. v. HHS, 690 F.2d at 266; FOIA Update, Fall 1983, at 14. But see also Washington Post Co. v. HHS, 690 F.2d at 266 (list of nonfederal employment positions held not "financial" within meaning of Exemption 4).

<sup>14</sup> See, e.g., Landfair v. United States Dep't of the Army, 645 F. Supp. 325, 327 (D.D.C. 1986).

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governments and agencies of foreign governments.<sup>15</sup> The courts have held, however, that information generated by the federal government is not "obtained from a person" and is therefore excluded from Exemption 4's coverage.<sup>16</sup> Such information might possibly be protectible under Exemption 5, though, which incorporates a qualified privilege for sensitive commercial or financial information generated by the government.<sup>17</sup> (For a further discussion of the "commercial privilege," see Exemption 5, below.)

Documents prepared by the government can still come within Exemption 4, however, if they simply contain summaries or reformulations of information supplied by a source outside the government.<sup>18</sup> Moreover, the mere fact that the government supervises or directs the preparation of information submitted by sources outside the government does not preclude that information from being "obtained from a person."<sup>19</sup>

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<sup>15</sup> See, e.g., Comstock Int'l. Inc. v. Export-Import Bank, 464 F. Supp. 804, 806 (D.D.C. 1979) (corporation); Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) (state government); Stone v. Export-Import Bank, 552 F.2d 132, 137 (5th Cir. 1977) (foreign government agency), cert. denied, 434 U.S. 1012 (1978); see also Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776 (D.D.C. 1974) (foreign government or instrumentality is "person" for purposes of FOIA).

<sup>16</sup> See Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) ("person" under Exemption 4 "refers to a wide range of entities including corporations, associations and public or private organizations other than agencies") (appeal pending); see also, e.g., Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 404 (D.C. Cir. 1980); Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 469 (W.D.N.Y. 1987); Consumers Union v. VA, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

<sup>17</sup> See Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979); accord Morrison-Knudsen Co. v. Department of the Army of the United States, 595 F. Supp. 352, 354-56 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C. Cir. 1985).

<sup>18</sup> See, e.g., Gulf & Western Indus. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1979); Mulloy v. Consumer Prod. Safety Comm'n, No. 85-645, slip op. at 2 (S.D. Ohio Aug. 2, 1985) (manufacturing and sales data compiled in Establishment Inspection Report prepared by Commission investigator after on-site visit to plant held protectible under Exemption 4), aff'd, No. 85-3720 (6th Cir. July 22, 1986); BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,044, at 81,121 (D.D.C. Dec. 4, 1980).

<sup>19</sup> Silverberg v. HHS, No. 89-2743, slip op. at 6 (D.D.C. June 14, 1991), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 4 (M.D. Fla. June 3, 1986). But see Consumers Union v. VA, 301 F. Supp. at 803 (where product testing was actually performed by government personnel, using their expertise and government equipment, resulting data held not "obtained from a person" for purposes of Exemption 4).

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### "Confidential" Information

The third requirement of Exemption 4 is met if information is "privileged or confidential." By far, most Exemption 4 litigation has focused on whether or not requested information is "confidential" for purposes of Exemption 4. In earlier years, courts based the application of Exemption 4 upon whether there was a promise of confidentiality by the government to the submitting party,<sup>20</sup> or whether the information was of the type not customarily released to the public by the submitter.<sup>21</sup>

These earlier tests were then superseded by the rule of National Parks & Conservation Ass'n v. Morton,<sup>22</sup> long considered to be the leading case on the issue, which significantly altered the test for confidentiality under Exemption 4. In National Parks, the Court of Appeals for the District of Columbia Circuit held that the test for confidentiality was an objective one.<sup>23</sup> Thus, whether information would customarily be disclosed to the public by the person from whom it was obtained was not considered dispositive.<sup>24</sup> Likewise, an agency's promise that information would not be released was not considered dispositive.<sup>25</sup> Instead, the D.C. Circuit declared in National Parks that the term "confidential" should be read to protect governmental interests as well as private ones, according to the following two-part test:

To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (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.<sup>26</sup>

These two principal Exemption 4 tests, which apply disjunctively, have often been referred to in subsequent cases as the "impairment prong" and the "competitive harm prong." In National Parks, the D.C. Circuit expressly reserved the question of whether any other governmental interests--such as compliance or program effectiveness--might also be embodied in a "third

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<sup>20</sup> See, e.g., GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

<sup>21</sup> See, e.g., Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1972).

<sup>22</sup> 498 F.2d 765 (D.C. Cir. 1974).

<sup>23</sup> Id. at 766.

<sup>24</sup> Id. at 767.

<sup>25</sup> Washington Post Co. v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982) (citing National Parks, 498 F.2d at 766).

<sup>26</sup> 498 F.2d at 770.

prong" of the exemption.<sup>27</sup>

Two years ago, in a surprising new development, D.C. Circuit Court Judge Randolph, joined by Circuit Court Judge Williams, suggested in a concurring opinion in Critical Mass Energy Project v. NRC, that if it were a question of first impression, they would "apply the common meaning of [the word] 'confidential' and [would] reject" the National Parks test altogether.<sup>28</sup> Judges Randolph and Williams contended that there was no "legitimate basis" for the D.C. Circuit's addition of "some two-pronged 'objective' test" for determining if material was "confidential" in light of the unambiguous language of the exemption.<sup>29</sup> Nevertheless, they recognized that they "were not at liberty" to apply their "common sense" definition because the D.C. Circuit had "endorsed the National Parks definition many times," thus compelling them to follow it as well.<sup>30</sup> Accordingly, the government petitioned for, and was granted, an en banc rehearing in Critical Mass<sup>31</sup> so that the full D.C. Circuit could have an opportunity to consider whether the definition of confidentiality set forth in National Parks--and followed by the panel majority in Critical Mass--was indeed faithful to the language and legislative intent of Exemption 4.<sup>32</sup>

In August of 1992, the D.C. Circuit issued its en banc decision in Critical Mass. After examining the "arguments in favor of overturning National Parks, [the court] conclude[d] that none justifies the abandonment of so well established a precedent."<sup>33</sup> This ruling was founded on the principle of stare decisis--which counsels against the overruling of an established precedent.<sup>34</sup> The D.C. Circuit determined that "[i]n obedience to" stare decisis, it would not "set aside circuit precedent of almost twenty years' standing."<sup>35</sup> In so holding, it noted the "widespread acceptance of National Parks by [the] other circuits," the lack of any subsequent action by Congress that would remove the "conceptual underpinnings" of the decision, and the fact that the test had not proven to

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<sup>27</sup> Id. at 770 n.17.

<sup>28</sup> 931 F.2d 939, 948 (D.C. Cir.) (Randolph & Williams, JJ., concurring), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

<sup>29</sup> 931 F.2d at 948.

<sup>30</sup> Id.

<sup>31</sup> 942 F.2d 799 (D.C. Cir. 1991).

<sup>32</sup> See FOIA Update, Fall 1992, at 1.

<sup>33</sup> 975 F.2d 871, 877 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

<sup>34</sup> 975 F.2d at 875.

<sup>35</sup> Id.

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be "so flawed that [it] would be justified in setting it aside."<sup>36</sup>

Although the National Parks test for confidentiality under Exemption 4 was thus reaffirmed, the full D.C. Circuit went on to "correct some misunderstandings as to its scope and application."<sup>37</sup> Specifically, the court "confined" the reach of National Parks and established an entirely new standard to be used for determining whether information "voluntarily" submitted to an agency is "confidential."<sup>38</sup> The United States Supreme Court declined to review the D.C. Circuit's en banc decision<sup>39</sup> and thus it now stands as the leading Exemption 4 case on this issue.<sup>40</sup>

#### The Critical Mass Decision

Through its en banc decision in Critical Mass, a seven-to-four majority of the Court of Appeals for the District of Columbia Circuit established two distinct standards to be used in determining whether commercial or financial information submitted to an agency is "confidential" under Exemption 4.<sup>41</sup> Specifically, the tests for confidentiality set forth in National Parks & Conservation Ass'n v. Morton,<sup>42</sup> were confined "to the category of cases to which [they were] first applied; namely, those in which a FOIA request is made for financial or commercial information a person was obliged to furnish the Government."<sup>43</sup> The D.C. Circuit announced an entirely new test for the protection of information that is "voluntarily" submitted: Such information is now categorically protected provided it is not "customarily" disclosed to the public by the submitter.<sup>44</sup>

In reaching this result, the D.C. Circuit first examined the bases for its decision in National Parks and then identified various interests of both the government and submitters of information that are protected by Exemption 4.<sup>45</sup> By so doing, it found that different interests are implicated depending upon whether the requested information was submitted voluntarily or under compul-

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<sup>36</sup> Id. at 876-77.

<sup>37</sup> Id. at 875.

<sup>38</sup> Id. at 871, 879.

<sup>39</sup> 113 S. Ct. 1579 (1993).

<sup>40</sup> See FOIA Update, Spring 1993, at 1.

<sup>41</sup> 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

<sup>42</sup> 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>43</sup> 975 F.2d at 880.

<sup>44</sup> Id. at 879.

<sup>45</sup> Id. at 877-79.

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sion.<sup>46</sup> As to the government's interests, the D.C. Circuit found, where submission of the information is "compelled" by the government the interest protected by nondisclosure is that of ensuring the continued reliability of the information.<sup>47</sup> On the other hand, it concluded, where information is submitted on a "voluntary" basis, the governmental interest protected by nondisclosure is that of ensuring the continued and full availability of the information.<sup>48</sup>

The D.C. Circuit found that this same dichotomy between compelled and voluntary submissions applies to the submitter's interests as well: Where submission of information is compelled, the harm to the submitter's interest is the "commercial disadvantage" that is recognized under the National Parks "competitive injury" prong.<sup>49</sup> Where information is volunteered, on the other hand, the exemption recognizes a different interest of the submitter--that of protecting information that "for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained.'" <sup>50</sup>

Having delineated these various interests that are protected by Exemption 4, the D.C. Circuit then noted that the Supreme Court had "encouraged the development of categorical rules" in FOIA cases "whenever a particular set of facts will lead to a generally predictable application."<sup>51</sup> The court found that the circumstances of the Critical Mass case--which involved voluntarily submitted reports--lent themselves to such "categorical" treatment.<sup>52</sup>

Accordingly, the D.C. Circuit held that it was reaffirming the National Parks test for "determining the confidentiality of information submitted under compulsion," but was announcing a categorical rule for the protection of information provided on a voluntary basis.<sup>53</sup> It declared that such voluntarily provided information is "'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."<sup>54</sup> It also emphasized that this categorical test for voluntarily submitted information is "objective" and that the agency invoking it

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<sup>46</sup> Id.

<sup>47</sup> Id. at 878.

<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Id. (citing Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971)).

<sup>51</sup> Id. at 879 (citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)).

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Id.

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"must meet the burden of proving the provider's custom."<sup>55</sup>

Applying this test to the information at issue in the Critical Mass case, the D.C. Circuit agreed with the district court's conclusion that the reports were commercial in nature, that they were provided to the agency on a voluntary basis, and that the submitter did not customarily release them to the public.<sup>56</sup> Thus, the reports were found to be confidential and exempt from disclosure under this new test for Exemption 4.<sup>57</sup>

The D.C. Circuit concluded its opinion by observing the objection raised by the requester in the case that the new test announced by the court "may lead government agencies and industry to conspire to keep information from the public by agreeing to the voluntary submission of information that the agency has the power to compel."<sup>58</sup> The court dismissed this objection on the grounds that there is "no provision in FOIA that obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act" and that it did not "see any reason to interfere" with an agency's "exercise of its own discretion in determining how it can best secure the information it needs."<sup>59</sup>

#### Applying Critical Mass

The pivotal issue that has arisen as a result of the decision in Critical Mass,<sup>60</sup> is the distinction that the court drew between information "required" to be submitted to an agency and information provided "voluntarily." Although the Court of Appeals for the District of Columbia Circuit never expressly articulated a definition of these two terms in its opinion in Critical Mass, the De-

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<sup>55</sup> Id.

<sup>56</sup> Id. at 880 (citing first district court decision and first panel decision in Critical Mass, which recognized that submitter made reports available on confidential basis to individuals and organizations involved in nuclear power production process pursuant to explicit nondisclosure policy).

<sup>57</sup> Id.; see also Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 990 (D.D.C. 1992) (applying newly established Critical Mass test and holding that voluntarily submitted information properly withheld because it had been "amply demonstrated" that it would not be customarily released to public) (appeal pending).

<sup>58</sup> 975 F.2d at 880.

<sup>59</sup> Id.; see Animal Legal Defense Fund v. Secretary of Agric., 813 F. Supp. 882, 892 (D.D.C. 1993) (based upon this holding in Critical Mass, court found that there was "nothing" it could do, "however much it might be inclined to do so," to upset agency regulations that permitted regulated entities to keep documents "on-site," outside possession of agency, and thus unreachable under FOIA) (non-FOIA case brought under Administrative Procedure Act).

<sup>60</sup> 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993).

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partment of Justice has issued policy guidance on this subject based upon an extensive analysis of the underlying rationale of the D.C. Circuit's decision, as well as several other indications of the court's intent.<sup>61</sup> It has concluded that a submitter's voluntary participation in an activity--such as seeking a government contract or applying for a grant or a loan--does not govern whether any submissions made in connection with that activity are likewise "voluntary."<sup>62</sup> Rather than examining the nature of a submitter's participation in an activity, agencies are advised to focus on whether submission of the information at issue was required by those who chose to participate.<sup>63</sup> The Department of Justice's policy guidance on Critical Mass also points out that information can be "required" to be submitted by a broad range of legal authorities, including informal mandates that call for submission as a condition of doing business with the government.<sup>64</sup> Furthermore, the existence of agency authority to require submission of information does not automatically mean such a submission is "required"; the agency authority must actually be exercised in order for a particular submission to be deemed "required."<sup>65</sup>

There has been only one case decided thus far that contains any detailed analysis of the Critical Mass distinction between "voluntary" and "required" submissions.<sup>66</sup> In that case, involving an application for approval to transfer a contract, the court found that the submission had been required both by the agency's statute--which did not, on its face, apply to the submission at issue, but was found to apply based upon the agency's longstanding practice of interpreting the statute more broadly--and by the agency's letter to the submitters which required them to "submit the documents as a condition necessary to receiving approval of their application."<sup>67</sup> Using the same approach as the Department of Justice's Critical Mass guidance, the court specifically held that "[u]nder Critical Mass, submissions that are required to realize the benefits of a voluntary program are to be considered mandatory."<sup>68</sup>

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<sup>61</sup> See FOIA Update, Spring 1993, at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); see also id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

<sup>62</sup> Id. at 5.

<sup>63</sup> Id.; see also id. at 1 (pointing to significance of this guidance to procurement process and to its development in coordination with the Office of Federal Procurement Policy).

<sup>64</sup> Id.; accord Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 8-11 (D.D.C. Sept. 2, 1993) (submission "compelled" both by agency statute and by agency letter sent to submitters) (reverse FOIA suit).

<sup>65</sup> FOIA Update, Spring 1993, at 5; accord Government Accountability Project v. NRC, No. 86-1976, slip op. at 12 (D.D.C. July 2, 1993) (dicta).

<sup>66</sup> See Lykes Bros. S.S. Co. v. Pena, slip op. at 7-11.

<sup>67</sup> Id. at 9.

<sup>68</sup> Id.; accord FOIA Update, Spring 1993, at 3-5.



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There have been five other cases decided subsequent to Critical Mass that have applied the new voluntary/required distinction, but in none of these decisions did the courts set forth any rationale or analysis for their conclusions on this pivotal issue and instead the information at issue was either summarily declared to have been voluntarily provided<sup>69</sup> or, conversely, to have been required.<sup>70</sup>

In one other case, the court discussed the applicability of the Critical Mass distinction to documents that had been provided to the agency not by their originator, but as a result of the unauthorized action of a confidential source.<sup>71</sup> Although these documents were not actually at issue in the case, the court nevertheless elected to analyze their status under Critical Mass.<sup>72</sup> The court first noted that the decision in Critical Mass provided it with "little guidance" as those documents "had been produced voluntarily by the originator, without any intervening espionage."<sup>73</sup> The court nevertheless opined that in its case "the secret, unauthorized delivery" of the documents at issue made the submission "'involuntary' in the purest sense," but that application of the "more stringent standard for involuntary transfer would contravene the spirit" of Critical Mass.<sup>74</sup> Thus, the court declared that in such circumstances the proper test for determining the confidentiality of the documents should be the "more permissive standard" of Critical Mass, i.e., protection would be afforded if the information was of a kind that is not customarily released to the public by the submitter.<sup>75</sup>

Under Critical Mass, once information is determined to be voluntarily provided it is to be afforded protection as "confidential" information "if it is of a kind that would customarily not be released to the public by the person from

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<sup>69</sup> See Environmental Technology, Inc. v. EPA, 822 F. Supp. 1226, 1229 (E.D. Va. 1993) (unit price information) (reverse FOIA suit); McDonnell Douglas Corp. v. Rice, No. 92-2211, transcript at 35 (D.D.C. Sept. 30, 1992) (bench order) (exercised option price) (non-FOIA case brought under Administrative Procedure Act) (petition for reh'g pending); Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A, transcript at 28 (E.D. Va. Sept. 10, 1992) (bench order) (unit price information).

<sup>70</sup> See Africa Fund v. Mosbacher, No. 92-289, slip op. at 15-16 & n.3 (S.D.N.Y. May 26, 1993) (information concerning export license applications); Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 15 (C.D. Cal. May 10, 1993) (information concerning New Drug Application).

<sup>71</sup> Government Accountability Project v. NRC, slip op. at 2.

<sup>72</sup> See id. at 10.

<sup>73</sup> Id. at 11-12.

<sup>74</sup> Id. at 12.

<sup>75</sup> Id.; see also id. at 11 (citing Critical Mass, 975 F.2d at 879).

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whom it was obtained."<sup>76</sup> The D.C. Circuit observed in Critical Mass that this test was "objective" and that the agency invoking it "must meet the burden of proving the provider's custom."<sup>77</sup> The subsequent cases that have applied this "customary treatment" standard to information found to have been voluntarily submitted contain rather limited and often conclusory discussions of the showing necessary to satisfy it.<sup>78</sup> Nevertheless, in one of these cases the court did provide some useful elaboration by specifically noting and then rejecting, as "vague hearsay," the requester's contention that there had been "prior, unrestricted disclosure" of the information at issue.<sup>79</sup> In so doing, the court expressly found the requester's evidence to be "nonspecific" and lacking precision "regarding dates and times" of the alleged disclosures; conversely, it noted that the submitter had "provided specific, affirmative evidence that no unrestricted disclosure" had occurred.<sup>80</sup> Accordingly, the court concluded that it had been "amply demonstrated" that the information satisfied the customary treatment standard of Critical Mass.<sup>81</sup>

In creating this customary treatment standard, the D.C. Circuit in Critical Mass articulated the test as dependent upon the treatment afforded the information by the individual submitter and not the treatment afforded the information by an industry as a whole.<sup>82</sup> This approach has been followed by all the cases applying the customary treatment standard thus far, although one court also

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<sup>76</sup> 975 F.2d at 879.

<sup>77</sup> Id.

<sup>78</sup> See Government Accountability Project v. NRC, slip op. at 11 (it "is not to be doubted" that documents are "unavailable to the public"); Environmental Technology, Inc. v. EPA, 822 F. Supp. at 1229 (it is "readily apparent that the information is of a kind that [the submitter] would not customarily share with its competitors or with the general public"); McDonnell Douglas Corp. v. Rice, transcript at 35 ("it is not challenged that [the submitter] does not customarily make available to the public the prices it proposes in its contract bids"); Cohen, Dunn & Sinclair, P.C. v. GSA, transcript at 27 (pricing information "is of a kind that would customarily not be released to the public by the entity from which it is obtained"); Harrison v. Lujan, No. 90-1512, slip op. at 1 (D.D.C. Dec. 8, 1992) (agency's "uncontradicted evidence . . . establishes that the documents at issue contain information that the provider would not customarily make available to the public"); Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 990 (D.D.C. 1992) ("it has been amply demonstrated that [the submitters] would not customarily release the information to the public") (appeal pending).

<sup>79</sup> See Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. at 989.

<sup>80</sup> Id.

<sup>81</sup> Id. at 990.

<sup>82</sup> See 975 F.2d at 872, 878, 879, 880; accord FOIA Update, Spring 1993, at 7 (advising agencies applying customary treatment standard to examine treatment afforded information by individual submitter).

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found it "relevant" that the requester--who was a member of the same industry as the submitters--had, "up until the eve of trial," taken the position that the type of information at issue ought not to be released.<sup>83</sup> Further, as applied by the D.C. Circuit in Critical Mass, the customary treatment standard allows for some disclosures of the information to have been made, provided that such disclosures were not made to the general public.<sup>84</sup>

As a matter of sound administrative practice the Department of Justice has advised agencies to employ procedures analogous to those set forth in Executive Order No. 12,600<sup>85</sup> when making determinations under the customary treatment standard.<sup>86</sup> (For a further discussion of the Executive Order and its requirements, see Competitive Harm Prong of National Parks, and "Reverse" FOIA, below.) Accordingly, whenever an agency is uncertain of a submitter's customary treatment of requested information, the submitter should be notified and given an opportunity to provide the agency with a description of its treatment of the information, including any disclosures that are customarily made and the conditions under which such disclosures occur.<sup>87</sup>

#### Impairment Prong of National Parks

For information that is "required" to be submitted to an agency, the Court of Appeals for the District of Columbia Circuit has held that the tests for confidentiality originally established in National Parks & Conservation Ass'n v. Morton,<sup>88</sup> continue to apply.<sup>89</sup> The first of these tests, the impairment prong, traditionally had been found to be satisfied when an agency demonstrated that the information at issue was provided voluntarily and that submitting entities would not provide such information in the future if it were subject to public disclosure.<sup>90</sup> Conversely, protection under the impairment prong traditionally

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<sup>83</sup> Cohen, Dunn & Sinclair, P.C. v. GSA, transcript at 27.

<sup>84</sup> See 975 F.2d at 880 (specifically citing to lower court decision that noted records had been provided to numerous interested parties under nondisclosure agreements, but had not been provided to public-at-large); accord FOIA Update, Spring 1993, at 7 (advising agencies that customary treatment standard allows submitter to have made some disclosures of information, provided such disclosures are not "public" ones).

<sup>85</sup> 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (1988) and in FOIA Update, Summer 1987, at 2-3.

<sup>86</sup> FOIA Update, Spring 1993, at 7.

<sup>87</sup> Id.

<sup>88</sup> 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>89</sup> Critical Mass, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993).

<sup>90</sup> See, e.g., Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (manu-  
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has been denied when it was determined that the benefits associated with submission of particular information made it unlikely that the agency's ability to obtain future such submissions would be impaired.<sup>91</sup>

<sup>90</sup>(...continued)

facturing formulas, processes, quality control and internal security measures submitted voluntarily to FDA to assist with cyanide-tampering investigations protected pursuant to impairment prong because agencies relied heavily on such information and would be less likely to obtain it if businesses feared it would be made public); Klayman & Gurley v. United States Dep't of Commerce, No. 88-0783, slip op. at 4 (D.D.C. Apr. 17, 1990); ISC Group v. DOD, No. 88-0631, slip op. at 7 (D.D.C. May 22, 1989); Landfair v. United States Dep't of the Army, 645 F. Supp. 325, 328 (D.D.C. 1986); Carlisle Tire & Rubber Co. v. Customs Serv., 1 Gov't Disclosure Serv. (P-H) ¶ 79,162, at 79,268 (D.D.C. Nov. 21, 1979) (impairment prong satisfied when agency's guarantee of confidentiality was essential to voluntary cooperation of foreign manufacturers in providing "essential" information), aff'd in part, rev'd in part on other grounds, 663 F.2d 210 (D.C. Cir. 1980).

<sup>91</sup> See, e.g., Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 471 (W.D.N.Y. 1987) (no impairment because it is unlikely that borrowers would decline benefits associated with obtaining loans simply because status of loan was released); Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 6 (M.D. Fla. June 3, 1986) (no impairment when submission "virtually mandatory" if supplier wished to do business with government); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (same), aff'd in part & rev'd in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"); see also Key Bank of Me., Inc. v. SBA, No. 91-362-P, slip op. at 7 (D. Me. Dec. 31, 1992) (no impairment based on speculative assertion that public disclosure of Dun & Bradstreet reports will adversely affect company's profits and thus make it "unlikely" that credit agencies will do business with government; this "intimation regarding impairment of profits in no way speaks to the ability of affected credit agencies to continue to exist and supply needed data"); RMS Indus. v. DOD, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992) (no impairment for "contract bid prices, terms and conditions . . . since bids by nature are offers to provide goods and/or services for a price and under certain terms and conditions"); Wiley Rein & Fielding v. United States Dep't of Commerce, 782 F. Supp. 675, 677 (D.D.C. 1992) (no impairment given fact that requested documents contained no "sensitive information" and there was "no reason to believe" that such information would not be provided in future), appeal dismissed as moot, No. 92-5122 (D.C. Cir. Mar. 8, 1993). But see Orion Research, Inc. v. EPA, 615 F.2d 551, 554 (1st Cir.) (finding impairment for technical proposals submitted in connection with government contract because release "would induce potential bidders to submit proposals that do not include novel ideas"), cert. denied, 449 U.S. 833 (1980); RMS Indus. v. DOD, slip op. at 7 (finding impairment for equipment descriptions, employee, customer, and subcontractor names submitted in connection with government contract because

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Under the new categorical test announced by the D.C. Circuit in Critical Mass, the voluntary character of an information submission is now sufficient to render it exempt, provided the information would not be customarily released to the public by the submitter.<sup>92</sup> (For a further discussion of this point, see Applying Critical Mass, above.) In this regard, the D.C. Circuit has made it clear that an agency's unexercised authority, or mere "power to compel" submission of information, does not preclude such information from being provided to the agency "voluntarily."<sup>93</sup> This holding was compatible with several decisions rendered prior to Critical Mass that had protected information under the impairment prong despite the existence of agency authority that could have been used to compel its submission.<sup>94</sup>

As a result of the D.C. Circuit's ruling in Critical Mass the significance of the impairment prong is undoubtedly diminished.<sup>95</sup> Nevertheless, the D.C. Circuit recognized that even when agencies require submission of information "there are circumstances in which disclosure could affect the reliability of such data."<sup>96</sup> Thus, in the aftermath of Critical Mass, the impairment prong of

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<sup>91</sup>(...continued)

"bidders only submit such information if it will not be released to their competitors"); Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A, transcript at 29 (E.D. Va. Sept. 10, 1992) (bench order) (finding impairment for detailed unit price information despite lack of "actual proof of a specific bidder being cautious in its bid or holding back").

<sup>92</sup> 975 F.2d at 879.

<sup>93</sup> Id. at 880; see FOIA Update, Spring 1993, at 5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); see also id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

<sup>94</sup> See Timken Co. v. United States Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,974 (D.D.C. June 24, 1983); Klayman & Gurley v. Department of Commerce, slip op. at 5-6; see also, e.g., Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.29 (D.C. Cir. 1983) (whether submissions are mandatory was a factor to be considered in an impairment claim, but was "not necessarily dispositive"); Washington Post Co. v. HHS, 690 F.2d 252, 268-69 (D.C. Cir. 1982); Durnan v. United States Dep't of Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991); Atkinson v. SEC, No. 83-2030, slip op. at 4 (D.D.C. Oct. 27, 1983); Stewart v. Customs Serv., 2 Gov't Disclosure Serv. (P-H) ¶ 81,140, at 81,380 (D.D.C. Feb. 6, 1981). But see Teich v. FDA, 751 F. Supp. 243, 251 (D.D.C. 1990) ("[W]here compelled cooperation will obtain precisely the same results as voluntary cooperation, an impairment claim cannot be countenanced.") (decided prior to Critical Mass and thus now in conflict with that decision), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992).

<sup>95</sup> See FOIA Update, Spring 1993, at 7.

<sup>96</sup> Critical Mass, 975 F.2d at 878 (citing Washington Post Co. v. HHS, 690 F.2d at 268-69); see also ISC Group v. DOD, slip op. at 8 (report voluntarily  
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National Parks now applies to those situations where information is required to be provided, but where disclosure of that information under the FOIA will result in a diminution of the "reliability" or "quality" of what is submitted.<sup>97</sup>

If an agency determines that release will not cause impairment, that decision should be given extraordinary deference by the courts.<sup>98</sup> In this regard there are two conflicting decisions addressing the feasibility of a submitter raising the issue of impairment on behalf of an agency. In one, the district court ruled that a submitter has "standing" to raise the issue of impairment;<sup>99</sup> but in a more recent case, the Court of Appeals for the Fourth Circuit specifically refused to allow a submitter to make an impairment argument on the agency's behalf.<sup>100</sup>

A decade ago, in Washington Post Co. v. HHS, the D.C. Circuit held that an agency must demonstrate that a threatened impairment is "significant," because a "minor" impairment is insufficient to overcome the general disclosure mandate of the FOIA.<sup>101</sup> Moreover, in Washington Post the D.C. Circuit

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<sup>96</sup>(...continued)

submitted "may contain more information and be more helpful" to agency "than any information submitted pursuant to a compulsory production demand"). But see Silverberg v. HHS, No. 89-2743, slip op. at 11-12 (D.D.C. June 14, 1991) (rejecting, as "entirely speculative," claim of qualitative impairment based on contention that laboratory inspectors--who work in teams of three and whose own identities are protected--would fear litigation and thus be less candid if names of laboratories they inspected were released), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); Teich v. FDA, 751 F. Supp. at 252 (rejecting, as "absurd," contention that companies would be less likely to conduct and report safety tests to FDA for fear of public disclosure because companies' own interests in engendering good will and in avoiding product liability suits is assurance that they will conduct "the most complete testing program" possible).

<sup>97</sup> See 975 F.2d at 878; accord Africa Fund v. Mosbacher, No. 92-289, slip op. at 17 (S.D.N.Y. May 26, 1993) (protection of information submitted with export license applications "fosters the provision of full and accurate information").

<sup>98</sup> See, e.g., General Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (observing that there is not "much room for judicial review of the quintessentially managerial judgment" that disclosure will not cause impairment); AT&T Info. Sys. v. GSA, 627 F. Supp. 1396, 1401 (D.D.C. 1986) (finding that the agency "is in the best position to determine the effect of disclosure on its ability to obtain necessary technical information" (quoting Orion Research, Inc. v. EPA, 615 F.2d at 554)), rev'd on procedural grounds & remanded, 810 F.2d 1233 (D.C. Cir. 1987).

<sup>99</sup> United Technologies Corp. v. HHS, 574 F. Supp. 86, 89 (D. Del. 1983).

<sup>100</sup> Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988).

<sup>101</sup> 690 F.2d at 269.

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held that the factual inquiry concerning the degree of impairment "necessarily involves a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure."<sup>102</sup> Because the case was remanded for further proceedings, the court found it unnecessary to decide the details of such a balancing test at that time.<sup>103</sup>

Five years later, in the first panel decision in Critical Mass, the D.C. Circuit cited Washington Post to reiterate that a threatened impairment must be significant, but it made no mention whatsoever of a balancing test.<sup>104</sup> The notion of a balancing test was resurrected in a subsequent decision of the D.C. Circuit in the Washington Post case.<sup>105</sup> This time the D.C. Circuit elaborated on the balancing test--even suggesting that it might apply to all aspects of Exemption 4, not just the impairment prong--and held that "information will be withheld only when the affirmative interests in disclosure on the one side are outweighed by the factors identified in National Parks I (and its progeny) militating against disclosure on the other side."<sup>106</sup> Because the case was remanded once again (and ultimately was settled), the court did not actually rule on the outcome of such a balancing process.<sup>107</sup>

The district court decision in Critical Mass, on remand from the first panel decision of the D.C. Circuit, is the only decision to date to explicitly apply this balancing test under the impairment prong of Exemption 4.<sup>108</sup> (Although it did not expressly reference the term, one other district court has utilized a balancing test in ruling under the competitive harm prong.<sup>109</sup> For further discussion of this point, see Competitive Harm Prong of National Parks, below.) In Critical Mass, the district court held that a consumer organization requesting information bearing upon the safety of nuclear power plants had "no particularized need of its own" for access to the information and thus was "re-mitted to the general public interest in disclosure for disclosure's sake to support its request."<sup>110</sup> Although the court conceded that the public has an inter-

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<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> 830 F.2d 278, 286 (D.C. Cir. 1987), vacated en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

<sup>105</sup> 865 F.2d 320, 326-27 (D.C. Cir. 1989).

<sup>106</sup> Id. at 327.

<sup>107</sup> Id. at 328.

<sup>108</sup> 731 F. Supp. 554, 555-56 (D.D.C. 1990), rev'd in part on other grounds & remanded, 931 F.2d 939 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

<sup>109</sup> See Teich v. FDA, 751 F. Supp. at 243.

<sup>110</sup> 731 F. Supp. at 556.

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est "of significantly greater moment than idle curiosity" in information concerning the safety of nuclear power plants, that same interest was shared by the NRC and the submitter of the information and their interest in preventing disclosure was deemed to be of "a much more immediate and direct nature."<sup>111</sup> Curiously, when this decision in Critical Mass was subsequently reviewed by the both a second panel of the D.C. Circuit and then by the entire D.C. Circuit sitting en banc, no mention was made of any balancing test under Exemption 4.<sup>112</sup>

#### Competitive Harm Prong of National Parks

The great majority of Exemption 4 cases have involved the competitive harm prong of the test for confidentiality established in National Parks & Conservation Ass'n v. Morton.<sup>113</sup> In order for an agency to make a determination under this prong it is essential that the submitter of the requested information be given an opportunity to provide the agency with its views on the possible competitive harm that would be caused by disclosure. While such an opportunity had long been voluntarily afforded submitters by several agencies and had been recommended by the Department of Justice,<sup>114</sup> it is now required by executive order. Executive Order No. 12,600<sup>115</sup> now provides for mandatory notification of submitters of confidential commercial information whenever an agency "determines that it may be required to disclose" such information under the FOIA.<sup>116</sup> Once submitters are notified, they must be given a reasonable period of time within which to object to disclosure of any of the requested information.<sup>117</sup> The Executive Order requires that agencies give careful consideration to the submitters' objections and provide them with a written statement explaining why any such objections are not sustained.<sup>118</sup> (For a further discussion of these procedures, see "Reverse" FOIA, below.) If an agency decides to invoke Exemption 4 and that decision is subsequently challenged in court by a FOIA requester, the submitter's objections to disclosure--usually provided in an affidavit filed in conjunction with the agency's papers--will, in turn, be evaluated and relied upon by the court in determining the propriety of

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<sup>111</sup> Id.

<sup>112</sup> See 931 F.2d 939, 945-47 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

<sup>113</sup> 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>114</sup> See FOIA Update, June 1982, at 3.

<sup>115</sup> 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (1988) and in FOIA Update, Summer 1987, at 2-3.

<sup>116</sup> Exec. Order No. 12,600, § 1.

<sup>117</sup> Id. § 4.

<sup>118</sup> Id. § 5.



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the exemption claim.<sup>119</sup>

The courts have tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines. For example, in some contexts customer names have been withheld because disclosure would cause substantial competitive harm<sup>120</sup> and in other contexts customer names have been ordered released because disclosure would not cause substantial competitive harm.<sup>121</sup> The individualized and sometimes conflicting determinations indicative of competitive harm holdings is well illustrated in one case in which the Court of Appeals for the District of Columbia Circuit originally affirmed a district court's decision which found that customer names of "CAT" scanner manufacturers were protected,<sup>122</sup> but subsequently vacated that decision upon the death of one of its judges.<sup>123</sup> On reconsideration, the newly constituted panel found that disclosure of the customer list raised a factual question as to

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<sup>119</sup> See, e.g., North Carolina Network for Animals v. United States Dep't of Agric., No. 90-1443, slip op. at 8 (4th Cir. Feb. 5, 1991) (noting absence of sworn affidavits or detailed justification for withholding from submitters of information); Wiley Rein & Fielding v. United States Dep't of Commerce, 782 F. Supp. 675, 676 (D.D.C. 1992) (noting that "no evidence" was provided to indicate that submitters objected to disclosure), appeal dismissed as moot, No. 92-5122 (D.C. Cir. Mar. 8, 1993); Brown v. Department of Labor, No. 89-1220, slip op. at 6 (D.D.C. Feb. 15, 1991), appeal dismissed, No. 91-5108 (D.C. Cir. Dec. 3, 1991); Teich v. FDA, 751 F. Supp. 243, 254 (D.D.C. 1990) (after striking original declaration of submitter "on basic fairness grounds," court found submitter then "not able to support its position"), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992); Black Hills Alliance v. United States Forest Serv., 603 F. Supp. 117, 121 (D.S.D. 1984) (disclosure ordered with court noting that "[i]t is significant that [the submitter] itself has not submitted an affidavit addressing" the issue of competitive harm); see also Durnan v. United States Dep't of Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991) (rejecting challenge to agency's reliance on submitter's declaration, finding it entirely "relevant" to competitive harm determination); Silverberg v. HHS, No. 89-2743, slip op. at 2-3 (D.D.C. June 26, 1990) (where only some submitters made objections to disclosure, court permitted requester to obtain copies of those objections through discovery to enable him to substantiate his claim that not all submitters were entitled to Exemption 4 protection) (discovery order).

<sup>120</sup> See, e.g., RMS Indus. v. DOD, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992); Goldstein v. ICC, No. 82-1511, slip op. at 6 (D.D.C. July 31, 1985) (case reopened and customer names found protectible); BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,044, at 81,120 (D.D.C. Dec. 4, 1980).

<sup>121</sup> See, e.g., Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. 1560, 1566 (D.D.C. 1985); Braintree Elec. Light Dep't v. Department of Energy, 494 F. Supp. 287, 290 (D.D.C. 1980).

<sup>122</sup> Greenberg v. FDA, 775 F.2d 1169, 1172-73 (D.C. Cir. 1985).

<sup>123</sup> Greenberg v. FDA, 803 F.2d 1213, 1215 (D.C. Cir. 1986).

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the showing of competitive harm that precluded the granting of summary judgment after all.<sup>124</sup>

Actual competitive harm need not be demonstrated for purposes of the competitive harm prong; evidence of "actual competition and a likelihood of substantial competitive injury" is all that need be shown.<sup>125</sup> One court, however, has gone so far as to employ a balancing test under this prong--although it never expressly referred to it as such or cited to any authority supporting its application--finding that disclosure of certain safety and effectiveness data pertaining to a medical device was "unquestionably in the public interest" and that the benefit of releasing this type of information "far outstrips the negligible competitive harm" alleged by the submitter.<sup>126</sup> (For a further discussion of this point, see Impairment Prong of National Parks, above.)

Although conclusory allegations of harm are unacceptable,<sup>127</sup> it is clear that "elaborate antitrust proceedings" are not required.<sup>128</sup> One court concluded that disclosure of certain wage information would cause competitive harm based upon the fact that the requester, who was a competitor of the submitter,

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<sup>124</sup> Id. at 1219.

<sup>125</sup> CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988); see, e.g., Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); accord NBC v. SBA, No. 92 Civ. 6483, slip op. at 5 n.3 (S.D.N.Y. Jan. 28, 1993) (although court noted that agency "should have provided more details" regarding possible competitive harm, generalized sworn declaration from submitter found sufficient); Journal of Commerce, Inc. v. United States Dep't of the Treasury, No. 86-1075, slip op. at 4 (D.D.C. June 1, 1987) (submitter not required to document or pinpoint actual harm, but need only show its likelihood) (partial grant of summary judgment), renewed motion for summary judgment granted (D.D.C. Mar. 30, 1988); see also Hercules, Inc. v. Marsh, 659 F. Supp. 849, 854 (W.D. Va. 1987) (given fact that contract always awarded to submitter, protection under competitive harm prong unavailable as submitter failed to meet "threshold requirement" of facing competition) (reverse FOIA suit), aff'd, 839 F.2d 1027 (4th Cir. 1988).

<sup>126</sup> Teich v. FDA, 751 F. Supp. at 253. But cf. Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 18 (C.D. Cal. May 10, 1993) (finding competitive harm and so protecting research data used to support safety and effectiveness of pharmaceutical drug).

<sup>127</sup> See, e.g., Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993) (submitters "required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict") (reverse FOIA suit).

<sup>128</sup> National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 681 (D.C. Cir. 1976); accord Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

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had requested confidential treatment for its own similar submission.<sup>129</sup> In denying a competitive harm claim, another court noted that because the requested information pertained to every laboratory in a certain program, disclosure would not create a competitive advantage for any one of them because "each laboratory would have access to the same type of information as every other laboratory in the program."<sup>130</sup>

Some courts have utilized a "mosaic" approach to sustain a finding of competitive harm, thereby protecting information that would not in and of itself cause harm, but which would be harmful when combined with information already available to the requester.<sup>131</sup> In one case where it was found that a company's labor costs would be revealed by disclosure of its wage rate and man-hour information, the court employed what could be called a "reverse-mosaic" approach and ordered release of the wage rates without the manhour information, finding that release of one without the other would not cause the company competitive harm.<sup>132</sup>

Many courts have held that if the information sought to be protected is itself publicly available through other sources, disclosure under the FOIA will not cause competitive harm and Exemption 4 is not applicable.<sup>133</sup> (The public

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<sup>129</sup> HLI Lordship Indus. v. Committee for Purchase from the Blind & Other Severely Handicapped, 663 F. Supp. 246, 251 (E.D. Va. 1987).

<sup>130</sup> Silverberg v. HHS, No. 89-2743, slip op. at 10 (D.D.C. June 14, 1991), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); see also Carolina Biological Supply Co. v. United States Dep't of Agric., No. 93CV00113, slip op. at 8 (M.D.N.C. Aug. 2, 1993) (competitive harm unlikely when all companies in same business will have equal access to disputed information) (reverse FOIA suit).

<sup>131</sup> See, e.g., Lederle Lab. v. HHS, No. 88-0249, slip op. at 22-23 (D.D.C. July 14, 1988) (scientific tests and identities of agency reviewers withheld because disclosure would permit requester to "indirectly obtain that which is directly exempted from disclosure"); Timken Co. v. United States Customs Serv., 491 F. Supp. 557, 559 (D.D.C. 1980); Carlisle Tire & Rubber Co. v. United States Customs Serv., 1 Gov't Disclosure Serv. (P-H) ¶ 79,162, at 79,269 (D.D.C. Nov. 21, 1979).

<sup>132</sup> Painters Dist. Council Six v. GSA, No. 85-2971, slip op. at 8 (N.D. Ohio July 23, 1986); see also Lykes Bros. S.S. Co. v. Pena, slip op. at 15 (submitter failed to show any harm given fact that proposed disclosures would "redact all price terms, financial terms, rates and the like"); San Jose Mercury News v. Department of Justice, No. 88-20504, slip op. at 4-5 (N.D. Cal. Apr. 17, 1990) (no harm once company name and other identifying information deleted from requested forms).

<sup>133</sup> See, e.g., Anderson v. HHS, 907 F.2d 936, 952 (10th Cir. 1990) ("[N]o meritorious claim of confidentiality" can be made for documents which are in the public domain.); CNA Fin. Corp. v. Donovan, 830 F.2d at 1154; Continental Stock Transfer & Trust Co. v. SEC, 566 F.2d 373, 375 (2d Cir. 1977);

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availability of information has also defeated an agency's impairment claim.<sup>134</sup>) One court has held, however, that simply because individuals subject to a drug test had "a right of access to the performance and testing information" of the laboratory conducting their tests, that did "not make the [requested] information [concerning all certified laboratories] publicly available."<sup>135</sup>

The feasibility of "reverse engineering" has been considered in evaluating a showing of competitive harm. In Worthington Compressors, Inc. v. Costle,<sup>136</sup> the D.C. Circuit held that the cost of reverse engineering (i.e., the cost of obtaining a finished product and dismantling it to learn its constituent elements) is a pertinent inquiry and that the test should be "whether release of the requested information, given its commercial value to competitors and the cost of acquiring it through other means, will cause substantial competitive harm to the business that submitted it."<sup>137</sup> (This inquiry into the possibility of reverse engineering is not applicable to documents withheld under the trade secret category of Exemption 4.<sup>138</sup>)

In Worthington Compressors, the D.C. Circuit pointed out that agency disclosures of information that benefit competitors at the expense of submitters

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<sup>133</sup>(...continued)

MCI Telecommunications Corp. v. GSA, No. 89-0746, slip op. at 17 (D.D.C. Mar. 25, 1992); International Computaprint v. United States Dep't of Commerce, No. 87-1848, slip op. at 13 (D.D.C. Aug. 16, 1988) (reverse FOIA suit); Goldstein v. ICC, slip op. at 2; Trend Imports Sales, Inc. v. EPA, 3 Gov't Disclosure Serv. (P-H) ¶ 83,115, at 83,707 (D.D.C. Mar. 1, 1983).

<sup>134</sup> See Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1371 (E.D.N.C. 1986).

<sup>135</sup> Silverberg v. HHS, slip op. at 7 (D.D.C. June 14, 1991); see also All-net Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (nonspecific allegation of prior, unrestricted disclosure insufficient to remove Exemption 4 protection in light of specific, affirmative evidence that no unrestricted disclosure had occurred) (appeal pending).

<sup>136</sup> 662 F.2d 45, 52 (D.C. Cir.), supplemental opinion sub nom. Worthington Compressors, Inc. v. Gorsuch, 668 F.2d 1371 (D.C. Cir. 1981).

<sup>137</sup> Accord Greenberg v. FDA, 803 F.2d at 1218; Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 7-8 (M.D. Fla. June 3, 1986); Air Line Pilots Ass'n Int'l v. FAA, 552 F. Supp. 811, 814 (D.D.C. 1982); see also Zotos Int'l v. Young, 830 F.2d 350, 353 (D.C. Cir. 1987) (if commercially valuable information has remained secret for many years, it is incongruous to argue that it may be readily reverse-engineered) (non-FOIA case).

<sup>138</sup> See Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 2-3 (D.D.C. Dec. 16, 1987) (refusing to consider feasibility of reverse engineering for documents withheld as trade secrets because once trade secret determination is made, documents "are exempt from disclosure, and no further inquiry is necessary" (quoting Public Citizen Health Research Group v. FDA, 704 F.2d at 1286)).

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deserve "close attention" by the courts.<sup>139</sup> As the court of appeals observed:

Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government.<sup>140</sup>

Further, neither the willingness of the requester to restrict circulation of the information nor a claim by the requester that it is not a competitor of the submitter should logically defeat a showing of competitive harm. The question is whether "public disclosure" would cause harm; there is no "middle ground between disclosure and nondisclosure."<sup>141</sup> Additionally, the mere passage of time does not necessarily erode Exemption 4 protection, provided that disclosure of the material would still be likely to cause substantial competitive harm.<sup>142</sup>

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<sup>139</sup> 662 F.2d at 51.

<sup>140</sup> Id.; accord Washington Psychiatric Soc'y v. OPM, No. 87-1913, slip op. at 5 (D.D.C. Oct. 13, 1988); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 9 (D.D.C. Sept. 29, 1987), modified (D.D.C. Nov. 20, 1987), motion to amend judgment denied (D.D.C. Dec. 16, 1987); Air Line Pilots Ass'n v. FAA, 552 F. Supp. 811, 814 (D.D.C. 1982); see also Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. at 988-89 (noting submitter's twenty-two million dollar investment and rejecting requester's argument that receipt of seven million dollars in annual sales revenue is somehow "de minimis"); SMS Data Prods. Group, Inc. v. United States Dep't of the Air Force, No. 88-0481, slip op. at 7 (D.D.C. Mar. 31, 1989) (noting that release would allow competitors access to information that they would have to spend "considerable funds" to develop on their own).

<sup>141</sup> Seawell, Dalton, Hughes & Timms v. Export-Import Bank, No. 84-241, slip op. at 2 (E.D. Va. July 27, 1984); Burke Energy Corp. v. Department of Energy for the United States, 583 F. Supp. 507, 512 (D. Kan. 1984).

<sup>142</sup> See, e.g., Burke Energy Corp. v. Department of Energy for the United States, 583 F. Supp. at 514 (nine-year-old data protected); Timken Co. v. United States Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,976 (D.D.C. June 24, 1983) (ten-year-old data protected); see also FOIA Update, Fall 1983, at 14; see generally Africa Fund v. Mosbacher, No. 92-289, slip op. at 19-20 (S.D.N.Y. May 26, 1993) (rejecting argument that exemption permanently precludes release because passage of time might render later disclosures "of little consequence"); Teich v. FDA, 751 F. Supp. at 253 (rejecting competitive harm protection based partly upon fact that documents were as much as 20 years old).

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Numerous types of competitive injury have been identified by the courts as properly cognizable under the competitive harm prong, including the harms generally caused by disclosure of: detailed financial information such as a company's assets, liabilities, and net worth;<sup>143</sup> actual costs, break-even calculations, profits and profit rates;<sup>144</sup> data describing a company's workforce which would reveal labor costs, profit margins and competitive vulnerability;<sup>145</sup> a company's selling prices, purchase activity and freight charges;<sup>146</sup> a company's purchase records, including prices paid for advertising;<sup>147</sup> technical and commercial data, names of consultants and subcontractors, performance, cost and equipment information;<sup>148</sup> shipper and importer names, type and quantity of freight hauled, routing systems, cost of raw materials, and information constituting the "bread and butter" of a manufacturing company;<sup>149</sup> currently unannounced and future products, proprietary technical information, pricing strategy and subcontractor information;<sup>150</sup> raw research data used to support a pharmaceutical drug's safety and effectiveness, information regarding an unapproved application to market the drug in a different manner, and sales and distribution data of a drug manufacturer;<sup>151</sup> and technical proposals which are submitted, or could be used, in conjunction with offers on government contracts.<sup>152</sup>

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<sup>143</sup> See, e.g., National Parks & Conservation Ass'n v. Kleppe, 547 F.2d at 684; Cleveland & Vicinity Dist. Council v. United States Dep't of Labor, No. 87CV2384, slip op. at 8-9 (N.D. Ohio Apr. 22, 1992) (magistrate's recommendation) (dollar volume of business), adopted (N.D. Ohio May 22, 1992).

<sup>144</sup> See, e.g., Gulf & Western Indus. v. United States, 615 F.2d at 530.

<sup>145</sup> See, e.g., Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977).

<sup>146</sup> See, e.g., Braintree Elec. Light Dep't v. Department of Energy, 494 F. Supp. at 289.

<sup>147</sup> See, e.g., Destileria Serralles, Inc. v. Department of the Treasury, No. 85-0837, slip op. at 9 (D.P.R. Sept. 22, 1988).

<sup>148</sup> See, e.g., RMS Indus. v. DOD, slip op. at 7; BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,189, at 81,495 (D.D.C. Mar. 20, 1981).

<sup>149</sup> See, e.g., Journal of Commerce, Inc. v. United States Dep't of the Treasury, No. 86-1075, slip op. at 6-8 (D.D.C. Mar. 30, 1988).

<sup>150</sup> See, e.g., SMS Data Prods. Group v. United States Dep't of the Air Force, slip op. at 6-8.

<sup>151</sup> See Citizens Comm'n on Human Rights v. FDA, slip op. at 18-20.

<sup>152</sup> See, e.g., Joint Bd. of Control v. Bureau of Indian Affairs, No. 87-217, slip op. at 8 (D. Mont. Sept. 9, 1988); Landfair v. United States Dep't of the Army, 645 F. Supp. 325, 329 (D.D.C. 1986); Professional Review Org. v. HHS, 607 F. Supp. 423, 426 (D.D.C. 1985) (detailing manner in which professional services contract was to be conducted).

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On the other hand, protection under the competitive harm prong has been denied when the prospect of injury is remote<sup>153</sup>--for example when a government contract is not awarded competitively<sup>154</sup>--or when the requested information is too general in nature.<sup>155</sup>

In addition, several courts, including the D.C. Circuit, have held that the harms flowing from "embarrassing" disclosures, or disclosures which could cause "customer or employee disgruntlement," are not cognizable under Exemption 4.<sup>156</sup> (Moreover, such harms would not be cognizable under Exemption

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<sup>153</sup> See, e.g., Carolina Biological Supply Co. v. United States Dep't of Agric., slip op. at 9 (disclosure of number of animals sold by companies supplying laboratory specimens "will be simply a small addition to information available in the marketplace" and thus will not cause competitive harm); Teich v. FDA, 751 F. Supp. at 254 (safety and effectiveness data pertaining to medical device ordered disclosed on basis of finding that at "this late date" in product approval process, disclosure "could not possibly help" competitors of submitter); see also Brown v. Department of Labor, slip op. at 5 (certain wage information not protected because no showing submitter would suffer "'substantial' injury" if information were disclosed).

<sup>154</sup> Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988) (reverse FOIA suit); see also U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 12 (D.D.C. Mar. 26, 1986) (aggregate contract price for armored limousines for the President ordered disclosed as not competitively harmful given unique nature of contract and agency's role in design of vehicles); cf. Cove Shipping, Inc. v. Military Sealift Command, No. 84-2709, slip op. at 8-10 (D.D.C. Feb. 27, 1986) (contract's wage and benefit breakdown not protected because it related to "one isolated contract, in an industry where labor contracts vary from bid to bid") (civil discovery case in which Exemption 4 case law applied).

<sup>155</sup> North Carolina Network for Animals v. United States Dep't of Agric., slip op. at 9 (general information regarding sales and pricing that would not reveal submitters' costs, profits, sources, or age, size, condition, or breed of animals sold); SMS Data Prods. Group v. United States Dep't of the Air Force, slip op. at 8 (general information regarding publicly held corporation's management structure, financial and production capabilities, corporate history and employees, most of which would be found in corporation's annual report and SEC filings and would in any event be readily available to a stockholder); Davis Corp. v. United States, No. 87-3365, slip op. at 9 (D.D.C. Jan. 19, 1988) (information contained in letters from contractor to agency regarding performance of contract that did not reveal contractor's suppliers or costs) (reverse FOIA suit); EHE Nat'l Health Serv., Inc. v. HHS, No. 81-1087, slip op. at 5 (D.D.C. Feb. 24, 1984) ("mundane" information regarding submitter's operation) (reverse FOIA suit); American Scissors Corp. v. GSA, No. 83-1562, slip op. at 8 (D.D.C. Nov. 15, 1983) (general description of manufacturing process with no details) (reverse FOIA suit).

<sup>156</sup> General Elec. Co. v. NRC, 750 F.2d 1394, 1402-03 (7th Cir. 1984); see (continued...)

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6 either, for it is well established that businesses have no "corporate privacy."<sup>157</sup> For a further discussion of this point, see the cases cited under Exemption 6, below.) More recently, the D.C. Circuit skirted this issue and expressly did not decide whether an allegation of harm flowing only from the embarrassing publicity associated with disclosure of a submitter's illegal payments to government officials would be sufficient to establish competitive harm.<sup>158</sup> Nevertheless, the court did go on to hold that the submitter's "right to an exemption, if any, depends upon the competitive significance of whatever information may be contained in the documents" and that the submitter's motive for seeking confidential treatment, even if it was to avoid embarrassing publicity, was "simply irrelevant."<sup>159</sup>

The status of unit prices in awarded government contracts has once again become a controversial issue under Exemption 4. Previously, there were three cases which contained a thorough analysis of the possible effects of disclosure of unit prices, including two appellate decisions, and in all three of these cases the court denied Exemption 4 protection, finding that disclosure of the prices would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier, and that the possibility of competitive harm was thus too speculative.<sup>160</sup>

In the most recent of these cases, the Court of Appeals for the Ninth Circuit denied Exemption 4 protection for the unit prices provided by a successful offeror despite the offeror's contention that competitors would be able to determine its profit margin by simply subtracting from the unit price the other

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<sup>156</sup>(...continued)

also CNA Fin. Corp. v. Donovan, 830 F.2d at 1154 ("unfavorable publicity" and "demoralized" employees insufficient for showing of competitive harm); Public Citizen Health Research Group v. FDA, 704 F.2d at 1291 n.30 (competitive harm limited to that flowing from "affirmative use of proprietary information by competitors"); Silverberg v. HHS, slip op. at 10 (D.D.C. June 14, 1991) (possibility that competitors might "distort" requested information and thus cause submitter embarrassment insufficient for showing of competitive harm); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) ("fear of litigation" insufficient for showing of competitive harm), aff'd in part & rev'd in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987).

<sup>157</sup> See, e.g., National Parks & Conservation Ass'n v. Kleppe, 547 F.2d at 685 n.44.

<sup>158</sup> See Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 341 (D.C. Cir. 1989) (reverse FOIA suit).

<sup>159</sup> Id.

<sup>160</sup> See Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit); Acumenics Research & Technology, Inc. v. United States Dep't of Justice, 843 F.2d 800, 808 (4th Cir. 1988) (reverse FOIA suit); J.H. Lawrence Co. v. Smith, No. 81-2993, slip op. at 8-9 (D. Md. Nov. 10, 1982).



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component parts which are either set by statute or standardized within the industry.<sup>161</sup> The Ninth Circuit upheld the agency's determination that competitors would not be able to make this type of calculation because the component figures making up the unit price were not, in fact, standardized, but instead were subject to fluctuation.<sup>162</sup>

Similarly, in the absence of a showing of competitive harm, the District Court for the District of Columbia has denied Exemption 4 protection for the prices charged the government for computer equipment, stating that "[d]isclosure of prices charged the Government is a cost of doing business with the Government."<sup>163</sup> Later, this same court recognized the "strong public interest in release of component and aggregate prices in Government contract awards," and thus again rejected an Exemption 4 claim for unit prices.<sup>164</sup>

The current Federal Acquisition Regulation (FAR) also mandates the disclosure of successful offerors' unit prices (with some exceptions) in negotiated contracts in excess of \$10,000 through a post-award debriefing process.<sup>165</sup> Because Exemption 4 protection is vitiated if the information is publicly available elsewhere, all unit prices of successful offerors that are required to be disclosed under the FAR debriefing scheme should not be considered to be within the available protection of Exemption 4.<sup>166</sup>

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<sup>161</sup> Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d at 1347.

<sup>162</sup> Id. at 1347-48; accord RMS Indus. v. DOD, slip op. at 7 (court "unconvinced based on the evidence that the release of contract bid prices, terms and conditions whether interim or final will harm the successful bidders").

<sup>163</sup> Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981); accord JL Assocs., 90-2 CPD 261, B-239790 at 4 (Oct. 1, 1990) (Comptroller General decision noting that "disclosure of prices charged the government is ordinarily a cost of doing business with the government"); see also EHE Nat'l Health Serv., Inc. v. HHS, slip op. at 4 ("[O]ne who would do business with the government must expect that more of his offer is more likely to become known to others than in the case of a purely private agreement.").

<sup>164</sup> AT&T Info. Sys. v. GSA, 627 F. Supp. 1396, 1403 (D.D.C. 1986); rev'd on other grounds & remanded, 810 F.2d 1233, 1236 (D.C. Cir. 1987). But see Sperry Univac Div. v. Baldrige, 3 Gov't Disclosure Serv. (P-H) ¶ 83,265, at 84,052 (E.D. Va. June 16, 1982) (protecting unit prices on finding that they revealed submitter's pricing and discount strategy), appeal dismissed, No. 82-1723 (4th Cir. Nov. 22, 1982).

<sup>165</sup> 48 C.F.R. § 15.1001(c)(1)(iv) (1992).

<sup>166</sup> See FOIA Update, Fall 1984, at 4; FOIA Update, Winter 1986, at 6; accord JL Assocs., 90-2 CPD 261, B-239790 at 4 n.2 (Oct. 1, 1990) (Comptroller General decision rejecting argument that disclosure of option unit prices would cause submitter competitive harm by revealing pricing strategy and decisionmaking process and noting that FAR "expressly advises awardees that the  
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During the past two years, however, and prior to the decision by the D.C. Circuit in Critical Mass,<sup>167</sup> there were three cases involving unit prices decided by the District Court for the District of Columbia, with each case reaching a different result. In one, the court ordered disclosure of the unit prices, rejecting as "highly speculative" the argument that their release would allow competitors to calculate the submitter's profit margin and thus be able to underbid it in future procurements.<sup>168</sup> In another case, the court determined that the submitter's competitive harm arguments were not speculative and it even went so far as to issue an injunction permanently prohibiting the agency from releasing those unit prices to the public.<sup>169</sup> In the third case, the court found that it was a "fact-intensive question" whether the submitter would suffer competitive harm from release of its "price information" and it therefore declined to rule on the applicability of Exemption 4 in the context of a summary judgment motion.<sup>170</sup>

That same district court issued another opinion during that same time period in a case involving unexercised option prices rather than "ordinary" unit prices.<sup>171</sup> In that case, the court expressly stated that it "generally agrees that '[d]isclosure of prices charged the Government is a cost of doing business with the Government.'"<sup>172</sup> It then upheld the agency's decision to release the option prices because "competitively sensitive information such as cost, overhead,

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<sup>166</sup>(...continued)

unit prices of awards will generally be disclosed to unsuccessful offerors"). But see Environmental Technology, Inc. v. EPA, 822 F. Supp. 1226, 1229 n.4 (E.D. Va. 1993) (interpreting FAR provision to actually prohibit release of unit prices if such information "constitutes 'confidential business information'") (reverse FOIA suit); McDonnell Douglas Corp. v. Rice, No. 92-2211, transcript at 38 (D.D.C. Sept. 30, 1992) (bench order) (in ruling on different FAR disclosure provision, found that even if such provision required disclosure of exercised option prices, such a disclosure would be "arbitrary and capricious") (non-FOIA case brought under Administrative Procedure Act) (petition for reh'g pending).

<sup>167</sup> 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993).

<sup>168</sup> Brownstein Zeidman & Schomer v. Department of the Air Force, 781 F. Supp. 31, 33 (D.D.C. 1991).

<sup>169</sup> McDonnell Douglas Corp. v. NASA, No. 91-3134, transcript at 10 (D.D.C. Jan. 24, 1992) (bench order) (reverse FOIA suit) (appeal pending).

<sup>170</sup> MCI Telecommunications Corp. v. GSA, slip op. at 15.

<sup>171</sup> General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. 804, 807 (D.D.C. 1992) (reverse FOIA suit) (appeal pending).

<sup>172</sup> Id. (quoting Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. at 6).

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or profit identifiers would not be revealed."<sup>173</sup>

None of the above cases concerning unit prices involved a request for pricing information submitted by an unsuccessful offeror. Three years ago, in the first decision to touch on this point, a court considered a situation in which the requester did not actually seek unit prices, but instead had requested the bottom-line price (total cumulative price) that an unsuccessful offeror had proposed for a government contract, as well as the bottom-line prices it had proposed for four years' worth of contract options.<sup>174</sup> In accepting the submitter's contention that disclosure of these bottom-line prices would cause it to suffer competitive harm by enabling competitors to deduce its pricing strategy, the court found that unsuccessful offerors had a different expectation of confidentiality than successful offerors, that the public interest in disclosure of pricing information concerning unawarded contracts was slight, and most importantly, that the unsuccessful offeror--who would be competing with the successful offeror on the contract options as well as on future related contracts--had demonstrated factually how the contract and option prices could be used by its competitors to derive data harmful to its competitive position.<sup>175</sup> Thus, in rare instances, it might be possible for an unsuccessful offeror to make out a claim under Exemption 4 for protection of its pricing information.<sup>176</sup>

In the aftermath of Critical Mass there have been three decisions that have afforded protection to unit and option prices premised on the theory that contract submissions are "voluntary" and that such pricing terms are not customarily disclosed to the public.<sup>177</sup> (These decisions appear to implicitly define voluntary submissions according to the nature of the activity to which they are connected and thus are contrary to the guidance issued by the Department of Justice concerning the voluntary/required distinction.<sup>178</sup> For a further discussion of Critical Mass and its new standard, see Applying Critical Mass, above.) In addition to affording protection to contract pricing information under Critical Mass, two of these decisions--in rather cursory orders issued

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<sup>173</sup> Id.; see RMS Indus. v. DOD, slip op. at 7 (rejecting competitive harm claim for "interim" prices).

<sup>174</sup> Raytheon Co. v. Department of the Navy, No. 89-2481, slip op. at 2-3 (D.D.C. Dec. 22, 1989).

<sup>175</sup> Id. at 8-15.

<sup>176</sup> See also FOIA Update, Spring/Summer 1990, at 2; FOIA Update, Fall 1983, at 10-11.

<sup>177</sup> See Environmental Technology, Inc. v. EPA, 822 F. Supp. at 1229 (unit price information); McDonnell Douglas Corp. v. Rice, transcript at 35 (exercised option price); Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A, transcript at 28 (E.D. Va. Sept. 10, 1992) (bench order) (unit price information).

<sup>178</sup> See FOIA Update, Spring 1993, at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

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from the bench--went on to alternatively afford protection under the competitive harm prong.<sup>179</sup>

#### Third Prong of National Parks

In addition to the impairment prong and the competitive harm prong of the test for confidentiality established in National Parks & Conservation Ass'n v. Morton, the decision specifically left open the possibility of a third prong that would protect other governmental interests, such as compliance and program effectiveness.<sup>180</sup> Several subsequent decisions reaffirmed this possibility in dicta,<sup>181</sup> and with its en banc decision in Critical Mass, the Court of Appeals for the District of Columbia Circuit conclusively recognized the existence of a "third prong" under National Parks.<sup>182</sup>

The third prong received its first thorough appellate court analysis and acceptance by the Court of Appeals for the First Circuit.<sup>183</sup> That court expressly admonished against using the two primary prongs of National Parks as "the exclusive criteria for determining confidentiality" and held that the pertinent inquiry is whether public disclosure of the information will harm an "identifiable private or governmental interest which the Congress sought to protect by enacting Exemption 4 of the FOIA."<sup>184</sup>

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<sup>179</sup> McDonnell Douglas Corp. v. Rice, transcript at 34, 36 (accepting submitter's assertion that disclosure of exercised option price would reveal pricing strategy and permit future bids to be predicted and undercut); Cohen, Dunn & Sinclair, P.C. v. GSA, transcript at 29; Findings of Fact at 7-8 (accepting same argument based on disclosure of detailed unit price information).

<sup>180</sup> 498 F.2d 765, 770 n.17 (D.C. Cir. 1974).

<sup>181</sup> See Washington Post Co. v. HHS, 690 F.2d 252, 268 n.51 (D.C. Cir. 1982); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976); Public Citizen Health Research Group v. FDA, 539 F. Supp. 1320, 1326 (D.D.C. 1982), rev'd & remanded on other grounds, 704 F.2d 1280 (D.C. Cir. 1983).

<sup>182</sup> 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993); see also FOIA Update, Spring 1993, at 7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

<sup>183</sup> See 9 to 5 Org. for Women Office Workers v. Board of Governors of the Fed. Reserve Sys., 721 F.2d 1 (1st Cir. 1983); accord Africa Fund v. Mosbacher, No. 92-289, slip op. at 16 (S.D.N.Y. May 26, 1993) (finding third prong satisfied when agency "submitted extensive declarations that explain why disclosure of documents . . . would interfere with the export control system" (citing Durnan v. United States Dep't of Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991))).

<sup>184</sup> 9 to 5, 721 F.2d at 10; see, e.g., Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 990 (D.D.C. 1992) (computer models protected under third prong because disclosure would make providers of proprietary input data

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Thereafter, the Department of Justice issued policy guidance regarding Exemption 4 protection for "intrinsically valuable" records--records that are significant not for their content, but as valuable commodities which can be sold in the marketplace.<sup>185</sup> Because protection for such documents is well rooted in the legislative history of Exemption 4, the third prong of the National Parks test should permit the owners of such records to retain their full proprietary interest in them when release through the FOIA would result in a substantial loss of their market value.<sup>186</sup> Of course, this protection would be available only if there were sufficient evidence to demonstrate factually that potential customers would actually utilize the FOIA as a substitute for directly purchasing the records from the submitter.<sup>187</sup>

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<sup>184</sup>(...continued)

reluctant to supply such data to submitter, and without that data computer models would become ineffective, which, in turn, would reduce effectiveness of agency's program) (appeal pending); Clarke v. United States Dep't of the Treasury, No. 84-1873, slip op. at 4-6 (E.D. Pa. Jan. 24, 1986) (identities of Flower Bond owners protected under third prong because government had legitimate interest in fulfilling "pre-FOIA contractual commitments of confidentiality" given to investors in order to ensure that pool of future investors willing to purchase government securities was not reduced; if that occurred, the pool of money from which government borrows would correspondingly be reduced, thereby harming national interest); Comstock Int'l, Inc. v. Export-Import Bank, 464 F. Supp. 804, 808 (D.D.C. 1979) (loan applicant information withheld under third prong on showing that disclosure would impair Bank's ability to promote U.S. exports); see also FOIA Update, Fall 1983, at 15; cf. M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (settlement negotiation documents protected upon finding that "it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure . . . were required"). But see News Group Boston, Inc. v. National R.R. Passenger Corp., 799 F. Supp. 1264, 1269 (D. Mass. 1992) (recognizing existence of third prong, but declining to apply it based on lack of specific showing that agency effectiveness would be impaired), appeal dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992).

<sup>185</sup> See FOIA Update, Winter 1985, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value").

<sup>186</sup> See id.; see also FOIA Update, Fall 1983, at 3-5 (setting forth similar basis for protecting copyrighted materials against substantial adverse market effect caused by FOIA disclosure).

<sup>187</sup> See Brittany Dyeing & Printing Corp. v. EPA, No. 91-2711, slip op. at 10-12 (D.D.C. Mar. 12, 1993) (rejecting argument that FOIA disclosure of Dun & Bradstreet report would cause "loss of potential customers" because no evidence was presented to support contention that potential customers would use FOIA in such a manner, particularly in light of time involved in receiving information through FOIA process; nor was it shown how many such reports would be available through FOIA and court would not assume that majority, or  
(continued...)

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The third prong was at issue in a case decided several years ago that concerned an agency that had the authority--but had not yet had the time and resources--to promulgate a regulation that would require submission of certain data.<sup>188</sup> During this interim period the agency was relying on companies to voluntarily submit the desired information.<sup>189</sup> The court rejected the agency's argument that under these circumstances disclosure would impair its efficiency and effectiveness, holding instead that because Congress had "announced a preference for mandatory over voluntary submissions," the agency was "hard-pressed to support its claim that voluntary submissions are somehow more efficient."<sup>190</sup>

Thirteen years after the National Parks decision first raised the possibility that Exemption 4 could protect interests other than those reflected in the impairment and competitive harm prongs, a panel of the Court of Appeals for the District of Columbia Circuit embraced the third prong in the first appellate decision in Critical Mass.<sup>191</sup> There, the panel adopted what it termed the "persuasive" reasoning of the First Circuit and expressly held that an agency may invoke Exemption 4 on the basis of interests other than the two principally identified in National Parks.<sup>192</sup>

Upon remand from the D.C. Circuit, the district court in Critical Mass found the requested information to be properly withheld pursuant to the third prong.<sup>193</sup> The court reached this decision based on the fact that if the requested information were disclosed, future submissions would not be provided until they were demanded under some form of compulsion--which would then have to be enforced, precipitating "acrimony and some form of litigation with

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<sup>187</sup>(...continued)

even substantial number, could be so obtained); Key Bank of Me., Inc. v. SBA, No. 91-362-P, slip op. at 7 (D. Me. Dec. 31, 1992) (denying protection for Dun & Bradstreet reports because "the notion that those who are in need of credit information will use the government as a source in order to save costs belies common sense").

<sup>188</sup> See Teich v. FDA, 751 F. Supp. 243, 251 (D.D.C. 1990), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992).

<sup>189</sup> 751 F. Supp. at 251.

<sup>190</sup> Id. at 252-53.

<sup>191</sup> 830 F.2d 278, 282, 286 (D.C. Cir. 1987), vacated en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

<sup>192</sup> 830 F.2d at 286.

<sup>193</sup> 731 F. Supp. 554, 557 (D.D.C. 1990), rev'd in part & remanded, 931 F.2d 939 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

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attendant expense and delay."<sup>194</sup> On appeal for the second time, a panel of the D.C. Circuit reversed the lower court on this point, but that decision was itself vacated when the D.C. Circuit decided to hear the case en banc.<sup>195</sup>

In its en banc decision in Critical Mass, the D.C. Circuit conducted an extensive review of the interests sought to be protected by Exemption 4 and expressly held that "[i]t should be evident from this review that the two interests identified in the National Parks test are not exclusive."<sup>196</sup> In addition, the court went on to state that although it was overruling the first panel decision in Critical Mass, it "note[d]" that that panel had adopted the First Circuit's conclusion that Exemption 4 protects a "governmental interest in administrative efficiency and effectiveness."<sup>197</sup> Moreover, the D.C. Circuit specifically recognized yet another Exemption 4 interest--namely, "a private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis."<sup>198</sup> It declined to offer an opinion as to whether any other governmental or private interests might also fall within Exemption 4's protection.<sup>199</sup>

### Privileged Information

The term "privileged" in Exemption 4 has been utilized by some courts as an alternative for protecting nonconfidential commercial or financial information. Indeed, the Court of Appeals for the District of Columbia Circuit has indicated that this term should not be treated as being merely synonymous with "confidential," particularly in light of the legislative history's explicit reference to certain privileges, e.g., the attorney-client and doctor-patient privileges.<sup>200</sup> Nevertheless, during the FOIA's first two decades, only two district court decisions had discussed "privilege" in the Exemption 4 context. In one case, a court upheld the Department of the Interior's withholding of detailed statements by law firms of work that they had done for the Hopi Indians on the ground that they were "privileged" because of their work-product nature within the meaning of Exemption 4: "The vouchers reveal strategies developed by Hopi counsel in anticipation of preventing or preparing for legal action to safeguard

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<sup>194</sup> 731 F. Supp. at 557.

<sup>195</sup> 931 F.2d 939, 944-45 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

<sup>196</sup> 975 F.2d at 879.

<sup>197</sup> Id.; see also Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. at 990 (recognizing, after Critical Mass, third prong protection to prevent agency effectiveness from being impaired).

<sup>198</sup> 975 F.2d at 879.

<sup>199</sup> Id.

<sup>200</sup> See Washington Post Co. v. HHS, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982).

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tribal interests. Such communications are entitled to protection as attorney work product."<sup>201</sup> In the second case, a legal memorandum prepared for a utility company by its attorney qualified as legal advice protectible under Exemption 4 as subject to the attorney-client privilege.<sup>202</sup> In both of these cases the information was also withheld as "confidential."

Eight years ago, for the first time, a court protected material relying solely on the "privilege" portion of Exemption 4, recognizing protection for documents subject to the "confidential report" privilege.<sup>203</sup> In a brief opinion, one court recognized Exemption 4 protection for settlement negotiation documents, but did not expressly characterize them as "privileged."<sup>204</sup> Another court subsequently recognized Exemption 4 protection for documents subject to the critical self-evaluative privilege.<sup>205</sup>

On the other hand, the Court of Appeals for the Tenth Circuit has recently held that documents subject to a state protective order entered pursuant to the State of Utah's equivalent of Rule 26(c)(7) of the Federal Rules of Civil Procedure--which permits courts to issue orders denying or otherwise limiting the manner in which discovery is conducted so that a trade secret or other confidential commercial information is not disclosed or is only disclosed in a certain way--were not "privileged" for purposes of Exemption 4.<sup>206</sup> While observing that discovery privileges "may constitute an additional ground for nondisclosure" under Exemption 4, the Tenth Circuit noted that those other privileges were for information "not otherwise specifically embodied in the language of Exemption 4."<sup>207</sup> By contrast, it concluded, recognition of a priv-

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<sup>201</sup> Indian Law Resource Ctr. v. Department of the Interior, 477 F. Supp. 144, 148 (D.D.C. 1979).

<sup>202</sup> See Miller, Anderson, Nash, Yerke & Wiener v. United States Dep't of Energy, 499 F. Supp. 767, 771 (D. Or. 1980).

<sup>203</sup> Washington Post Co. v. HHS, 603 F. Supp. 235, 237-39 (D.D.C. 1985), rev'd on procedural grounds & remanded, 795 F.2d 205 (D.C. Cir. 1986).

<sup>204</sup> See M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986); see also FOIA Update, Fall 1985, at 3-4 ("OIP Guidance: Protecting Settlement Negotiations").

<sup>205</sup> Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 21 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96, 99 (D.C. Cir. 1988). But cf. Kansas Gas & Elec. Co. v. NRC, No. 87-2748, slip op. at 4 (D.D.C. July 2, 1993) (because self-critical analysis privilege previously rejected in state court proceeding brought to suppress disclosure of documents, "doctrine of collateral estoppel" prevented "relitigation" of that claim in federal court) (reverse FOIA suit).

<sup>206</sup> Anderson v. HHS, 907 F.2d 936, 945 (10th Cir. 1990).

<sup>207</sup> Id.



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ilege for materials protected by a protective order under Rule 26(c)(7) "would be redundant and would substantially duplicate Exemption 4's explicit coverage of 'trade secrets and commercial or financial information.'"<sup>208</sup> Similarly, the Court of Appeals for the Fifth Circuit has "decline[d] to hold that the [FOIA] creates a lender-borrower privilege," despite the express reference to such a privilege in Exemption 4's legislative history.<sup>209</sup>

### Interrelation with Trade Secrets Act

Finally, it should be noted that the Trade Secrets Act<sup>210</sup>--an extraordinarily broadly worded criminal statute--prohibits the disclosure of much more than simply "trade secret" information and instead prohibits the unauthorized disclosure of all data protected by Exemption 4. (See discussion of this statute in connection with Exemption 3, above.) Indeed, virtually every court that has considered the issue has found the Trade Secrets Act and Exemption 4 to be "coextensive."<sup>211</sup> In 1987, the Court of Appeals for the District of Columbia Circuit issued a long-awaited decision which contains an extensive analysis of the argument advanced by several commentators that the scope of the Trade Secrets Act is narrow, extending no more broadly than the scope of its three predecessor statutes.<sup>212</sup> The D.C. Circuit rejected that argument and held that the scope of the Trade Secrets Act is "at least co-extensive with that of Exemption 4."<sup>213</sup> Thus, the court held that if information falls within the scope of Exemption 4, it also falls within the scope of the Trade Secrets Act.<sup>214</sup> The court concluded that it need not "attempt to define the outer limits" of the Trade Secrets Act, i.e., whether information falling outside the scope of Exemption 4 was nonetheless still within the scope of the Trade Secrets Act, because the FOIA itself would provide authorization for release of any information falling outside the scope of an exemption.<sup>215</sup>

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<sup>208</sup> Id.

<sup>209</sup> Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 400 (5th Cir.), cert. denied, 471 U.S. 1137 (1985).

<sup>210</sup> 18 U.S.C. § 1905 (1988).

<sup>211</sup> See, e.g., General Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984).

<sup>212</sup> See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1144-52 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988).

<sup>213</sup> 830 F.2d at 1151.

<sup>214</sup> Id. at 1151-52; see also id. at 1140 (noting that Trade Secrets Act "appears to cover practically any commercial or financial data collected by any federal employee from any source" and that "comprehensive catalogue of items" listed in Act "accomplishes essentially the same thing as if it had simply referred to 'all officially collected commercial information' or 'all business and financial data received'").

<sup>215</sup> Id. at 1152 n.139.

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The practical effect of the Trade Secrets Act is to limit an agency's ability to make a discretionary release of otherwise-exempt material, because to do so in violation of the Trade Secrets Act would not only be a criminal offense, it would also constitute "a serious abuse of agency discretion" redressable through a "reverse" FOIA suit.<sup>216</sup> Thus, in the absence of a statute or properly promulgated regulation authorizing release--which would remove the disclosure prohibition of the Trade Secrets Act--a determination by an agency that material falls within Exemption 4 is "tantamount" to a decision that it cannot be released.<sup>217</sup>

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Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."<sup>1</sup> As such, it has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context."<sup>2</sup>

Although originally it was "not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery,"<sup>3</sup> the Supreme Court has now made it clear that the coverage of Exemption 5 is quite broad, encompassing both statutory privileges and those commonly recognized by case law, and that it is not limited to those privileges explicitly mentioned in its legislative history.<sup>4</sup> Accordingly, the Court of Appeals for the District of Columbia Circuit has stated that the statutory language "unequivocally" incorporates "all civil discovery rules into FOIA [Exemption 5]."<sup>5</sup> However, this incorporation of discovery privileges requires that a privilege be applied in the FOIA context as

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<sup>216</sup> National Org. for Women v. Social Sec. Admin., 736 F.2d 727, 743 (D.C. Cir. 1984) (Robinson, J., concurring); accord Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit); Charles River Park "A." Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975); see also FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

<sup>217</sup> CNA Fin. Corp. v. Donovan, 830 F.2d at 1144.

<sup>1</sup> 5 U.S.C. § 552(b)(5) (1988).

<sup>2</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see also FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

<sup>3</sup> Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 354 (1979).

<sup>4</sup> See United States v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984); see also FOIA Update, Fall 1984, at 6.

<sup>5</sup> Martin v. Office of Special Counsel, 819 F.2d at 1185; see also Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987) ("Exemption 5 requires the application of existing rules regarding discovery.").

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it exists in the discovery context.<sup>6</sup> Thus, the precise contours of a privilege, with regard to applicable parties or types of information which are protectible, are also incorporated into the FOIA.<sup>7</sup>

The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege (referred to by some courts as "executive privilege"), the attorney work-product privilege and the attorney-client privilege.<sup>8</sup>

### Initial Considerations

The threshold issue under Exemption 5 is whether a record is of the sort intended to be covered by the phrase "inter-agency or intra-agency memorandums," a phrase which would seem to contemplate only those documents generated by an agency and not circulated beyond the executive branch. In fact, however, in recognition of the necessities and practicalities of agency operations, the courts have construed the scope of Exemption 5 far more expansively and have included documents generated outside of an agency. This pragmatic approach has been characterized as the "functional test" for assessing the applicability of Exemption 5 protection.<sup>9</sup> However, some documents generated within an agency, but transmitted outside of the executive branch, have been found to fail this threshold test and thus not qualify for Exemption 5 protection.<sup>10</sup>

Regarding documents generated outside of an agency but created pursuant to agency initiative, whether purchased or provided voluntarily without compensation, it has been held that "Congress apparently did not intend 'inter-agency and intra-agency' to be rigidly exclusive terms, but rather to include any agency

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<sup>6</sup> See United States Dep't of Justice v. Julian, 486 U.S. 1, 13 (1988) (pre-sentence report privilege, designed to protect report subjects, cannot be invoked against them as first-party requesters).

<sup>7</sup> Id.

<sup>8</sup> See NLRB v. Sears, Roebuck & Co., 421 U.S. at 149.

<sup>9</sup> See Durns v. Bureau of Prisons, 804 F.2d 701, 704 n.5 (D.C. Cir.) (employing "a functional rather than a literal test in assessing whether memoranda are 'inter-agency or intra-agency'"), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988); see also United States Dep't of Justice v. Julian, 486 U.S. 1, 11 n.9 (1988) (Scalia, J., dissenting) (issue not reached by majority).

<sup>10</sup> See, e.g., Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 575 (D.C. Cir. 1990) (agency records transmitted to Congress for purposes of congressional inquiry held not "inter-agency" records under Exemption 5 on basis that Congress is not an "agency" under FOIA); see also Paisley v. CIA, 712 F.2d 686, 699 n.54 (D.C. Cir. 1983) (presaging Dow Jones by suggesting that agency responses to congressional requests for information may not constitute protectible "inter-agency" communications).

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document that is part of the deliberative process."<sup>11</sup> Thus, recommendations from Congress may be protected,<sup>12</sup> as well as advice from a state agency.<sup>13</sup> Similarly, the Court of Appeals for the District of Columbia Circuit has held that Exemption 5 likewise applies to documents originating with a court.<sup>14</sup> Under this "functional" approach, documents generated by consultants outside of an agency are typically found to qualify for Exemption 5 protection because agencies, in the exercise of their functions, commonly have "a special need for the opinions and recommendations of temporary consultants."<sup>15</sup> Indeed, such advice can "play[] an integral function in the government's decision-[making]."<sup>16</sup>

Several years ago, the D.C. Circuit made broad use of the "functional" test, holding that Exemption 5's "inter-agency or intra-agency" threshold requirement was satisfied even where no "formal relationship" existed between HHS and an outside scientific journal reviewing an article submitted by an HHS

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<sup>11</sup> Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980); see also Hooper v. Bowen, No. 88-1030, slip op. at 18 (C.D. Cal. May 24, 1989) ("courts have regularly construed this threshold test expansively rather than hypertechnically"); FOIA Update, June 1982, at 10 ("FOIA Counselor: Protecting 'Outside' Advice").

<sup>12</sup> Ryan v. Department of Justice, 617 F.2d at 790 (protecting judicial recommendations from senators to Attorney General).

<sup>13</sup> Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 315 (S.D.N.Y. 1976) ("the rationale applies with equal force to advice from state as well as federal agencies").

<sup>14</sup> Durns v. Bureau of Prisons, 804 F.2d at 704 & n.5 (presentence report prepared by probation officer for sentencing judge, with copies provided to Parole Commission and Bureau of Prisons); cf. Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 184-85 (D.C. Cir. 1987) (upholding application of Exemption 5--without discussing "inter-agency and intra-agency" threshold--to material supplied by outside contractors).

<sup>15</sup> Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); cf. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (recognizing importance of outside consultants in deliberative process privilege context), cert. denied, 485 U.S. 977 (1988).

<sup>16</sup> Hoover v. United States Dep't of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980); see also, e.g., Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979); Wu v. National Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972) (recommendations of volunteer consultants protected), cert. denied, 410 U.S. 926 (1973); Hooper v. Bowen, slip op. at 17-19 (records originating with private insurance companies which acted as "fiscal intermediaries" for Health Care Financing Administration protected); Beltone Elec. Corp. v. FTC, No. 81-1360, slip op. at 9-10 (D.D.C. Dec. 6, 1983) (documents prepared by paid outside consultants protected); American Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., 3 Gov't Disclosure Serv. (P-H) ¶ 83,182, at 83,846 (D.D.C. June 14, 1983) (same).

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scientist for possible publication.<sup>17</sup> The D.C. Circuit held that the deciding factor is the "role" the evaluative comments from the journal's reviewers play in the process of agency deliberations--that is, they are regularly relied upon by agency authors and supervisors in making the agency's decisions.<sup>18</sup> While courts ordinarily require that there be some formal or informal relationship between the "consultant" and the agency, some courts have accorded Exemption 5 protection even absent such a relationship.<sup>19</sup>

However, a minority of courts, particularly in the context of witness statements taken in NLRB investigations, have not embraced the "functional test" and have rigidly applied the "inter-agency or intra-agency" language of Exemption 5's threshold to find that documents submitted by nonagency personnel are not protectible under the exemption.<sup>20</sup>

In 1990, the D.C. Circuit held in Dow Jones & Co. v. Department of Justice,<sup>21</sup> that documents transmitted to Congress do not qualify for Exemption 5 protection, based upon the simple fact that Congress is not an "agency" under

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<sup>17</sup> Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989).

<sup>18</sup> Id. at 1123-24 (citing CNA Fin. Corp. v. Donovan, 830 F.2d at 1161). But cf. Texas v. ICC, 889 F.2d 59, 62 (5th Cir. 1989) (embracing "functional test" but finding it not satisfied for documents submitted by private party not standing in any consultative or advisory role with agency).

<sup>19</sup> See Destileria Serralles, Inc. v. Department of the Treasury, No. 85-837, slip op. at 10 (D.P.R. Sept. 22, 1988) (protecting confidential business information furnished to agency by business competitor); Information Acquisition Corp. v. Department of Justice, No. 77-839, slip op. at 4 (D.D.C. May 23, 1979) (protecting unsolicited comments from members of public on presidential nomination); see also FOIA Update, Summer 1987, at 4-5 ("OIP Guidance: Broad Protection for Witness Statements"); FOIA Update, June 1982, at 10.

<sup>20</sup> See Thurner Heat Treating Corp. v. NLRB, 839 F.2d 1256, 1259-60 (7th Cir. 1988) (witness statements taken from nonagency employees in contemplation of litigation held not intra-agency); Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (Exemption 5 narrowly construed to apply "only to internal agency documents or documents prepared by outsiders who have a formal relationship with the agency"); Poss v. NLRB, 654 F.2d 659, 659 (10th Cir. 1977) (same); Kilroy v. NLRB, 633 F. Supp. 136, 140 (S.D. Ohio 1985) (witness statements taken from nonagency employees not intra-agency), aff'd, 823 F.2d 553 (6th Cir. 1987) (table cite); see also Southam News v. INS, No. 85-2721, slip op. at 17 (D.D.C. May 18, 1989) (letters to and from private parties held not to meet threshold); Knight v. DOD, No. 87-480, slip op. at 2-3 (D.D.C. Dec. 7, 1987) (correspondence to contractors not intra-agency); American Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., No. 82-2806, slip op. at 3 (D.D.C. July 22, 1983) (advice of professional advisory committees does not merit protection as disclosure would not chill outsiders' candor).

<sup>21</sup> 917 F.2d 571 (D.C. Cir. 1990).

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the terms of the statute<sup>22</sup>--even though prior to Dow Jones, several district court decisions had accorded such documents protection under Exemption 5.<sup>23</sup> Nevertheless, the D.C. Circuit stated that agencies may "protect communications outside the agency so long as those communications are part and parcel of the agency's deliberative process."<sup>24</sup>

The issue remains unsettled as to documents generated in the course of settlement negotiations. Communications reflecting settlement negotiations between the government and an adverse party, which are of necessity exchanged between the parties, have been held not to constitute "intra-agency" memoranda under Exemption 5.<sup>25</sup> However, certain of those courts recognized the great difficulties inherent in such a harsh Exemption 5 construction, especially in light of the "logic and force of [the] policy plea" that the government's indispensable settlement mechanism can be impeded by such a result.<sup>26</sup>

Accordingly, one court has held that notes of an agency employee which reflected positions taken and issues raised in treaty negotiations were properly withheld pursuant to Exemption 5 because their release would harm the agency deliberative process.<sup>27</sup> Other courts have found the attorney work-product and deliberative process privileges to be properly invoked for documents prepared by agency personnel which reflected the substance of meetings between adverse

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<sup>22</sup> Id. at 574 (citing 5 U.S.C. § 551(1)).

<sup>23</sup> See, e.g., Demetracopoulos v. CIA, 3 Gov't Disclosure Serv. (P-H) ¶ 82,508, at 83,283 (D.D.C. Nov. 9, 1982) (documents transmitted to Congress); Letelier v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 82,257, at 82,714 (D.D.C. May 11, 1982) (same); see also FOIA Update, Spring 1983, at 5 (superseded in part by Dow Jones).

<sup>24</sup> 917 F.2d at 575.

<sup>25</sup> See County of Madison v. United States Dep't of Justice, 641 F.2d 1036, 1042 (1st Cir. 1981); M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (privilege allowed under Exemption 4 but not under Exemption 5); NAACP Legal Defense & Educ. Fund, Inc. v. United States Dep't of Justice, 612 F. Supp. 1143, 1145-46 (D.D.C. 1985); Norwood v. FAA, 580 F. Supp. 994, 1002-03 (W.D. Tenn. 1984) (on motion for clarification and reconsideration); Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 747-49 (D.D.C. 1983).

<sup>26</sup> County of Madison v. United States Dep't of Justice, 641 F.2d at 1040; Center for Auto Safety v. Department of Justice, 576 F. Supp. at 746 n.18 (quoting County of Madison v. United States Dep't of Justice, 641 F.2d at 1040); see also Murphy v. TVA, 571 F. Supp. 502, 506 (D.D.C. 1983) (public policy favoring compromise over confrontation would be "seriously undermined" if internal documents reflecting employees' thoughts during course of negotiations were released).

<sup>27</sup> Fulbright & Jaworski v. Department of the Treasury, 545 F. Supp. 615, 620 (D.D.C. 1982).

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parties and agency personnel in preparation for eventual settlement of a case.<sup>28</sup> Furthermore, Justice Brennan, noting the need for protecting attorney work-product information, has specifically cited as a particular disclosure danger the ability of adverse parties to "gain insight into the agency's general strategic and tactical approach to deciding when suits are brought . . . and on what terms they may be settled."<sup>29</sup>

Thus, the law with respect to settlement documents stands in a state of flux, with repeated judicial suggestions underscoring the dangers of their disclosure, but with substantial case precedents standing as obstacles to Exemption 5 protection for those documents that have been shared with opposing parties. All of the adverse decisions in this area, though, have failed to take cognizance of the relatively recent development of a distinct "settlement negotiation" privilege.<sup>30</sup> In addition, settlement information may qualify for protection under Exemption 4 where the information meets the "commercial or financial" threshold,<sup>31</sup> or under the more traditional Exemption 5 privileges. Accordingly, while such information should be withheld by agencies at the administrative level pursuant to Exemption 5, particularly where strong policy interests militating against disclosure are present, special care should be taken to maximize the prospects of favorable case law development on this delicate issue.

Additionally, it is not the "hypothetical litigation" between particular par-

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<sup>28</sup> See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (deliberative process privilege); Wilson v. Department of Justice, No. 87-2415, slip op. at 8-11 (D.D.C. June 14, 1992) (attorney work-product privilege); Oxy USA Inc. v. United States Dep't of Energy, No. 88-C-541-B (N.D. Okla. July 13, 1989) (deliberative process and attorney work-product privileges); Cities Serv. Co. v. FTC, 627 F. Supp. 827, 832 (D.D.C. 1984) (attorney work-product privilege), aff'd, 778 F.2d 889 (D.C. Cir. 1985) (table cite); Burke Energy Corp. v. Department of Energy, 583 F. Supp. 507, 513 (D. Kan. 1984) (deliberative process privilege); Fulbright & Jaworski v. Department of the Treasury, 545 F. Supp. at 620 (deliberative process privilege); see also FOIA Update, June 1982, at 10; cf. United States v. Metropolitan St. Louis Sewer Dist., 952 F.2d 1040, 1045 (8th Cir. 1992) (draft consent decrees covered by both deliberative process and attorney work-product privileges; remanded for determination of whether privileges waived). But see Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 257-58 (D.C. Cir. 1977) (certain documents prepared by agency concerning negotiations failed to reveal any inter-agency deliberations and therefore were not withholdable).

<sup>29</sup> FTC v. Grolier Inc., 462 U.S. 19, 31 (1983) (Brennan, J., concurring) (emphasis added).

<sup>30</sup> See, e.g., Olin Corp. v. Insurance Co. of N. America, 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985); Bottaro v. Hatton Assocs., 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982); see also FOIA Update, Fall 1985, at 3-4 ("OIP Guidance: Protecting Settlement Negotiations").

<sup>31</sup> See M/A-COM Info. Sys. v. HHS, 656 F. Supp. at 692.

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ties (in which relevance or need are appropriate factors) which governs the Exemption 5 inquiry;<sup>32</sup> rather, it is the circumstances in private litigation in which memoranda would "routinely be disclosed."<sup>33</sup> Therefore, whether the privilege invoked is absolute or qualified is of no significance.<sup>34</sup> Accordingly, no requester is entitled to greater rights of access under Exemption 5 by virtue of whatever special interests might influence the outcome of actual civil discovery to which he is a party.<sup>35</sup> Indeed, such an approach, combined with a pragmatic application of Exemption 5's threshold language, is the only means by which the Supreme Court's firm admonition against use of the FOIA to circumvent discovery privileges can be given full effect.<sup>36</sup> Nevertheless, the mere fact that information may not generally be discoverable does not necessarily mean that it is not discoverable by a specific class of parties in civil litigation. Just as the FOIA's privacy exemptions are not used against a first-party requester,<sup>37</sup> a privilege that is designed to protect a certain class of persons cannot be invoked against those persons as FOIA requesters.<sup>38</sup>

### Deliberative Process Privilege

The most commonly invoked privilege incorporated within Exemption 5 is the deliberative process privilege, the general purpose of which is to "prevent injury to the quality of agency decisions."<sup>39</sup> Specifically, three policy purposes

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<sup>32</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 n.16 (1975).

<sup>33</sup> H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

<sup>34</sup> See FTC v. Grolier Inc., 462 U.S. at 27; see also FOIA Update, Fall 1984, at 6.

<sup>35</sup> See FTC v. Grolier Inc., 462 U.S. at 28; NLRB v. Sears, Roebuck & Co., 421 U.S. at 149; see also, e.g., Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987) ("the needs of a particular plaintiff are not relevant to the exemption's applicability"); Swisher v. Department of the Air Force, 660 F.2d 369, 371 (8th Cir. 1981) (fact that privilege may be overcome by showing of "need" in civil discovery context in no way diminishes Exemption 5 applicability).

<sup>36</sup> See United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984) ("We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented."); see also Martin v. Office of Special Counsel, 819 F.2d at 1186 (Where a requester is "unable to obtain those documents using ordinary civil discovery methods, . . . FOIA should not be read to alter that result.").

<sup>37</sup> See H.R. Rep. No. 1380, 93d Cong., 2d Sess. 13 (1974); see also FOIA Update, Spring 1989, at 4.

<sup>38</sup> See United States Dep't of Justice v. Julian, 486 U.S. at 13 (presentence report privilege, designed to protect reports' subjects, cannot be invoked against them as first-party requesters).

<sup>39</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).



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es consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.<sup>40</sup>

Logically flowing from the foregoing policy considerations is the privilege's protection of the "decision making processes of government agencies."<sup>41</sup> In concept, the privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm.<sup>42</sup>

Indeed, in a major en banc decision, the Court of Appeals for the District of Columbia Circuit emphasized that even the mere status of an agency decision within an agency decisionmaking process may be protectible if the release of that information would have the effect of prematurely disclosing "the recommended outcome of the consultative process . . . as well as the source of any decision."<sup>43</sup> This is particularly important to agencies involved in a regulatory process that specifically mandates public involvement in the decision process

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<sup>40</sup> See, e.g., Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. United States Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc); Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 23 (C.D. Cal. May 10, 1993) (release of predecisional documents may confuse public about agency policy and procedure). But see also ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1237-38 (D.C. Cir. 1983) (suggesting that otherwise exempt predecisional material "may" be ordered released so as to explain actual agency positions) (dictum), rev'd on other grounds, 466 U.S. 463 (1984).

<sup>41</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. at 150.

<sup>42</sup> See, e.g., National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) ("[T]he ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process."); Schell v. HHS, 843 F.2d 933, 940 (6th Cir. 1988) ("Because Exemption 5 is concerned with protecting the deliberative process itself, courts now focus less on the material sought and more on the effect of the material's release."); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("Congress enacted Exemption 5 to protect the executive's deliberative processes--not to protect specific materials."); Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 117 (D.D.C. 1984) (ongoing regulatory process would be subject to "delay and disrupt[ion]" if preliminary analyses were prematurely disclosed).

<sup>43</sup> Wolfe v. HHS, 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc).

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once the agency's deliberations are complete.<sup>44</sup> Moreover, the predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision,<sup>45</sup> nor by the passage of time in general.<sup>46</sup>

Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked.<sup>47</sup> First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy."<sup>48</sup> Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."<sup>49</sup> The burden is upon the agency to show that the information in question satisfies both requirements.<sup>50</sup>

In determining whether a document is predecisional, an agency does not necessarily have to point specifically to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process."<sup>51</sup> On this point, the Supreme Court has been very clear:

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<sup>44</sup> See *id.* at 776; see also National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1120-21 (draft forest plans and preliminary draft environmental impact statements protected); Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. at 118 (preliminary scientific data generated in connection with study of chemical protected).

<sup>45</sup> See, e.g., May v. Department of the Air Force, 777 F.2d 1012, 1014-15 (5th Cir. 1985); Cuccaro v. Secretary of Labor, 770 F.2d 355, 357 (3d Cir. 1985).

<sup>46</sup> See, e.g., Founding Church of Scientology v. Levi, 1 Gov't Disclosure Serv. (P-H) ¶ 80,155, at 80,374 (D.D.C. Aug. 12, 1980).

<sup>47</sup> See Mapother v. Department of Justice, No. 92-5261, slip op. at 7 (D.C. Cir. Sept. 17, 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative." (citing Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992))) (to be published).

<sup>48</sup> Jordan v. United States Dep't of Justice, 591 F.2d at 774.

<sup>49</sup> Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

<sup>50</sup> See Southam News v. INS, No. 85-2721, slip op. at 16-17 (D.D.C. May 18, 1989).

<sup>51</sup> Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 868; see also Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 559 (1st Cir. 1992); Formaldehyde Inst. v. HHS, 889 F.2d 1118, 1123 (D.C. Cir. 1989); Knowles v. Thornburgh, No. 90-1294, slip op. at 5-6 (D.D.C. Mar. 11, 1992) (information generated during process preceding President's ultimate decision on application for clemency held predecisional).

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Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.<sup>52</sup>

Thus, so long as a document is generated as part of such a continuing process of agency decisionmaking, Exemption 5 can be applicable.<sup>53</sup> In a particularly instructive decision, Access Reports v. Department of Justice,<sup>54</sup> the D.C. Circuit emphasized the importance of identifying the larger process to which a document sometimes contributes. Further, "predecisional" documents

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<sup>52</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. at 151 n.18; see also Schell v. HHS, 843 F.2d at 941 ("When specific advice is provided, . . . it is no less predecisional because it is accepted or rejected in silence, or perhaps simply incorporated into the thinking of superiors for future use."); Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. at 118 ("[t]here should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take--of the deliberative process--by which the decision itself is made'"); Pfeiffer v. CIA, 721 F. Supp. 337, 340 (D.D.C. 1989) (court "must give considerable deference to the agency's explanation of its decisional process, due to agency's expertise").

<sup>53</sup> See, e.g., Maryland Coalition for Integrated Educ. v. United States Dep't of Educ., No. 89-2851, slip op. at 6 (D.D.C. July 20, 1992) (material prepared during compliance review that goes beyond critique of reviewed program to discuss broader agency policy held part of deliberative process) (appeal pending); Washington Post Co. v. DOD, No. 84-2949, slip op. at 21 (D.D.C. Feb. 25, 1987) (document generated in continuing process of examining agency policy falls within deliberative process); Ashley v. United States Dep't of Labor, 589 F. Supp. 901, 908-09 (D.D.C. 1983) (documents containing agency self-evaluations need not be shown to be part of clear process leading up to "assured" final decision so long as agency can demonstrate that documents were part of some deliberative process). But see also Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987) (suggesting agency must specify final "decisions to which the advice or recommendations . . . contributed"); Cook v. Watt, 597 F. Supp. 545, 550-52 (D. Alaska 1983) (confusingly refusing to extend privilege to documents originating in deliberative process merely because process held in abeyance and no decision reached). Compare Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980) (holding document must be "essential element" of deliberative process) with Schell v. HHS, 843 F.2d at 939-41 (appearing to reject, at least implicitly, "essential element" test).

<sup>54</sup> 926 F.2d 1192, 1196 (D.C. Cir. 1991); see also Taylor v. United States Dep't of the Treasury, No. C90-1928, slip op. at 3-4 (N.D. Cal. Jan. 20, 1991) (deliberative process privilege protects "communications leading to the actual enactment of a law, not merely communications preceding a decision to commence the process of amending a law").

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are not only those circulated within the agency, but can also be those from an agency lacking decisional authority which advises another agency possessing such authority.<sup>55</sup>

In contrast, however, are postdecisional documents. They generally embody statements of policy and final opinions that have the force of law,<sup>56</sup> that implement an established policy of an agency,<sup>57</sup> or that explain actions that an agency has already taken.<sup>58</sup> Exemption 5 does not apply to postdecisional documents, as "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted."<sup>59</sup>

Indeed, many courts have questioned whether certain documents at issue were tantamount to agency "secret law," i.e., "orders and interpretations which [the agency] actually applies to cases before it,"<sup>60</sup> and which are "routinely used by agency staff as guidance."<sup>61</sup> Such documents should be disclosed because they are not in fact predecisional, but rather "discuss established policies and decisions."<sup>62</sup> Only those portions of a postdecisional document that discuss predecisional recommendations not expressly adopted can be protected.<sup>63</sup>

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<sup>55</sup> See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 188 (1975); Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984).

<sup>56</sup> See, e.g., Taxation With Representation Fund v. IRS, 646 F.2d 666, 677 (D.C. Cir. 1981).

<sup>57</sup> See, e.g., Brinton v. Department of State, 636 F.2d 600, 605 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981).

<sup>58</sup> See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. at 153-54. But cf. Murphy v. TVA, 571 F. Supp. 502, 505 (D.D.C. 1983) (protection afforded to "interim" decisions which agency retains option of changing).

<sup>59</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. at 152.

<sup>60</sup> Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971).

<sup>61</sup> Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 869; see also Schlefer v. United States, 702 F.2d 233, 243-44 (D.C. Cir. 1983).

<sup>62</sup> Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 868; Hansen v. United States Dep't of the Air Force, 817 F. Supp. at 124-25 (draft document used by agency as final product ordered disclosed).

<sup>63</sup> See NLRB v. Sears, Roebuck & Co., 421 U.S. at 151 (holding postdecisional documents subject to deliberative process privilege "as long as prior communications and the ingredients of the decisionmaking process are not disclosed"); see also Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977) ("It would exalt form over substance to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only 'report' what those recommendations and opinions are.").

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Several criteria have been fashioned to clarify the "often blurred" distinction between predecisional and postdecisional documents.<sup>64</sup> First, an agency should determine whether the document is a "final opinion" within the meaning of one of the automatic disclosure provisions of the FOIA, subsection (a)(2)(A).<sup>65</sup> In an extensive consideration of this point, the Court of Appeals for the Fifth Circuit held that, as section (a)(2)(A) specifies "the adjudication of [a] case[]," Congress intended "final opinions" to be only those decisions resulting from proceedings (such as that in Sears) in which a party invoked (and obtained a decision concerning) a specific statutory right of "general and uniform" applicability.<sup>66</sup>

Second, the nature of the decisionmaking authority vested in the office or person issuing the document must be considered.<sup>67</sup> If the author lacks "legal decision authority," the document is far more likely to be predecisional.<sup>68</sup> A crucial caveat in this regard, however, is that courts often look "beneath formal lines of authority to the reality of the decisionmaking process."<sup>69</sup> Hence, even an assertion by the agency that an official lacks ultimate decisionmaking authority might be "superficial" and unavailing if agency "practices" commonly accord decisionmaking authority to that official.<sup>70</sup> Conversely, an agency offi-

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<sup>64</sup> Schlefer v. United States, 702 F.2d at 237; see generally ITT World Communications, Inc. v. FCC, 699 F.2d at 1235; Arthur Andersen & Co. v. IRS, 679 F.2d at 258-59.

<sup>65</sup> 5 U.S.C. § 552(a)(2)(A) (1988); see Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360-61 n.23 (1979).

<sup>66</sup> Skelton v. United States Postal Serv., 678 F.2d 35, 41 (5th Cir. 1982). But see also Afshar v. Department of State, 702 F.2d 1125, 1142-43 (D.C. Cir. 1983) (even single recommendation of no precedential value or applicability to rights of individual members of public loses protection if specifically adopted as basis for final decision).

<sup>67</sup> See Pfeiffer v. CIA, 721 F. Supp. at 340 ("What matters is that the person who issues the document has authority to speak finally and officially for the agency.").

<sup>68</sup> Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. at 184-85; see also Badhwar v. United States Dep't of the Air Force, 615 F. Supp. 698, 702-03 (D.D.C. 1985) (Air Force safety board does not make decisions, only recommendations), aff'd in part & remanded in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); American Postal Workers Union v. Office of Special Counsel, No. 85-3691, slip op. at 6 (D.D.C. June 24, 1986) (prosecutorial recommendations to special counsel which were not binding or dispositive considered predecisional).

<sup>69</sup> Schlefer v. United States, 702 F.2d at 238; see also National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1123.

<sup>70</sup> Schlefer v. United States, 702 F.2d at 238, 241; see, e.g., Badran v. United States Dep't of Justice, 652 F. Supp. 1437, 1439 (N.D. Ill. 1987) (INS  
(continued...))

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cial who appears to have final authority may in fact not have such authority or may not be wielding that authority in a particular situation.<sup>71</sup>

Careful analysis of the decisionmaking process is sometimes required to determine whether the records reflect an earlier preliminary decision or recommendations concerning follow-up issues,<sup>72</sup> or whether the document sought reflects a final decision or merely advice to a higher authority.<sup>73</sup> Thus, agency recommendations to OMB concerning the development of proposed legislation to be submitted to Congress are predecisional,<sup>74</sup> but descriptions of "agency efforts to ensure enactment of policies already established" are postdecisional.<sup>75</sup>

Third, it is useful to examine the direction in which the document flows

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<sup>70</sup>(...continued)

decision on plaintiff's bond was final, even though it was reviewable by immigration judge, because "immigration judges are independent from the INS, and no review of plaintiff's bond occurred within the INS").

<sup>71</sup> See, e.g., National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1122-23 (headquarters' comments on regional plans held to be opinions and recommendations); Jowett, Inc. v. Department of the Navy, 729 F. Supp. at 874 (audit reports prepared by entity lacking final decisionmaking authority held protectible).

<sup>72</sup> See, e.g., City of Va. Beach v. United States Dep't of Commerce, 995 F.2d at 1254 (protecting documents discussing past decision as it impacts on future decision); Access Reports v. Department of Justice, 926 F.2d at 1196 (staff attorney memo on how proposed FOIA amendments would affect future cases not postdecisional working law but opinion on how to handle pending legislative process); Hamrick v. Department of the Navy, No. 90-283, slip op. at 4 (D.D.C. Aug. 28, 1992) ("[D]ocuments prepared after [agency's] decision to dual source the F404 engines are not 'formal agency policy,' but, recommendations for future decisions relating to F404 procurement based upon lessons learned from the dual sourcing decisionmaking process."); Coyote Valley Band of Pomo Indians v. United States, No. 87-2786, slip op. at 4 (N.D. Cal. Nov. 6, 1987); Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba, 624 F. Supp. 572, 574-75 (D.D.C. 1984).

<sup>73</sup> See, e.g., Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d at 1497; American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1276 (D.D.C. 1986), remanded on other grounds, No. 86-5390 (D.C. Cir. Dec. 9, 1987).

<sup>74</sup> See Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d at 1497.

<sup>75</sup> Dow, Lohnes & Albertson v. USIA, No. 82-2569, slip op. at 15-16 (D.D.C. June 5, 1984), vacated in part, No. 84-5852 (D.C. Cir. Apr. 17, 1985); see also Badhwar v. United States Dep't of Justice, 622 F. Supp. 1364, 1372 (D.D.C. 1985) ("There is nothing predecisional about a recitation of corrective action already taken.").

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along the decisionmaking chain. Naturally, a document "from a subordinate to a superior official is more likely to be predecisional,"<sup>76</sup> than is the contrary case: "[F]inal opinions . . . typically flow from a superior with policymaking authority to a subordinate who carries out the policy."<sup>77</sup> However, under certain circumstances, recommendations can flow from the superior to the subordinate.<sup>78</sup> Perhaps most important of all is to consider the "role, if any, that the document plays in the process of agency deliberations."<sup>79</sup>

Finally, even if a document is clearly protected from disclosure by the deliberative process privilege, it may lose this protection if a final decisionmaker "chooses expressly to adopt or incorporate [it] by reference."<sup>80</sup> At least one court, though, has suggested a less stringent standard of "formal or informal adoption."<sup>81</sup> Also, although mere "approval" of a predecisional document does not necessarily constitute adoption of it,<sup>82</sup> an inference of incorporation or adoption has twice been found to exist where a decisionmaker accepted

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<sup>76</sup> Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 868; see also Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1491 (11th Cir. 1992) ("recommendation to a supervisor on how to proceed is predecisional by nature"); MCI Telecommunications Corp. v. GSA, No. 89-746, slip op. at 9-10 (D.D.C. Mar. 25, 1992) (guidelines developed by panel members making recommendations, not final decisionmaker, held predecisional); Government Accountability Project v. Office of Special Counsel, No. 87-235, slip op. at 5-6 (D.D.C. Feb. 22, 1988) (protected documents "plainly contain advisory positions adopted by officials subordinate in rank to the final decisionmakers").

<sup>77</sup> Brinton v. Department of State, 636 F.2d at 605; see also American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. at 1276; Ashley v. United States Dep't of Labor, 589 F. Supp. at 908.

<sup>78</sup> See National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1123 (comments from headquarters to regional office found, under circumstances presented, to be advisory rather than directory).

<sup>79</sup> Formaldehyde Inst. v. HHS, 889 F.2d at 1122 (quoting CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988)) (emphasis added).

<sup>80</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. at 161; see also Atkin v. EEOC, No. 91-2508, slip op. at 23-24 (D.N.J. July 14, 1993) (recommendation to close file not protectible where contained in agency's actual decision to close file); Afshar v. Department of State, 702 F.2d at 1140.

<sup>81</sup> Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 866; see also American Soc'y of Pension Actuaries v. IRS, 746 F. Supp. 188, 192 (D.D.C. 1990) (ordering disclosure after finding that IRS's budget assumptions and calculations underlying final estimate for President's budget were "implicitly adopted" by government); Skelton v. United States Postal Serv., 678 F.2d at 39 n.5 (dictum).

<sup>82</sup> See, e.g., American Fed'n of Gov't Employees v. Department of the Army, 441 F. Supp. 1308, 1311 (D.D.C. 1977).

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a staff recommendation without giving a statement of reasons.<sup>83</sup> Where it is unclear whether a recommendation provided the basis for a final decision, the recommendation should be protectible.<sup>84</sup>

A second primary limitation on the scope of the deliberative process privilege is that of course it applies only to "deliberative" documents and it ordinarily is inapplicable to purely factual matters, or to factual portions of otherwise deliberative memoranda.<sup>85</sup> Not only would factual material "generally be available for discovery,"<sup>86</sup> but its release usually will not threaten consultative agency functions.<sup>87</sup> This seemingly straightforward distinction between deliberative and factual materials can blur, however, where the facts themselves reflect the agency's deliberative process<sup>88</sup>--which has prompted the D.C. Circuit to observe that "the use of the factual matter/deliberative matter distinction produced incorrect outcomes in a small number of cases."<sup>89</sup> In fact, the full D.C. Circuit has firmly declared that factual information should be examined "in light of the policies and goals that underlie" the privilege and "the context in which the materials are used."<sup>90</sup>

Recognizing the shortcomings of a rigid factual/deliberative distinction, courts generally allow agencies to withhold factual material in an otherwise

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<sup>83</sup> See American Soc'y of Pension Actuaries v. IRS, 746 F. Supp. at 191; Martin v. MSPB, 3 Gov't Disclosure Serv. (P-H) ¶ 82,416, at 83,044 (D.D.C. Sept. 14, 1982). But see American Postal Workers Union v. Office of Special Counsel, slip op. at 7-9 (incorporation not inferred).

<sup>84</sup> See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. at 184-85; Afshar v. Department of State, 702 F.2d at 1143 n.22; see also Africa Fund v. Mosbacher, No. 92-289, slip op. at 19 (S.D.N.Y. May 26, 1993) (record did not suggest either "adoption" or "final opinion" of agency); Wiley, Rein & Fielding v. United States Dep't of Commerce, No. 90-1754, slip op. at 6 (D.D.C. Nov. 27, 1990) ("Denying protection to a document simply because the document expresses the same conclusion reached by the ultimate agency decision-maker would eviscerate Exemption 5."); Ahearn v. United States Army Materials & Mechanics Research Ctr., 580 F. Supp. 1405, 1407 (D. Mass. 1984).

<sup>85</sup> See, e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 867.

<sup>86</sup> EPA v. Mink, 410 U.S. 73, 87-88 (1973).

<sup>87</sup> See Montrose Chem. Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974).

<sup>88</sup> See, e.g., Skelton v. United States Postal Serv., 678 F.2d at 38-39.

<sup>89</sup> Dudman v. Department of Air Force, 815 F.2d at 1568.

<sup>90</sup> Wolfe v. HHS, 839 F.2d at 774; see also National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1119 ("ultimate objective" of Exemption 5 is to safeguard agency's deliberative process).



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"deliberative" document under two general types of circumstances.<sup>91</sup> The first circumstance occurs where the author of a document selects specific facts out of a larger group of facts and this very act is deliberative in nature. In Montrose Chemical Corp. v. Train, for example, the summary of a large volume of public testimony compiled to facilitate the EPA Administrator's decision on a particular matter was held to be part of the agency's internal deliberative process.<sup>92</sup> The very act of distilling the testimony, of separating the significant facts from the insignificant facts, constituted an exercise of judgment by agency personnel.<sup>93</sup> Such "selective" facts are therefore entitled to the same protection as that afforded to purely deliberative materials, as their release would "permit indirect inquiry into the mental processes,"<sup>94</sup> and so "expose" predecisional agency deliberations.<sup>95</sup> Thus, to protect the factual materials, an agency must identify a process which "could reasonably be construed as predecisional and deliberative."<sup>96</sup>

A recent D.C. Circuit opinion concerning a report consisting of factual

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<sup>91</sup> See FOIA Update, Summer 1986, at 6.

<sup>92</sup> See 491 F.2d at 71.

<sup>93</sup> See id. at 68; see, e.g., Atkin v. EEOC, slip op. at 21 (staff selection of certain factual documents to be used for report preparation held deliberative); Bentson Contracting Co. v. NLRB, No. 90-451, slip op. at 3 (D. Ariz. Dec. 28, 1990) (document characterizing issues most important to parties and how factual framework is utilized to determine precedent used in rendering decision held deliberative).

<sup>94</sup> Williams v. United States Dep't of Justice, 556 F. Supp. at 65.

<sup>95</sup> Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d at 256; see also Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 562 (revealing IG's factual findings would divulge substance of related recommendations); Lead Indus. Ass'n v. OSHA, 610 F.2d at 85 (disclosing factual segments of summaries would reveal deliberative process by "demonstrating which facts in the massive rule-making record were considered significant to the decisionmaker"); Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1373 (E.D.N.C. 1986) (list of farmworker camps was "selective fact" and thus protected); Sorensen v. United States Dep't of Agric., No. 83-4143, slip op. at 7 (D. Idaho Mar. 11, 1985) (document comprising agency's "attempt to organize, evaluate and prioritize the facts of importance" held exempt).

<sup>96</sup> City of Va. Beach v. United States Dep't of Commerce, 995 F.2d at 1255; see also ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1239 (D.C. Cir. 1983) (notes must be more than "straightforward factual narrations" to be protected); Playboy Enters. v. Department of Justice, 677 F.2d 931, 936 (D.C. Cir. 1982) (factual materials must be generated in course of agency's decisionmaking process); Lacy v. United States Dep't of the Navy, 593 F. Supp. 71, 78 (D. Md. 1984) (photographs attached to deliberative report "do not become part of the deliberative process merely because some photographs were selected and others were not").

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materials prepared for a decision by the Attorney General as to whether to allow former U.N. Secretary General Kurt Waldheim to enter the United States provides an illustration of the factual/deliberative distinction.<sup>97</sup> The D.C. Circuit found that "the majority of the Waldheim Report's factual material was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action," and that it therefore fell within the deliberative process privilege.<sup>98</sup> By contrast, it also held that a chronology of Waldheim's military career was not deliberative, as it was "neither more nor less than a comprehensive collection of the essential facts" and "reflect[ed] no point of view."<sup>99</sup>

The second such circumstance is where the information is so inextricably connected to the deliberative material that its disclosure will expose or cause harm to the agency's deliberations. If revealing factual information is tantamount to revealing the agency's deliberations, then the facts may be withheld.<sup>100</sup> In a recent example, the D.C. Circuit held that the deliberative process privilege protects construction cost estimates, which the court characterized as "elastic facts," finding that their disclosure would reveal the agency's deliberations.<sup>101</sup>

Similarly, where factual or statistical information is actually an expression of deliberative communications it may be withheld on the basis that to reveal

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<sup>97</sup> Mapother v. Department of Justice, slip op. at 9-12.

<sup>98</sup> Id. at 11 (distinguishing and confining Playboy as a report designed only to inform Attorney General of facts he would make available to Member of Congress, rather than one involving any decision he would have to make); see also City of Va. Beach v. United States Dep't of Commerce, 995 F.2d at 1255 (similarly observing that in Playboy "[the] agency identified no decision in relation to the withheld investigative report").

<sup>99</sup> Mapother, slip op. at 12.

<sup>100</sup> See, e.g., Wolfe v. HHS, 839 F.2d at 774-76 ("fact" of status of proposal in deliberative process protected); Brownstein Zeidman & Schomer v. Department of the Air Force, 781 F. Supp. 31, 36 (D.D.C. 1991) (release of summaries of negotiations would inhibit free flow of information as "summaries are not simply the facts themselves"); Jowett, Inc. v. Department of the Navy, 729 F. Supp. at 877 (manner of selecting and presenting even most factual segments of audit reports would reveal process by which agency's final decision is made); Washington Post Co. v. DOD, No. 84-2403, slip op. at 5 (D.D.C. Apr. 15, 1988) (factual assertions in briefing documents found "thoroughly intertwined" with opinions and impressions); Washington Post Co. v. DOD, No. 84-2949, slip op. at 23 (summaries and lists of materials relied upon in drafting report found "inextricably intertwined with the policymaking process").

<sup>101</sup> Quarles v. Department of the Navy, 893 F.2d 390, 392-93 (D.C. Cir. 1990).

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that information would reveal the agency's deliberations.<sup>102</sup> Exemption 5 thus protects scientific reports that constitute the interpretation of technical data, insofar as "the opinion of an expert reflects the deliberative process of decision or policy making."<sup>103</sup> The government interest in withholding technical data is heightened if such material is requested at a time when disclosure of a scientist's "nascent thoughts . . . would discourage the intellectual risktaking so essential to technical progress."<sup>104</sup> Moreover, it is noteworthy that the D.C. Circuit has stated that the "results of . . . factual investigations" may be within the protective scope of Exemption 5.<sup>105</sup> However, the D.C. Circuit also has emphasized that agencies bear the burden of demonstrating that disclosure of such information "would actually inhibit candor in the decision-making process."<sup>106</sup>

Documents that are commonly encompassed by the deliberative process privilege include "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated,"<sup>107</sup> the release of which would be likely to "stifle honest and

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<sup>102</sup> See, e.g., SMS Data Prods. Group, Inc. v. United States Dep't of the Air Force, No. 88-481, slip op. at 3 (D.D.C. Mar. 31, 1989) (technical scores and technical rankings of competing contract bidders held predecisional and deliberative); National Wildlife Fed'n v. United States Forest Serv., No. 86-1255, slip op. at 9 (D.D.C. Sept. 26, 1987) (variables reflected in computer program's mathematical equation held protectible); American Whitewater Affiliation v. Federal Energy Regulatory Comm'n, No. 86-1917, slip op. at 7 (D.D.C. Dec. 2, 1986) ("the cost and energy comparisons involved in this case are deliberative"); Brinderson Constructors, Inc. v. United States Army Corps of Eng'rs, No. 85-905, slip op. at 11 (D.D.C. June 11, 1986) ("computations are certainly part of the deliberative process"); Professional Review Org., Inc. v. HHS, 607 F. Supp. 423, 427 (D.D.C. 1985) (scores used to rate procurement proposals may be "numerical expressions of opinion rather than 'facts'").

<sup>103</sup> Parke, Davis & Co. v. Califano, 623 F.2d at 6; see also Quarles v. Department of the Navy, 893 F.2d at 392-93 (cost estimates held protectible as "elastic facts"); National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1120 ("opinions on facts and their [sic] consequences of those facts form the grist for the policymaker's mill"). But see Ethyl Corp. v. EPA, 478 F.2d 47, 50 (4th Cir. 1973) (characterizing such material as "technological data of a purely factual nature").

<sup>104</sup> Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. at 118.

<sup>105</sup> Paisley v. CIA, 712 F.2d 686, 698 n.53 (D.C. Cir. 1983) (dictum).

<sup>106</sup> Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1070 (D.C. Cir. 1993) (agencies must show how process would be harmed where some factual material was released and similar factual material was withheld).

<sup>107</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. at 150; see also National  
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frank communication within the agency."<sup>108</sup> Accordingly, though the case law is not yet entirely settled on the point, "briefing materials"--such as reports or other documents which summarize issues and advise superiors--should be protectible under the deliberative process privilege.<sup>109</sup>

A particular category of documents likely to be found exempt under the deliberative process privilege is "drafts,"<sup>110</sup> although it has been observed that such a designation "does not end the inquiry."<sup>111</sup> It should be remembered,

<sup>107</sup>(...continued)

Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1121 ("Recommendations on how to best deal with a particular issue are themselves the essence of the deliberative process."); Four Corners Action Coalition v. United States Dep't of the Interior, No. 92-Z-2106, transcript at 4-5 (D. Colo. Dec. 9, 1992) (bench order) (marginal notes and editorial comments reflect deliberative process); Fine v. United States Dep't of Energy, No. 88-1033, slip op. at 9 (D.N.M. June 22, 1991) (notes written in margins of documents constitute deliberations of documents' recipient); Jowett, Inc. v. Department of the Navy, 729 F. Supp. 871, 875 (D.D.C. 1989) (documents that are "part of the give-and-take between government entities"); Strang v. Collyer, 710 F. Supp. 9, 12 (D.D.C. 1989) (meeting notes that reflect the exchange of opinions or give-and-take between agency personnel or divisions of agency). aff'd sub nom. Strang v. Desio, 899 F.2d 1268 (D.C. Cir. 1990) (table cite).

<sup>108</sup> Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 866; see also Schell v. HHS, 843 F.2d at 942 ("It is the free flow of advice, rather than the value of any particular piece of information, that Exemption 5 seeks to protect.").

<sup>109</sup> See Access Reports v. Department of Justice, 926 F.2d at 1196-97 (dictum); Washington Post Co. v. DOD, slip op. at 23 (summaries and lists of material compiled for general's report preparation held protectible); Williams v. United States Dep't of Justice, 556 F. Supp. 63, 65 (D.D.C. 1982) ("briefing papers prepared for the Attorney General prior to an appearance before a congressional committee" held protectible); see also FOIA Update, Fall 1988, at 5. Contra National Sec. Archive v. FBI, No. 88-1507, slip op. at 3-5 (D.D.C. Apr. 15, 1993) (briefing papers found not protectible) (appeal pending).

<sup>110</sup> See, e.g., City of Va. Beach v. United States Dep't of Commerce, 995 F.2d at 1253; Town of Norfolk v. United States Corps of Eng'rs, 968 F.2d 1438, 1458 (1st Cir. 1992); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d at 1569; Russell v. Department of the Air Force, 682 F.2d at 1048; Arthur Andersen & Co. v. IRS, 679 F.2d 254, 259 (D.C. Cir. 1982); Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 85-86 (2d Cir. 1979); Lyons v. OSHA, No. 88-1562, slip op. at 4 (D. Mass. Dec. 2, 1991); Exxon Corp. v. Department of Energy, 585 F. Supp. at 698.

<sup>111</sup> Arthur Andersen & Co. v. IRS, 679 F.2d at 257 (citing Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 866); see Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d at 1436 n.8 (suggesting new harm standard for "mundane," nonpolicy-oriented documents, which can  
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though, that the very process by which a "draft" evolves into a "final" document can itself constitute a deliberative process warranting protection.<sup>112</sup> As a result, Exemption 5 protection can be available to a draft document regardless of whether it differs from its final version.<sup>113</sup>

Two years ago, the factual/deliberative distinction led to sharply contrasting decisions by two circuit courts of appeal, where the issue was the Commerce Department's withholding of numeric material.<sup>114</sup> Both the Assembly of the State of California and the Florida House of Representatives sought "adjusted" census figures for their respective states that were developed in the event that the Secretary of Commerce decided to adjust the 1990 census, an event that did not occur.<sup>115</sup> The Court of Appeals for the Eleventh Circuit applied a rigid "fact or opinion" test in determining whether such numerical

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<sup>111</sup>(...continued)

include drafts); see also Hansen v. United States Dep't of the Air Force, 817 F. Supp. 123, 124-25 (D.D.C. 1992) (unpublished internal document lost draft status when consistently treated by agency as finished product over many years).

<sup>112</sup> See, e.g., National Wildlife Fed'n v. United States Forest Serv., 861 F.2d at 1122 ("To the extent that [the requester] seeks through its FOIA request to uncover any discrepancies between the findings, projections, and recommendations between the draft[s] prepared by lower-level [agency] personnel and those actually adopted . . . , it is attempting to probe the editorial and policy judgments of the decisionmakers."); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d at 1568-69; Russell v. Department of the Air Force, 682 F.2d at 1048-50; Pies v. IRS, 668 F.2d 1350, 1353-54 (D.C. Cir. 1981); Rothschild v. CIA, No. 91-1314, slip op. at 6-7 (D.D.C. Mar. 25, 1992) (extending protection to "marginalia consisting of comments, opinions, further relevant information and associated notes" on drafts); Oxy USA Inc. v. United States Dep't of Energy, No. 88-C-541-B, slip op. at 5 (N.D. Okla. July 13, 1989) (agency need not show extent to which draft differs from final document, because to do so would itself expose what occurred in deliberative process); Strang v. Collyer, 710 F. Supp. at 12; Exxon Corp. v. Department of Energy, 585 F. Supp. at 698; see also FOIA Update, Spring 1986, at 2; FOIA Update, Jan. 1983, at 6.

<sup>113</sup> See Mobil Oil Corp. v. EPA, 879 F.2d 698, 703 (9th Cir. 1989) (dicta); Lead Indus. Ass'n v. OSHA, 610 F.2d at 86; see also Exxon Corp. v. Department of Energy, 585 F. Supp. at 698; City of W. Chicago v. NRC, 547 F. Supp. 740, 751 (N.D. Ill. 1982); FOIA Update, Spring 1986, at 2. But see Texaco, Inc. v. United States Dep't of Energy, 2 Gov't Disclosure Serv. (P-H) ¶ 81,296, at 81,833 (D.D.C. Oct. 13, 1981) (aberrational ruling, without analysis, to the contrary).

<sup>114</sup> Assembly of Cal. v. United States Dep't of Commerce, 968 F.2d 916 (9th Cir. 1992); Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941 (11th Cir. 1992).

<sup>115</sup> Assembly of Cal., 968 F.2d at 917-18; Florida House of Representatives, 961 F.2d at 943-44.

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data are protectible.<sup>116</sup> It viewed the census data as "opinion" that was ultimately rejected by the decisionmaker and therefore held them to be withholdable pursuant to the deliberative process privilege.<sup>117</sup> The Court of Appeals for the Ninth Circuit, on the other hand, applied a "functional" test under which it found that the data, on "the continuum of deliberation and fact . . . , fell closer to fact."<sup>118</sup> The Ninth Circuit ordered the California data released on the basis that disclosure would not reveal any of the Department of Commerce's deliberative processes.<sup>119</sup> Since neither case went to the Supreme Court, this narrow conflict remains.

This past year, in a case involving purely factual data found not to fall within the deliberative process privilege, Petroleum Information Corp. v. United States Department of the Interior, the D.C. Circuit strongly indicated that such information should be shielded by the privilege or not according to whether it involves "some policy matter."<sup>120</sup> It focused on "whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents,"<sup>121</sup> while at the same time suggesting that more "mundane" documents should be protected where "disclosure genuinely could be thought likely to diminish the candor of agency deliberations in the future."<sup>122</sup> While it remains to be seen exactly how this emerging "policy" focus will be applied by the courts in future cases,<sup>123</sup> at a minimum it provides a focal point for the exercise of sound administrative dis-

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<sup>116</sup> Florida House of Representatives, 961 F.2d at 950.

<sup>117</sup> Id.

<sup>118</sup> Assembly of Cal., 968 F.2d at 921-22.

<sup>119</sup> Id. at 923.

<sup>120</sup> Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d at 1435.

<sup>121</sup> Id. at 1436.

<sup>122</sup> Id. at 1436 n.8; accord Army Times Publishing Co. v. Department of the Air Force, 998 F.2d at 1071, 1072 (concluding that "potentially harmful" factual information could be withheld if it were determined that it "would actually inhibit candor in the decision-making process if made available to the public").

<sup>123</sup> See Maryland Coalition for Integrated Educ. v. United States Dep't of Educ., No. 89-2851, slip op. at 5-6 (D.D.C. July 20, 1992) (agency's "routine review" of state compliance and "assess[ment of] how well existing policies are being implemented by the state" held not protectible because they "do not suggest or recommend future agency policy") (appeal pending); accord Maryland Coalition for Integrated Educ. v. United States Dep't of Educ., slip op. at 2 (same); see also Mapother v. Department of Justice, slip op. at 8-10 (discussing and harmonizing existing D.C. Circuit case law); Army Times Publishing Co. v. Department of the Air Force, 998 F.2d at 1070 (pointing to "process by which decisions and policies" are formulated).

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cretion in the application of the deliberative process privilege on a case-by-case basis. (See Discretionary Disclosure and Waiver, below, for a discussion of discretionary disclosure in connection with Exemption 5.)

Lastly, the protection of the very integrity of the deliberative process can, in some contexts, be the basis for protecting factual information.<sup>124</sup> It also should be noted that under some circumstances disclosure of even the identity of the author of a deliberative document could chill the deliberative process, thus warranting protection of that identity under Exemption 5.<sup>125</sup> One court has noted that the danger of revealing the agency's deliberations by disclosing facts is particularly acute where the document withheld is "short."<sup>126</sup> Factual information within a deliberative document may be withheld also where it is impossible to reasonably segregate meaningful portions of that factual information from the deliberative information.<sup>127</sup>

### Attorney Work-Product Privilege

The second traditional privilege incorporated into Exemption 5 is the attorney work-product privilege, which protects documents and other memoranda prepared by an attorney in contemplation of litigation.<sup>128</sup> As its purpose is to protect the adversarial trial process by insulating the attorney's preparation

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<sup>124</sup> See, e.g., Wolfe v. HHS, 839 F.2d at 776 (revealing status of proposal in deliberative process "could chill discussions at a time when agency opinions are fluid and tentative"); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d at 1568 (revealing editorial judgments would stifle creative thinking).

<sup>125</sup> See, e.g., Brinton v. Department of State, 636 F.2d 600, 604 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981); Miscavige v. IRS, No. 91-1638, slip op. at 8 (N.D. Ga. June 15, 1992); see also FOIA Update, Spring 1985, at 6; cf. Wolfe v. HHS, 839 F.2d at 775-76 (discussing how particularized disclosure can chill agency discussions).

<sup>126</sup> Nadler v. United States Dep't of Justice, 955 F.2d at 1491 (dicta) (considering document "one and one-half pages in length").

<sup>127</sup> See Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988) (short document would be rendered "nonsensical" by segregation); see also Lead Indus. Ass'n v. OSHA, 610 F.2d at 86 ("Instead of merely combing the documents for 'purely factual' tidbits, the court should have considered the segments in the context of the whole document and that document's relation to the administrative process."); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. at 1375 (impossible to "reasonably" segregate nondeliberative material from autopsy report); Morton-Norwich Prods., Inc. v. Mathews, 415 F. Supp. 78, 82 (D.D.C. 1976). But see also Army Times Publishing Co. v. Department of the Air Force, 998 F.2d at 1070 (emphasizing agency obligation to specifically address possible segregability and disclosure of factual information).

<sup>128</sup> See Hickman v. Taylor, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3).

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from scrutiny,<sup>129</sup> the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen.<sup>130</sup> The privilege is not limited to civil proceedings, but rather extends to administrative proceedings,<sup>131</sup> and to criminal matters as well.<sup>132</sup> Similarly, the privilege has also been held applicable to documents generated in preparation of an amicus brief.<sup>133</sup>

The privilege sweeps broadly in several respects.<sup>134</sup> First, litigation need never have actually commenced, so long as specific claims have been identified which make litigation probable.<sup>135</sup> Significantly, the Court of Appeals for the District of Columbia Circuit has ruled that the privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated."<sup>136</sup> The privilege also has been held to attach to law enforcement investigations, where the investigation is "based upon a specific wrongdoing and represent[s] an attempt to garner evidence and build a case against the suspected wrongdoer."<sup>137</sup>

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<sup>129</sup> See Jordan v. United States Dep't of Justice, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc).

<sup>130</sup> Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980).

<sup>131</sup> See, e.g., Exxon Corp. v. Department of Energy, 585 F. Supp. 690, 700 (D.D.C. 1983); see also Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987) (same result under Exemption (d)(5) of Privacy Act).

<sup>132</sup> See, e.g., Antonelli v. Sullivan, 732 F.2d 560, 561 (7th Cir. 1983); see also FOIA Update, Spring 1984, at 7. But cf. Powell v. Department of Justice, 584 F. Supp. 1508, 1520 (N.D. Cal. 1984) (suggesting, but not deciding, that attorney work-product materials generated in criminal case should be subject to disclosure under criminal discovery provisions).

<sup>133</sup> See Strang v. Collyer, 710 F. Supp. 9, 12-13 (D.D.C. 1989), aff'd sub nom. Strang v. Desio, 899 F.2d 1268 (D.C. Cir. 1990) (table cite).

<sup>134</sup> See generally FOIA Update, Summer 1983, at 6.

<sup>135</sup> See Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), cert. denied, 429 U.S. 920 (1976); see, e.g., Chemcentral/Grand Rapids Corp. v. EPA, No. 91-C-4380, slip op. at 10-11 (N.D. Ill. Oct. 6, 1992) (privilege applies to legal advice given for specific agency clean-up sites); Savada v. DOD, 755 F. Supp. 6, 7 (D.D.C. 1991) (threat of litigation by counsel for adverse party held sufficient).

<sup>136</sup> Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992); see also Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987) (privilege extends to documents prepared when identity of prospective litigation opponent unknown).

<sup>137</sup> SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991).



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However, the mere fact that it is conceivable that litigation may occur at some unspecified time in the future will not necessarily be sufficient to protect attorney-generated documents; "the policies of the FOIA would be largely defeated" if agencies were to withhold any documents created by attorneys "simply because litigation might someday occur."<sup>138</sup> But where litigation is inevitable, a specific claim need not yet have arisen.<sup>139</sup>

Further, it has been held that a document prepared for two disparate purposes was compiled in anticipation of litigation if "litigation was a major factor" in the decision to create it.<sup>140</sup> However, documents prepared in an agency's ordinary course of business, not sufficiently related to litigation, may not be accorded protection.<sup>141</sup>

The attorney work-product privilege also has been held to cover documents "relat[ing] to possible settlements" of litigation.<sup>142</sup> Logically, it can

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<sup>138</sup> Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 587 (D.C. Cir. 1987) (citing Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 865).

<sup>139</sup> See Schiller v. NLRB, 964 F.2d at 1208 (documents that provide tips and instructions for handling future litigation held protectible); Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d at 127 (memoranda that "advise the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency and the likely outcome" held protectible); Lacefield v. United States, No. 92-N-1680, slip op. at 14 (D. Colo. Mar. 10, 1993) (knowledge that adversary plans to challenge agency position constitutes articulable claim); Silber v. United States Dep't of Justice, No. 91-876, transcript at 23-24 (D.D.C. Aug. 13, 1992) (bench order) (privilege covers monograph written to assist attorneys in prosecuting cases); Anderson v. United States Parole Comm'n, 3 Gov't Disclosure Serv. (P-H) ¶ 83,055, at 83,557 (D.D.C. Jan. 6, 1983) (privilege covers case digest of legal theories and defenses frequently used in litigation); Automobile Importers of America, Inc. v. FTC, 3 Gov't Disclosure Serv. (P-H) ¶ 82,488, at 83,226 (D.D.C. Sept. 28, 1982) (privilege protects set of agency options and considerations used in auto-safety enforcement proceedings).

<sup>140</sup> Wilson v. Department of Energy, No. 84-3163, slip op. at 7 n.1 (D.D.C. Jan. 28, 1985). But see also United States v. Gulf Oil Corp., 760 F.2d 292, 296-97 (Temp. Emer. Ct. App. 1985) (holding that anticipation of litigation must be "the primary motivating purpose behind the creation of the document") (non-FOIA case).

<sup>141</sup> See Hill Tower, Inc. v. Department of the Navy, 718 F. Supp. 562, 567 (N.D. Tex. 1988) (aircraft accident investigation information in JAG Manual report not created in anticipation of litigation).

<sup>142</sup> See, e.g., United States v. Metropolitan St. Louis Sewer Dist., 952 F.2d 1040, 1045 (8th Cir. 1992) (remanded to determine if privilege was waived); Cities Serv. Co. v. FTC, 627 F. Supp. 827, 832 (D.D.C. 1984), *aff'd*, 778 F.2d 889 (D.C. Cir. 1985) (table cite); Church of Scientology v. IRS, No. 90- (continued...)

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also protect the recommendation to close litigation,<sup>143</sup> and even the final agency decision to terminate litigation.<sup>144</sup> But documents prepared subsequent to the closing of a case are presumed, absent some specific basis for concluding otherwise, not to have been prepared in anticipation of litigation.<sup>145</sup> Moreover, one court has even held that documents not originally prepared in anticipation of litigation cannot assume the protection derived from the work-product privilege merely by their later placement in a litigation-related document.<sup>146</sup>

Second, Rule 26(b)(3) of the Federal Rules of Civil Procedure allows the privilege to be used to protect documents prepared "by or for another party or by or for that other party's representative." Not only do documents prepared by agency attorneys who are responsible for the litigation of a case which is being defended or prosecuted by the Department of Justice qualify for the privilege,<sup>147</sup> but also documents prepared by an attorney "not employed as a litigator."<sup>148</sup> Courts have looked at the plain meaning of the rule and have extended work-product protection to materials prepared by nonattorneys who are supervised by attorneys.<sup>149</sup> The unstated assumption in such cases is that

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<sup>142</sup>(...continued)

11069, slip op. at 20 (D. Mass. Apr. 22, 1992) (magistrate's recommendation) (fact that parties were contemplating settlement does not foreclose application of attorney work-product privilege); cf. Carey-Canada, Inc. v. Aetna Casualty & Sur. Co., 118 F.R.D. 250, 251-52 (D.D.C. 1987) (civil discovery context).

<sup>143</sup> See A. Michael's Piano, Inc. v. FTC, No. 2:92 CV 00603, slip op. at 1 (D. Conn. Jan. 29, 1993) (even if staff attorney is considering or recommending closing an investigation, exemption still applies) (appeal pending).

<sup>144</sup> See FOIA Update, Summer 1985, at 5.

<sup>145</sup> See Senate of P.R. v. United States Dep't of Justice, 823 F.2d at 586; see also, e.g., Senate of P.R. v. United States Dep't of Justice, No. 84-1829, slip op. at 20 (D.D.C. May 13, 1992) (finding reasonable anticipation of litigation where case was closed but where agency was carefully reevaluating it in light of new evidence).

<sup>146</sup> Dow Jones & Co. v. Department of Justice, 724 F. Supp. 985, 989 (D.D.C. 1989), aff'd on other grounds, 917 F.2d 571 (D.C. Cir. 1990).

<sup>147</sup> See, e.g., Cook v. Watt, 597 F. Supp. 545, 548 (D. Alaska 1983).

<sup>148</sup> Illinois State Bd. of Educ. v. Bell, No. 84-337, slip op. at 9-10 (D.D.C. May 31, 1985).

<sup>149</sup> See, e.g., Durham v. United States Dep't of Justice, No. 91-2636, slip op. at 6-7 (D.D.C. Aug. 17, 1993) (material prepared by government personnel under prosecuting attorney's direction) (to be published); Taylor v. Office of Special Counsel, No. 91-N-734, slip op. at 17 (D. Colo. Mar. 22, 1993) (telephone interview conducted by examiner at request of attorney); Joint Bd. of Control v. Bureau of Indian Affairs, No. 87-217, slip op. at 9-10 (D. Mont. Sept. 9, 1988) (water studies produced by contract companies); Nishnic v.

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work-product protection is appropriate where the nonattorney acts as the agent of the attorney; where that is not the case, the work-product privilege as incorporated by the FOIA has not been extended to protect the material prepared by the nonattorney.<sup>150</sup>

Third, the work-product privilege has been held to remain applicable where the information has been shared with a party holding a common interest with the agency.<sup>151</sup> The privilege remains applicable even where the document has become the basis for a final agency decision.<sup>152</sup>

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<sup>149</sup>(...continued)

United States Dep't of Justice, 671 F. Supp. 771, 772-73 (D.D.C. 1987) (historian's research and interviews); Wilson v. Department of Energy, slip op. at 8 (consultant's report); Exxon Corp. v. FTC, 466 F. Supp. 1088, 1099 (D.D.C. 1978) (economist's report), aff'd, 663 F.2d 120 (D.C. Cir. 1980). But cf. Brittany Dyeing & Printing Corp. v. EPA, No. 91-2711, slip op. at 7-8 (D.D.C. Mar. 12, 1993) (confusing attorney-work product privilege and deliberative process privilege to hold that witness statements taken by investigator at behest of counsel cannot be protected because they would "not expose agency decision making process").

<sup>150</sup> See Hall v. Department of Justice, No. 87-474, slip op. at 17-19 (D.D.C. Mar. 8, 1989) (magistrate's recommendation) (agency's affidavit failed to show that prosecutorial report of investigation was prepared by Marshals Service personnel under direction of attorney), adopted (D.D.C. July 31, 1989); Nishnic v. United States Dep't of Justice, 671 F. Supp. at 810-11 (summaries of witness statements taken by USSR officials for United States Department of Justice held not protectible).

<sup>151</sup> See United States v. Gulf Oil Corp., 760 F.2d at 295-96 (documents shared between two companies contemplating merger); Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982); Nishnic v. United States Dep't of Justice, No. 86-2802, slip op. at 10 (D.D.C. May 15, 1987) (documents shared with foreign nation). But see also Texas v. ICC, 889 F.2d 59, 62 (5th Cir. 1989) (communications between agency and interested nonagency held not protectible because nonagency "did not stand in any consultative or advisory role" to agency).

<sup>152</sup> See Uribe v. Executive Office for United States Attorneys, No. 87-1836, slip op. at 5-6 (D.D.C. May 23, 1989) (criminal "prosecution declination memorandum" protected) (citing FTC v. Grolier Inc., 462 U.S. 19 (1983)); Iglesias v. CIA, 525 F. Supp. 547, 549 (D.D.C. 1981); FOIA Update, Summer 1985, at 5; see also Federal Open Mkt. Comm. v. Merrill, 434 U.S. 340, 360 n.23 (1979) (protecting final determination under commercial privilege); cf. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 160 (1975) (holding that memoranda reflecting agency decision to prosecute party do not constitute "final disposition" of "case" within the meaning of subsection (a)(2) of FOIA). But see FTC v. Grolier Inc., 462 U.S. at 32 n.4 (Brennan, J., concurring) ("[I]t is difficult to imagine how a final decision could be 'prepared in anticipation of litigation or for trial.'").

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In NLRB v. Sears, Roebuck & Co.,<sup>153</sup> the Supreme Court allowed the withholding of a final agency decision on the basis that it was shielded by the work-product privilege,<sup>154</sup> but it also stated that Exemption 5 can never apply to final decisions and it expressed reluctance to "construe Exemption 5 to apply to documents described in 5 U.S.C. § 552(a)(2)," <sup>155</sup> the "reading room" provision of the FOIA.<sup>156</sup> This result led to considerable confusion,<sup>157</sup> which was cleared up by the Supreme Court in Federal Open Market Committee v. Merrill.<sup>158</sup> In Merrill, the Court explained its statements in Sears,<sup>159</sup> and plainly stated that even if a document is a final opinion, and therefore falls within subsection (a)(2)'s mandatory disclosure requirements, it may still be withheld if it falls within the work-product privilege.<sup>160</sup>

Fourth, the Supreme Court's decisions in United States v. Weber Aircraft Corp.<sup>161</sup> and FTC v. Grolier Inc.,<sup>162</sup> viewed in light of the traditional contours of the attorney work-product doctrine, afford sweeping attorney work-product protection to factual materials. Because factual work-product enjoys qualified immunity from civil discovery, such materials are discoverable "only upon a showing that the party seeking discovery has substantial need" of materials which cannot be obtained elsewhere without "undue hardship."<sup>163</sup> In Grolier, the Supreme Court held that the "test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of

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<sup>153</sup> 421 U.S. 132 (1975).

<sup>154</sup> Id. at 160.

<sup>155</sup> Id. at 153-54.

<sup>156</sup> See FOIA Update, Summer 1992, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)").

<sup>157</sup> See, e.g., Bristol-Meyers Co. v. FTC, 598 F.2d 18, 24 n.11, 29 (D.C. Cir. 1978).

<sup>158</sup> 443 U.S. 340 (1979).

<sup>159</sup> Id. at 360 n.23 (clarifying that Sears observations were made in relation to privilege for predecisional communications only).

<sup>160</sup> Id. ("It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges."). But see also SafeCard Servs., Inc. v. SEC, 926 F.2d at 1203-05, 1206 (mistakenly applying Bristol-Meyers, a pre-Merrill decision, in requiring release of work-product that memorializes final decision).

<sup>161</sup> 465 U.S. 792 (1984).

<sup>162</sup> 462 U.S. 19 (1983).

<sup>163</sup> Fed. R. Civ. P. 26(b)(3).

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relevance."<sup>164</sup> Because the rules of civil discovery require a showing of "substantial need" and "undue hardship" in order for a party to obtain any factual work-product,<sup>165</sup> such material is not "routinely" or "normally" discoverable. This "routinely or normally discoverable" test was unanimously reaffirmed by the Supreme Court in Weber Aircraft.<sup>166</sup>

Although several pre-Weber Aircraft circuit court decisions mistakenly limited attorney work-product protection to "deliberative" material,<sup>167</sup> no distinction between factual and deliberative work-product should be applied. This broad view of the privilege has been expressed by several courts, including the D.C. Circuit, to clarify once and for all that factual information is fully entitled to work-product protection.<sup>168</sup>

A collateral issue is the applicability of the attorney work-product privilege to witness statements. Within the civil discovery context, the Supreme

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<sup>164</sup> 462 U.S. at 26. See also NLRB v. Sears, Roebuck & Co., 421 U.S. at 149 & n.16.

<sup>165</sup> Fed. R. Civ. P. 26(b)(3).

<sup>166</sup> 465 U.S. at 799.

<sup>167</sup> See Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 735 (5th Cir. 1977), rev'd on other grounds, 437 U.S. 214 (1978); Deering Milliken Inc. v. Irving, 548 F.2d 1131, 1138 (4th Cir. 1977); Title Guar. Co. v. NLRB, 534 F.2d 484, 492-93 n.15 (2d Cir.), cert. denied, 429 U.S. 834 (1976).

<sup>168</sup> Martin v. Office of Special Counsel, 819 F.2d at 1187 ("The work-product privilege simply does not distinguish between factual and deliberative material."); see also Norwood v. FAA, 993 F.2d 570, 576 (6th Cir. 1993) (work-product privilege protects documents regardless of status as factual or deliberative); Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1492 (11th Cir. 1992) ("[U]nlike the deliberative process privilege, the work-product privilege encompasses factual materials."); Manchester v. DEA, 823 F. Supp. 1259, 1269 (E.D. Pa. 1993) (segregation not required where "factual information is incidental to, and bound with, privileged" information); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 814 (D.N.J. 1993) (following Martin); Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 21-22 (D. Mass. Nov. 12, 1992) (documents need not show litigative strategy to be withheld in full); Wilson v. Department of Justice, No. 87-2415, slip op. at 5-6 (D.D.C. June 17, 1991) (work-product privilege covers entire document); Jochen v. Office of Special Counsel, No. 86-4765, slip op. at 4 (C.D. Cal. Feb. 4, 1987); Pennsylvania Dep't of Pub. Welfare v. HHS, 623 F. Supp. 301, 307 (M.D. Pa. 1985); United Technologies Corp. v. NLRB, 632 F. Supp. 776, 781 (D. Conn. 1985) ("if a document is attorney work product the entire document is privileged"), aff'd on other grounds, 777 F.2d 90 (2d Cir. 1985); Christmann & Weborn v. Department of Energy, 589 F. Supp. 584, 586 (N.D. Tex. 1984) (citing Weber Aircraft), aff'd, 768 F.2d 1348 (5th Cir. 1985) (table cite); accord FOIA Update, Fall 1984, at 6. Contra Fine v. United States Dep't of Energy, No. 88-1033, slip op. at 8-12 (D.N.M. Aug. 27, 1993) (refusing to follow Martin).

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Court has recognized at least a qualified privilege from civil discovery for such documents, i.e., such material was held discoverable only upon a showing of necessity and justification.<sup>169</sup> Applying the "routinely and normally discoverable" test of Grolier and Weber Aircraft, the D.C. Circuit has firmly held that witness statements are protectible under Exemption 5.<sup>170</sup> Despite the weight of law that supports the proposition that the contours of Exemption 5 are coextensive with the protections of the work-product privilege, though, some courts have held that witness statements are not protectible, either on the theory that they fail to meet Exemption 5's threshold requirement,<sup>171</sup> or that the witness statements are merely unprivileged factual information which must be segregated for disclosure.<sup>172</sup>

Any such differences over the traditional protection accorded witness statements do not in any event affect the viability of protecting aircraft accident witness statements. Such statements are protected under a distinct common law privilege first enunciated in Machin v. Zuckert<sup>173</sup> and applied under the FOIA in Weber Aircraft.<sup>174</sup> (See discussion of Other Privileges, below.)

As a final point, it should be noted that the Supreme Court's decision in Grolier resolved a split in the circuits by ruling that the termination of litigation does not vitiate the protection for material otherwise properly categorized as

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<sup>169</sup> See Hickman v. Taylor, 329 U.S. at 511.

<sup>170</sup> See Martin v. Office of Special Counsel, 819 F.2d at 1187.

<sup>171</sup> See Thurner Heat Treating Corp. v. NLRB, 839 F.2d 1256, 1259-60 (7th Cir. 1988) (witness statements taken from nonagency employees held not "intra-agency"); Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (Exemption 5 narrowly construed so as to apply only to "internal agency documents or documents prepared by outsiders who have a formal relationship with the agency"); Poss v. NLRB, 565 F.2d 654, 659 (10th Cir. 1977) (same); Kilroy v. NLRB, 633 F. Supp. 136, 142 (S.D. Ohio 1985) (rejecting application of Weber Aircraft to witness statements), aff'd, 823 F.2d 553 (6th Cir. 1987) (table cite).

<sup>172</sup> See, e.g., Uribe v. Executive Office for United States Attorneys, slip op. at 6 (statements made by plaintiff during interrogation did not "represent the attorney's conclusions, recommendations and opinions"); Wayland v. NLRB, 627 F. Supp. 1473, 1476 (M.D. Tenn. 1986) (witness statements not shown to be other than objective reporting of facts and "thus do not reflect the attorney's theory of the case and his litigation strategy"). But see FOIA Update, Summer 1987, at 4-5 ("OIP Guidance: Broad Protection for Witness Statements").

<sup>173</sup> 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).

<sup>174</sup> See 465 U.S. at 799; see also Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 185 (D.C. Cir. 1987) ("[T]he disclosure of 'factual' information that may have been volunteered would defeat the policy on which the Machin privilege is based.").

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attorney work-product.<sup>175</sup> Thus, there exists no temporal limitation on work-product protection under the FOIA, as a matter of law.<sup>176</sup> Consequently, this is an area of exemption applicability in which there exists much opportunity for the exercise of sound administrative discretion on a case-by-case basis to disclose technically exempt information.<sup>177</sup> (See discussion of such discretionary disclosure in *Discretionary Disclosure and Waiver*, below.)

### Attorney-Client Privilege

The third traditional privilege incorporated into Exemption 5 concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."<sup>178</sup> Unlike with the attorney work-product privilege, the availability of the attorney-client privilege is not limited to the context of litigation. Moreover, although it ordinarily applies to facts divulged by a client to his attorney, this privilege also encompasses any opinions given by an attorney to his client based upon those facts,<sup>179</sup> as well as communications between attorneys which reflect client-supplied information.<sup>180</sup>

The Supreme Court, in the civil discovery context, has emphasized the policy underlying the attorney-client privilege--"that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."<sup>181</sup> As is set out in greater detail in the attorney work-product discussion above, the Supreme Court held in United States v. Weber Aircraft Corp.<sup>182</sup> and in FTC v. Grolier Inc.<sup>183</sup> that

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<sup>175</sup> See 462 U.S. at 28; cf. Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n, 798 F.2d 499, 502-03 (D.C. Cir. 1986) (en banc) (same result under Government in the Sunshine Act).

<sup>176</sup> See FOIA Update, Summer 1983, at 1-2.

<sup>177</sup> See, e.g., FOIA Update, Summer 1985, at 5 (suggesting consideration be given to discretionary disclosure of work-product information).

<sup>178</sup> Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).

<sup>179</sup> See, e.g., Schlefer v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983); Brinton v. Department of State, 636 F.2d 600, 605 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981); NBC v. SBA, No. 92-6483, slip op. at 7 (S.D.N.Y. Jan. 28, 1993) (privilege protects "professional advice given by attorney that discloses" information given by client).

<sup>180</sup> See, e.g., Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984) (table cite).

<sup>181</sup> Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); see FOIA Update, Spring 1985, at 3-4.

<sup>182</sup> 465 U.S. 792, 799-800 (1984).

<sup>183</sup> 462 U.S. 19, 26-28 (1983).

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the scopes of the various privileges are coextensive in the FOIA and civil discovery contexts. Thus, those decisions that expand or contract the privilege's contours according to whether it is presented in a civil discovery or a FOIA context<sup>184</sup> do not accurately reflect the law.<sup>185</sup>

The parallelism of a civil discovery privilege and Exemption 5 protection is particularly significant with respect to the concept of a "confidential communication" within the attorney-client relationship. To this end, one court has held that confidentiality may be inferred when the communications suggest that "the government is dealing with its attorneys as would any private party seeking advice to protect personal interests."<sup>186</sup> In Upjohn Co. v. United States, the Supreme Court held that the privilege protects attorney-client communications where the specifics of the communication are confidential, even though the underlying subject matter is known to third parties.<sup>187</sup> Accordingly, the line of FOIA decisions that squarely conflicts with the Upjohn analysis<sup>188</sup> should not be followed.<sup>189</sup>

Finally, the Supreme Court in Upjohn concluded that the privilege encompasses confidential communications made to the attorney not only by decisionmaking "control group" personnel, but also by lower-echelon employees as well.<sup>190</sup> This broad construction of the attorney-client privilege acknowledges the reality that such lower-echelon personnel often possess information relevant to an attorney's advice-rendering function.<sup>191</sup>

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<sup>184</sup> See, e.g., Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d at 255 & n.28.

<sup>185</sup> See FOIA Update, Spring 1985, at 3-4.

<sup>186</sup> Alamo Aircraft Supply, Inc. v. Weinberger, No. 85-1291, slip op. at 4 (D.D.C. Feb. 21, 1986) (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980)). But see Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba, 624 F. Supp. 572, 578 (D.D.C. 1984) (confidentiality must be shown in order to invoke Exemption 5).

<sup>187</sup> See 449 U.S. at 395-96; see also United States v. Cunningham, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984); In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 388-90 (D.D.C. 1978).

<sup>188</sup> See, e.g., Schlefer v. United States, 702 F.2d at 245; Brinton v. Department of State, 636 F.2d at 604; Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d at 255.

<sup>189</sup> See FOIA Update, Spring 1985, at 4.

<sup>190</sup> See 449 U.S. at 392-97.

<sup>191</sup> See id.; see also Murphy v. TVA, 571 F. Supp. 502, 506 (D.D.C. 1983) (circulation within agency to employees involved in matter for which advice sought does not breach confidentiality); LSB Indus. v. Commissioner,

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### Other Privileges

The FOIA neither expands nor contracts existing privileges, nor does it create any new privileges.<sup>192</sup> However, the Supreme Court has indicated that Exemption 5 may incorporate virtually all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA.<sup>193</sup> Because Rule 501 of the Federal Rules of Evidence provides for courts to create privileges as necessary,<sup>194</sup> there exists the strong potential for "new" privileges to be applied under Exemption 5. However, one caveat should be noted in the application of discovery privileges under the FOIA: A privilege should not be used against a requester who would routinely receive such information in civil discovery.<sup>195</sup>

The Supreme Court in Federal Open Market Committee v. Merrill<sup>196</sup> found an additional privilege incorporated within Exemption 5 based upon Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause shown . . . a trade secret or other confidential research, development or commercial information" is protected from discovery. This qualified privilege is available "at least to the extent that this information is generated by the Government itself in the process leading up to the awarding of a contract" and expires upon the awarding of the contract or upon the withdrawal of the offer.<sup>197</sup> The theory underlying the privilege is that early release of such information would likely put the government at a competitive disadvantage by en-

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<sup>191</sup>(...continued)

556 F. Supp. 40, 43 (W.D. Okla. 1982) (agency investigators reporting information used by agency attorneys).

<sup>192</sup> See Association for Women in Science v. Califano, 566 F.2d 339, 342 (D.C. Cir. 1977); see also Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987) ("To decide [whether a recognized privilege should be abandoned] in a FOIA case would be inappropriate, as Exemption 5 requires the application of existing rules regarding discovery, not their reformulation.").

<sup>193</sup> See United States v. Weber Aircraft Corp., 465 U.S. 792, 799-800 (1984); FTC v. Grolier Inc., 462 U.S. 19, 26-27 (1983). But see Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1519 (N.D. Cal. 1984) (suggesting that greater access under criminal discovery could affect whether disclosure required under FOIA).

<sup>194</sup> See Trammel v. United States, 445 U.S. 40, 47 (1980).

<sup>195</sup> See, e.g., United States Dep't of Justice v. Julian, 486 U.S. 1, 9 (1988) (presentence report privilege, designed to protect report's subject, cannot be invoked against him as first-party requester); cf. Badhwar v. United States Dep't of the Air Force, 829 F.2d at 184 ("Exemption 5 requires application of existing rules regarding discovery, not their reformulation.").

<sup>196</sup> 443 U.S. 340 (1979).

<sup>197</sup> Id. at 360.

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dangerous consummation of a contract; consequently, "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure should . . . serve as relevant criteria."<sup>198</sup> Indeed, this harm rationale has led one court to hold that the commercial privilege may be invoked when a contractor who has submitted proposed changes to the contract requests sensitive cost estimates.<sup>199</sup> Based upon this underlying theory, there is nothing to prevent Merrill from being read more expansively to protect the government from competitive disadvantage outside of the contract setting; indeed, the issue in Merrill was not presented strictly within such a setting.<sup>200</sup>

While the breadth of this privilege is not yet fully established, a realty appraisal generated by the government in the course of soliciting buyers for its property has been held to fall squarely within it,<sup>201</sup> as have an agency's background documents which it used to calculate its bid in a "contracting out" procedure,<sup>202</sup> as well as portions of inter-agency cost estimates prepared by the government for use in the evaluation of construction proposals submitted by private contractors.<sup>203</sup> Quite clearly, however, purely legal memoranda drafted to assist contract award deliberations are not encompassed by this privilege.<sup>204</sup>

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<sup>198</sup> Id. at 363.

<sup>199</sup> Taylor Woodrow Int'l, Ltd. v. United States, No. 88-429, slip op. at 5-7 (W.D. Wash. Apr. 6, 1989) (concluding that disclosure would permit requester to take "unfair commercial advantage" of agency).

<sup>200</sup> See 443 U.S. at 360.

<sup>201</sup> See Government Land Bank v. GSA, 671 F.2d 663, 665-66 (1st Cir. 1982) ("FOIA should not be used to allow the government's customers to pick the taxpayers' pockets.").

<sup>202</sup> See Morrison-Knudsen Co. v. Department of the Army of the United States, 595 F. Supp. 352, 354-56 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite).

<sup>203</sup> See Hack v. Department of Energy, 538 F. Supp. 1098, 1100 (D.D.C. 1982); see generally Feldman, The Government's Commercial Data Privilege Under Exemption Five of the Freedom of Information Act, 105 Mil. L. Rev. 125 (1984); Belazis, The Government's Commercial Information Privilege: Technical Information and the FOIA's Exemption 5, 33 Admin. L. Rev. 415 (1981); see also FOIA Update, Fall 1983, at 14-15. But see also American Soc'y of Pension Actuaries v. Pension Benefit Guar. Corp., No. 82-2806, slip op. at 3-4 (D.D.C. July 22, 1983) (distinguishing Merrill).

<sup>204</sup> See Shermco Indus. v. Secretary of the Air Force, 613 F.2d 1314, 1319-20 n.11 (5th Cir. 1980); see also News Group Boston, Inc. v. National R.R. Passengers Corp., 799 F. Supp. 1264, 1270 (D. Mass. 1992) (affidavits insufficient to show why Amtrack payroll information covered by privilege), appeal dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992).

## EXEMPTION 5

More recently, the Supreme Court, in United States v. Weber Aircraft Corp.,<sup>205</sup> held that Exemption 5 incorporates the special privilege protecting witness statements generated during Air Force aircraft accident investigations. Broadening the holding of Merrill that a privilege "mentioned in the legislative history of Exemption 5 is incorporated by the exemption,"<sup>206</sup> the Court ruled in Weber Aircraft that this long-recognized civil discovery privilege, even though not specifically mentioned there, nevertheless falls within Exemption 5.<sup>207</sup> The "plain statutory language"<sup>208</sup> and the clear congressional intent to sustain claims of privilege when confidentiality is necessary to ensure efficient governmental operations<sup>209</sup> support this result.<sup>210</sup> This privilege has been applied also to protect statements made in Inspector General investigations.<sup>211</sup>

Similarly, in Hoover v. Department of the Interior, the Court of Appeals for the Fifth Circuit recognized an Exemption 5 privilege based on Federal Rule of Civil Procedure 26(b)(4), which limits the discovery of reports prepared by expert witnesses.<sup>212</sup> The document at issue in Hoover was an appraiser's report prepared in the course of condemnation proceedings.<sup>213</sup> In support of its conclusions, the Fifth Circuit stressed that such a report would not have been routinely discoverable and that premature release would jeopardize the bargaining position of the government.<sup>214</sup>

Because Exemption 5 incorporates virtually all civil discovery privileges, courts are increasingly recognizing the applicability of other privileges, whether

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<sup>205</sup> 465 U.S. at 799.

<sup>206</sup> Id. at 800.

<sup>207</sup> See also FOIA Update, Spring 1984, at 12-13.

<sup>208</sup> 465 U.S. at 802.

<sup>209</sup> Id.

<sup>210</sup> See also Badhwar v. United States Dep't of the Air Force, 829 F.2d at 185 (privilege applied to contractor report).

<sup>211</sup> See Ahearn v. United States Army Materials & Mechanics Research Ctr., 583 F. Supp. 1123, 1124 (D. Mass. 1984); see also Walsh v. Department of the Navy, No. 91-C-7410, slip op. at 10-11 (N.D. Ill. Mar. 23, 1992); American Fed'n of Gov't Employees v. Department of the Army, 441 F. Supp. 1308, 1313 (D.D.C. 1977). But see also Washington Post Co. v. United States Dep't of the Air Force, 617 F. Supp. 602, 606-07 (D.D.C. 1985) (finding privilege inapplicable where report format provided anonymity to witnesses).

<sup>212</sup> See 611 F.2d 1132, 1141 (5th Cir. 1980).

<sup>213</sup> See id. at 1135.

<sup>214</sup> See id. at 1142; cf. Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118-19 (D.D.C. 1984) (Rule 26(b)(4) provides parallel protection in civil discovery for opinions of expert witnesses who will not testify at trial).

## EXEMPTION 6

traditional or new, in the FOIA context. Among those other privileges now recognized for purposes of the FOIA are the confidential report privilege,<sup>215</sup> the presentence report privilege,<sup>216</sup> the critical self-evaluative privilege,<sup>217</sup> and the settlement negotiations privilege.<sup>218</sup> (For a detailed discussion of the settlement negotiations privilege, see Initial Considerations, above.)

Lastly, while it is evident that courts will continue to apply such civil discovery privileges under Exemption 5 of the FOIA, the mere fact that a particular privilege has been recognized by state law will not necessarily mean that it will be recognized by a federal court.<sup>219</sup>

## EXEMPTION 6

Personal privacy interests are protected by two provisions of the FOIA, Exemptions 6 and 7(C). While the application of Exemption 7(C), discussed below, is limited to information compiled for law enforcement purposes, Exemption 6 permits the government to withhold all information about individuals in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."<sup>1</sup> Of course, these exemptions cannot be invoked to withhold from a requester information pertaining only to himself.<sup>2</sup>

### Initial Considerations

To warrant protection under Exemption 6, information must first meet its threshold requirement; in other words, it must fall within the category of "per-

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<sup>215</sup> Cf. Washington Post Co. v. HHS, 603 F. Supp. 235, 238-39 (D.D.C. 1985) ("confidential report" privilege applied under Exemption 4), rev'd on other grounds, 795 F.2d 205 (D.C. Cir. 1986).

<sup>216</sup> See United States Dep't of Justice v. Julian, 486 U.S. at 9 (recognizing privilege, but finding it applicable to third-party requesters only).

<sup>217</sup> Cf. Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 18-21 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted (D.D.C. Dec. 15, 1987) (privilege applied under Exemption 4), rev'd & remanded on other grounds, 863 F.2d 96 (D.C. Cir. 1988).

<sup>218</sup> Cf. M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (privilege applied under Exemption 4 but not under Exemption 5).

<sup>219</sup> See, e.g., Sneirson v. Chemical Bank, 108 F.R.D. 159, 162 (D. Del. 1985) (non-FOIA case); Cincotta v. City of N.Y., No. 83-7506, slip op. at 3-4 (S.D.N.Y. Nov. 14, 1984) (non-FOIA case).

<sup>1</sup> 5 U.S.C. § 552(b)(6) (1988).

<sup>2</sup> See H.R. Rep. No. 1380, 93d Cong., 2d Sess. 13 (1974); see also FOIA Update, Spring 1989, at 5.

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sonnel and medical files and similar files."<sup>3</sup> Personnel and medical files are easily identified. However, there has not always been complete agreement about the meaning of the term "similar files." Prior to 1982, judicial interpretations of that phrase varied considerably and included a troublesome line of cases in the Court of Appeals for the District of Columbia Circuit, commencing with Board of Trade v. Commodity Futures Trading Commission,<sup>4</sup> which narrowly construed the term to encompass only "intimate" personal details.

In 1982, the Supreme Court acted decisively to resolve this controversy. In United States Department of State v. Washington Post Co.,<sup>5</sup> it firmly held, based upon a review of the legislative history of the FOIA, that Congress intended the term to be interpreted broadly, rather than narrowly.<sup>6</sup> The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information."<sup>7</sup> Rather, the Court made clear that all information which "applies to a particular individual" meets the threshold requirement for Exemption 6 protection.<sup>8</sup>

The D.C. Circuit, sitting en banc, subsequently reinforced the Supreme Court's broad interpretation of this term by holding that a tape recording of the last words of the space shuttle Challenger crew, which "reveal[ed] the sound and inflection of the crew's voices during the last seconds of their lives . . . contains personal information the release of which is subject to the balancing of the public gain against the private harm at which it is purchased."<sup>9</sup> Not only did the D.C. Circuit determine that "lexical" and "non-lexical" information are

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<sup>3</sup> 5 U.S.C. § 552(b)(6).

<sup>4</sup> 627 F.2d 392, 400 (D.C. Cir. 1980).

<sup>5</sup> 456 U.S. 595 (1982).

<sup>6</sup> See id. at 599-603 (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); S. Rep. No. 1219, 88th Cong., 2d Sess. 14 (1964)).

<sup>7</sup> 456 U.S. at 601 (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)).

<sup>8</sup> 456 U.S. at 602. But see Providence Journal Co. v. United States Dep't of the Army, 781 F. Supp. 878, 883 (D.R.I. 1991) (investigative report of criminal charges not "similar file" because "created in response to specific criminal allegations" rather than "regularly compiled administrative record"), rev'd in part on other grounds, 981 F.2d 552 (1st Cir. 1992).

<sup>9</sup> New York Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc). But see also Greenpeace USA, Inc. v. EPA, 735 F. Supp. 13, 14 (D.D.C. 1990) (information pertaining to employee's compliance with agency regulations regarding his appearance at public meeting at which he was identified as agency employee "does not go to personal information . . . [e]ven in view of the broad interpretation [of Exemption 6] enunciated by the Supreme Court").

## EXEMPTION 6

subject to identical treatment under the FOIA,<sup>10</sup> it also concluded that Exemption 6 is equally applicable to the "author" and the "subject" of a file.<sup>11</sup>

It is also important to note that, in order to qualify for protection under Exemption 6, information must be identifiable to a specific individual. Information pertaining to a large group of individuals is not identifiable to any specific individual, unless that bit of information is attributable to members of the group as a whole.<sup>12</sup> Likewise, information pertaining to a single individual whose identity cannot be determined after deletion of his name from the records does not qualify for Exemption 6 protection.<sup>13</sup>

Once it has been established that information meets the threshold requirement of Exemption 6, the focus of the inquiry turns to whether disclosure of the records at issue "would constitute a clearly unwarranted invasion of personal privacy." This requires a balancing of the public's right to disclosure against the individual's right to privacy.<sup>14</sup> First, it must be ascertained whether a protectible privacy interest exists which would be threatened by disclosure. If no privacy interest is found, further analysis is unnecessary, and the information at issue must be disclosed.<sup>15</sup>

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<sup>10</sup> 920 F.2d at 1005.

<sup>11</sup> Id. at 1007-08.

<sup>12</sup> See, e.g., Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983) (list of drugs ordered for use by some members of group of over 600 individuals).

<sup>13</sup> Citizens for Env'tl. Quality v. United States Dep't of Agric., 602 F. Supp. 534, 538-39 (D.D.C. 1984) (health test results ordered disclosed because identity of only agency employee tested could not, after deletion of his name, be ascertained from information known outside agency) (citing Department of the Air Force v. Rose, 425 U.S. 352, 380 n.19 (1976) (dicta)); see also Senate of P.R. v. United States Dep't of Justice, No. 84-1829, slip op. at 23 (D.D.C. Aug. 24, 1993) (information about inmate's cooperation ordered released after redacting name and identifying details); Frets v. Department of Transp., No. 88-404-W-9, slip op. at 9 (W.D. Mo. Dec. 14, 1989) (urinalysis reports of air traffic controllers ordered disclosed with names and dates redacted to conceal identities); cf. United States Dep't of State v. Ray, 112 S. Ct. 541, 548 (1991) ("Although disclosure of [highly] personal information constitutes only a de minimis invasion of privacy when the identities of the interviewees are unknown, the invasion of privacy becomes significant when personal information is linked to particular interviewees.").

<sup>14</sup> Rose, 425 U.S. at 372; Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 862 (D.C. Cir. 1981).

<sup>15</sup> Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); Holland v. CIA, No. 91-1233, slip op. at 32 (D.D.C. Aug. 31, 1992) (information must be disclosed when there is no significant privacy interest, even if public interest is also de minimis).

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On the other hand, if a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure.<sup>16</sup> If no public interest exists, the information should be protected; as the D.C. Circuit has observed, "something, even a modest privacy interest, outweighs nothing every time."<sup>17</sup> Similarly, if the privacy interest outweighs the public interest, the information should be withheld; if the opposite is found to be the case, the information should be released.<sup>18</sup>

### The Reporters Committee Decision

In 1989, the Supreme Court issued a landmark FOIA decision in United States Department of Justice v. Reporters Committee for Freedom of the Press,<sup>19</sup> which greatly affects all privacy-protection decisionmaking under the Act. The Reporters Committee case involved FOIA requests from members of the news media for access to any criminal history records--known as "rap sheets"--maintained by the FBI regarding certain persons alleged to have been involved in organized crime and improper dealings with a corrupt Congressman.<sup>20</sup> In holding "rap sheets" entitled to protection under Exemption (7)(C), the Supreme Court set forth five guiding principles that now govern the process by which determinations are made under both Exemptions 6 and 7(C) alike:

First, the Supreme Court made clear in Reporters Committee that substantial privacy interests can exist in personal information even though the information has been made available to the general public at some place and point in time. Establishing a "practical obscurity" standard,<sup>21</sup> the Court observed that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to" them.<sup>22</sup>

Second, the Court articulated the rule that the identity of a FOIA requester cannot be taken into consideration in determining what should be released under the Act. With the single exception that of course an agency will not invoke an exemption where the particular interest to be protected is the request-

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<sup>16</sup> Ripkis, 746 F.2d at 3.

<sup>17</sup> National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990); see also International Bhd. of Elec. Workers Local No. 5 v. HUD, 852 F.2d 87, 89 (3d Cir. 1988) (no public interest in disclosure of employees' social security numbers).

<sup>18</sup> See FOIA Update, Spring 1989, at 7 (outlining mechanics of balancing process).

<sup>19</sup> 489 U.S. 749 (1989); see also FOIA Update, Spring 1989, at 3-6 ("OIP Guidance: Privacy Protection Under the Supreme Court's Reporters Committee Decision").

<sup>20</sup> 489 U.S. at 757.

<sup>21</sup> Id. at 762, 780.

<sup>22</sup> Id. at 764.

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er's own interest, the Court declared, "the identity of the requesting party has no bearing on the merits of his or her FOIA request."<sup>23</sup>

Third, the Court declared that in determining whether any public interest would be served by a requested disclosure, one should no longer consider "the purposes for which the request for information is made."<sup>24</sup> Rather than turn on a requester's "particular purpose," circumstances, or proposed use, the Court ruled, such determinations "must turn on the nature of the requested document and its relationship to" the public interest generally.<sup>25</sup>

Fourth, the Court sharply narrowed the scope of the public interest to be considered under the Act's privacy exemptions, declaring for the first time that it is limited to "the kind of public interest for which Congress enacted the FOIA."<sup>26</sup> This "core purpose of the FOIA," as the Court termed it,<sup>27</sup> is to "shed[] light on an agency's performance of its statutory duties."<sup>28</sup>

Fifth, the Court established the proposition, under Exemption 7(C), that agencies may engage in "categorical balancing" in favor of nondisclosure.<sup>29</sup> Under this approach, which builds upon the above principles, it may be determined, "as a categorical matter," that a certain type of information always is protectible under an exemption, "without regard to individual circumstances."<sup>30</sup>

### Privacy Considerations

The first step in the Exemption 6 balancing process requires an assessment of the privacy interests at issue.<sup>31</sup> The relevant inquiry is whether public access to the information at issue would violate a viable privacy interest of the

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<sup>23</sup> Id. at 771.

<sup>24</sup> Id.

<sup>25</sup> Id. at 772.

<sup>26</sup> Id. at 774.

<sup>27</sup> Id. at 775.

<sup>28</sup> Id. at 773.

<sup>29</sup> Id. at 776-80 & n.22.

<sup>30</sup> Id. at 780; see, e.g., Reed v. NLRB, 927 F.2d 1249, 1252 (D.C. Cir. 1991) ("Exemption 6 protects 'Excelsior' lists [names and addresses of employees eligible to vote in union representation elections] as a category"), cert. denied, 112 S. Ct. 912 (1992); Grove v. Department of Justice, 802 F. Supp. 506, 511 (D.D.C. 1992) (Categorical balancing is appropriate for "information concerning criminal investigations of private citizens.") (Exemption 7(C)).

<sup>31</sup> See FOIA Update, Spring 1989, at 7.



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subject of such information.<sup>32</sup> In its Reporters Committee decision, the Supreme Court stressed that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."<sup>33</sup> Thus, in Reporters Committee, the Court found a "strong privacy interest" in the nondisclosure of records of a private citizen's criminal history, "even where the information may have been at one time public."<sup>34</sup> Of course, information need not be intimate or embarrassing to qualify for Exemption 6 protection.<sup>35</sup>

As a general rule, the threat to privacy must be real rather than speculative.<sup>36</sup> In some cases, this principle formerly was interpreted to mean that the privacy interest must be threatened by the very disclosure of information and not by any possible "secondary effects" of such release.<sup>37</sup> The material itself had to contain information which itself would cause an invasion of an individual's privacy, because, it was said, "Exemption 6 does not take into account unsubstantiated speculation about possible secondary side effects that may follow release."<sup>38</sup> One such "secondary effect" previously held not to be cognizable under Exemption 6 was the "receipt of unsolicited commercial mailings" upon disclosure of names and office addresses of stateside military personnel.<sup>39</sup>

The Court of Appeals for the District of Columbia Circuit, however, has pointedly clarified its holding in Arieff v. United States Department of the Navy,<sup>40</sup> which had been read as stating that "secondary effects" were not cognizable under Exemption 6. In National Association of Retired Federal Employees v. Horner [hereinafter NARFE], the D.C. Circuit has explained that the

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<sup>32</sup> See Schell v. HHS, 843 F.2d 933, 938 (6th Cir. 1988); Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984).

<sup>33</sup> 489 U.S. 749, 763 (1989).

<sup>34</sup> Id. at 767; see also FOIA Update, Spring 1989, at 4.

<sup>35</sup> United States Dep't of State v. Washington Post Co., 456 U.S. 595, 600 (1982); National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

<sup>36</sup> Department of the Air Force v. Rose, 425 U.S. 352, 380 n.19 (1976); Carter v. United States Dep't of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987); Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983).

<sup>37</sup> See, e.g., Southern Utah Wilderness Alliance, Inc. v. Hodel, 680 F. Supp. 37, 39 (D.D.C. 1988), vacated as moot, No. 88-5142 (D.C. Cir. Nov. 15, 1988).

<sup>38</sup> Id. at 39.

<sup>39</sup> Hopkins v. Department of the Navy, No. 84-1868, slip op. at 5 (D.D.C. Feb. 5, 1985).

<sup>40</sup> 712 F.2d at 1468.

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point in Arieff was that Exemption 6 was inapplicable because there was only "mere speculation" of a privacy invasion, i.e., only a slight possibility that the information, if disclosed, would be linked to a specific individual.<sup>41</sup> On the other hand, it has now explicitly been recognized that "[w]here there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain."<sup>42</sup> Even prior to that clarification, one court pragmatically observed that to distinguish between the initial disclosure and unwanted intrusions as a result of that disclosure would be "to honor form over substance."<sup>43</sup> Now, with the D.C. Circuit's clarification in NARFE of this troubling point, there should no longer be any such concern over "secondary effects" under Exemption 6.

In some instances, the disclosure of information may involve little or no invasion of privacy because no expectation of privacy exists. For example, if the information at issue is particularly well known or is widely available within the public domain, there generally is no such expectation of privacy.<sup>44</sup> At the same time, if the information in question was at some time or place available to the public, but is now "hard-to-obtain information," the individual to whom it pertains may have a privacy interest in maintaining its "practical obscurity."<sup>45</sup>

As another example, FOIA requesters, except when they are making first-party requests, do not ordinarily expect that their names will be kept private; therefore, release of their names would not cause even the minimal invasion of privacy necessary to trigger the balancing test.<sup>46</sup> Personal information about

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<sup>41</sup> 879 F.2d at 878.

<sup>42</sup> Id.; see, e.g., Hougan & Denton v. United States Dep't of Justice, No. 90-1312, slip op. at 3 (D.D.C. July 3, 1991) (solicitation by employers would invade privacy of participants in local union's training program). But see also United States Dep't of State v. Ray, 112 S. Ct. 541, 550-51 (1991) (Scalia, J., concurring in part).

<sup>43</sup> Hudson v. Department of the Army, No. 86-1114, slip op. at 6 (D.D.C. Jan. 29, 1987) (protecting personal information on basis that disclosure could ultimately lead to physical harm), aff'd, 926 F.2d 1215 (D.C. Cir. 1991) (table cite); see also, e.g., Hemenway v. Hughes, 601 F. Supp. 1002, 1006-07 (D.D.C. 1985) (same).

<sup>44</sup> See, e.g., National W. Life Ins. Co. v. United States, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (names and duty stations of Postal Service employees); see also Core v. United States Postal Serv., 730 F.2d 946, 948 (4th Cir. 1984) (no substantial invasion of privacy found in information identifying successful federal job applicants).

<sup>45</sup> Reporters Committee, 489 U.S. at 780; accord United States Dep't of State v. Washington Post Co., 456 U.S. at 603 n.5.

<sup>46</sup> See FOIA Update, Winter 1985, at 6; see also Holland v. CIA, No. 91-1233, slip op. at 30-32 (D.D.C. Aug. 31, 1992) (researcher who requested  
(continued...))

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requesters, however, such as home addresses and phone numbers, should not be disclosed.<sup>47</sup> In addition, the identities of first-party requesters under the Privacy Act of 1974<sup>48</sup> should be protected because, unlike under the FOIA, an expectation of privacy can fairly be inferred from the personal nature of the records involved in those requests.<sup>49</sup> Moreover, individuals who write to the government expressing personal opinions generally do so with some expectation of confidentiality; their identities, but not necessarily the substance of their letters, should be withheld accordingly.<sup>50</sup>

Additionally, neither corporations nor business associations possess protectible privacy interests.<sup>51</sup> The closely held corporation or similar business entity, however, is an exception to this principle: "While corporations have no privacy, personal financial information is protected, including information about small businesses when the individual and corporation are identical."<sup>52</sup>

The right to privacy of deceased persons is not entirely settled, but the

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<sup>46</sup>(...continued)

assistance of presidential advisor in obtaining CIA files he had requested held comparable to FOIA requester whose identity is not protected by Exemption 6); Martinez v. FBI, No. 82-1547, slip op. at 7 (D.D.C. Dec. 19, 1985) (identities of news reporters seeking information concerning criminal investigation not protected) (Exemption 7(C)).

<sup>47</sup> See FOIA Update, Winter 1985, at 6.

<sup>48</sup> 5 U.S.C. § 552a (1988 & Supp. IV 1992).

<sup>49</sup> See FOIA Update, Winter 1985, at 6.

<sup>50</sup> See Wilson v. Department of Justice, No. 87-2415, slip op. at 13 (D.D.C. June 14, 1991); see also Holy Spirit Ass'n v. FBI, 683 F.2d 562, 564 (D.C. Cir. 1982) (Mackinnon, J., concurring). But see also Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 5 (N.D. Cal. Mar. 27, 1985) (ordering disclosure of names of private citizens who wrote to Members of Congress and to Attorney General expressing views on McCarthy-era prosecution).

<sup>51</sup> See, e.g., Sims v. CIA, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976); Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. 1560, 1567 (D.D.C. 1985).

<sup>52</sup> Providence Journal Co. v. FBI, 460 F. Supp. 778, 785 (D.R.I. 1978), rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980); see also National Parks & Conservation Ass'n v. Kleppe, 547 F.2d at 685-86; FOIA Update, Sept. 1982, at 5. But see Ackerson & Bishop Chartered v. United States Dep't of Agric., No. 92-1068, slip op. at 1 (D.D.C. July 15, 1992) (commercial mushroom growers operating under personal names have no expectation of privacy).

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majority rule is that death extinguishes their privacy rights.<sup>53</sup> The Department of Justice follows this rule as a matter of policy.<sup>54</sup> However, particularly sensitive, often graphic, personal details about the circumstances surrounding an individual's death may be withheld where necessary to protect the privacy interests of surviving family members.<sup>55</sup> Even information that is not particularly sensitive in itself may be withheld to protect the privacy of surviving family members if release of the information would cause "a disruption of their

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<sup>53</sup> See, e.g., Tigar & Buffone v. United States Dep't of Justice, No. 80-2382, slip op. at 9-10 (D.D.C. Sept. 30, 1983) (Exemption 7(C)); Diamond v. FBI, 532 F. Supp. 216, 227 (S.D.N.Y. 1981), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984); Rabbitt v. Department of the Air Force, 383 F. Supp. 1065, 1070 (S.D.N.Y. 1974), on motion for reconsideration, 401 F. Supp. 1206, 1210 (S.D.N.Y. 1975); cf. United States v. Schlette, 842 F.2d 1574, 1581 (9th Cir.) (disclosure of presentence report of deceased person pursuant to Rule 32(c) of Federal Rules of Criminal Procedure), amended, 854 F.2d 359 (9th Cir. 1988). But see Kiraly v. FBI, 728 F.2d 273, 277-78 (6th Cir. 1984) (Exemption 7(C)).

<sup>54</sup> See FOIA Update, Sept. 1982, at 5.

<sup>55</sup> See Hale v. United States Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) ("no public interest in photographs of the deceased victim, let alone one that would outweigh the personal privacy interests of the victim's family") (Exemption 7(C)), cert. granted, vacated & remanded on other grounds, 113 S. Ct. 3029 (1993); Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (affirming nondisclosure of autopsy reports of individuals killed by cyanide-contaminated products); Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 186 (D.C. Cir. 1987) (autopsy reports might "shock the sensibilities of surviving kin"); Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987) (deceased infant's medical records exempt because their release "would almost certainly cause . . . parents more anguish"); KTVY-TV v. United States, No. 87-1432-T, slip op. at 9 (W.D. Okla. May 4, 1989) ("The privacy rights asserted--those of the survivors and family of the victims in not having photographs of the bodies of the victims and clinical descriptions of their wounds being divulged--are patent and compelling and within the protections of the Act.") (Exemption 7(C)), aff'd per curiam, 919 F.2d 1465 (10th Cir. 1990); Crooker v. Federal Bureau of Prisons, No. 86-510, slip op. at 5 (D.D.C. Feb. 27, 1987) (release of "painful and graphic details" of murder of corrections officer "would cause great pain to the deceased's surviving family"); Price v. United States Dep't of Justice, No. 84-330A, slip op. at 5-8 (M.D. La. June 24, 1985) (protecting highly detailed medical and psychiatric data concerning inmate who died in federal facility). But see Outlaw v. United States Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. 1993) (ordering disclosure in absence of evidence of existence of survivors who would be offended by release of murder-scene photographs of man murdered 25 years earlier); Journal-Gazette Co. v. United States Dep't of the Army, No. F89-147, slip op. at 8-9 (N.D. Ind. Jan. 8, 1990) (because autopsy report of Air National Guard pilot killed in training exercise contained "concise medical descriptions of the cause of death," not "graphic, morbid descriptions," survivors' minimal privacy interest outweighed by public interest).

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peace of minds."<sup>56</sup>

Public figures do not surrender all rights to privacy by placing themselves in the public eye, though their expectations of privacy certainly may be diminished. In some instances, "[t]he degree of intrusion is indeed potentially augmented by the fact that the individual is a well known figure."<sup>57</sup> It has been held that disclosure of sensitive personal information contained in investigative records about a public figure is appropriate "only where exceptional interests militate in favor of disclosure."<sup>58</sup> Thus, although one's status as a public figure might in some circumstances tip the balance in favor of disclosure, a public figure does not, by virtue of his status, forfeit all rights of privacy.<sup>59</sup> It also should be noted that, unlike under the Privacy Act, foreign nationals are entitled to the same privacy rights under the FOIA as are U.S. citizens.<sup>60</sup>

In addition, individuals who testify at criminal trials do not forfeit their rights to privacy except on those very matters that become part of the public record.<sup>61</sup> Similarly, individuals who provide law enforcement agencies with reports of illegal conduct have well-recognized privacy interests, particularly

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<sup>56</sup> New York Times Co. v. NASA, 782 F. Supp. 628, 631-32 (D.D.C. 1991) (withholding audiotape of voices of Challenger astronauts recorded immediately before their deaths, to protect family members from pain of hearing final words of loved ones); see also FOIA Update, Sept. 1982, at 5.

<sup>57</sup> Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 865 (D.C. Cir. 1981) (Exemption 7(C)).

<sup>58</sup> Id. at 866; see also Wilson v. Department of Justice, No. 87-2415, slip op. at 13 (D.D.C. June 14, 1991) (even Richard Secord would have privacy interest in fact that he was investigated; such investigation would reveal "little about 'what government is up to'"). But see also Wilson v. Department of Justice, 87-2415, slip op. at 8 (D.D.C. June 17, 1991) (ordering further declarations to determine whether any of the individuals investigated "are 'public figures' like the plaintiff whose involvement in Government operations would be of interest to the public").

<sup>59</sup> Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d at 865; see also FOIA Update, Sept. 1982, at 5; cf. Strassman v. United States Dep't of Justice, 792 F.2d 1267, 1268 (4th Cir. 1986) (Exemption 7(C)).

<sup>60</sup> Shaw v. United States Dep't of State, 559 F. Supp. 1053, 1067 (D.D.C. 1983); see, e.g., United States Dep't of State v. Ray, 112 S. Ct. 541 (1991) (applying traditional analysis of privacy interests under FOIA to Haitian nationals); see also FOIA Update, Summer 1985, at 5.

<sup>61</sup> See Kiraly v. FBI, 728 F.2d at 279; Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981); cf. Irons v. FBI, 880 F.2d 1446, 1454 (1st Cir. 1989) (en banc) (holding that disclosure of any source information beyond that actually testified to by confidential source is not required) (Exemption 7(D)).

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when such persons reasonably fear reprisals for their assistance.<sup>62</sup> (For a more detailed discussion of the privacy protection accorded such law enforcement sources, see discussion of Exemption 7(C), below.) Even absent any evidence of fear of reprisals, however, witnesses who provide information to investigative bodies--administrative and civil, as well as criminal--are generally accorded privacy protection.<sup>63</sup>

An agency generally is not required to conduct research to determine whether an individual has died or whether his activities have sufficiently become the subject of public knowledge so as to bar the application of Exemption 6.<sup>64</sup> This is further strengthened by the Supreme Court's observations in Reporters Committee that "without regard to individual circumstances" certain categories of records will always warrant privacy protection and that "the standard virtues of bright-line rules are thus present, and the difficulties attendant to

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<sup>62</sup> See Holy Spirit Ass'n v. FBI, 683 F.2d at 564-65 (concurring opinion) (Exemptions 6 and 7(C)); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 809 (D.N.J. 1993) (Because the La Cosa Nostra "is so violent and retaliatory, the names of interviewees, informants, witnesses, victims and law enforcement personnel must be safeguarded.") (Exemption 7(C)).

<sup>63</sup> See, e.g., Walsh v. Department of the Navy, No. 91-C-7410, slip op. at 11 (N.D. Ill. Mar. 23, 1992); Fine v. United States Dep't of Energy, No. 88-1033, slip op. at 7-8 (D.N.M. June 23, 1991). But cf. Fine v. United States Dep't of Energy, 823 F. Supp. 888, 896 (D.N.M. 1993) (ordering disclosure based, in part, upon fact that plaintiff no longer employed by agency and "not in a position on-the-job to harass or intimidate employees of DOE/OIG and/or its contractors").

<sup>64</sup> See FOIA Update, Winter 1984, at 5; see also, e.g., Williams v. United States Dep't of Justice, 556 F. Supp. 63, 66 (D.D.C. 1982) (agency good-faith processing, rather than extensive research for public disclosures, sufficient in lengthy, multi-faceted judicial proceedings); cf. McGehee v. Casey, 718 F.2d 1137, 1141 n.9 (D.C. Cir. 1983) (CIA cannot reasonably bear burden of conducting exhaustive search to prove that particular items of classified information have never been published) (non-FOIA case). But see also Diamond v. FBI, 707 F.2d at 77 (requiring agency to review 200,000 pages outside scope of request to search for evidence as to whether subjects' privacy had been waived through death or prior public disclosure) (Exemption 7(C)); Outlaw v. United States Dep't of Justice, 815 F. Supp. at 506 (photographs of victim murdered 25 years ago not withholdable to protect privacy of relatives where "[d]efendant's concern for the privacy of the decedent's surviving relatives has not extended to an effort to locate them . . . [and] there is no showing by defendant that, as of now, there are any surviving relatives of the deceased, or if there are, that they would be offended by the disclosure"); Wilkinson v. FBI, No. 80-1048, slip op. at 12-13 (C.D. Cal. June 17, 1987) (holding Exemption 7(C) inapplicable to documents more than 30 years old because government relied on presumption that "all persons the subject of FOIA requests are . . . living"); Powell v. United States Dep't of Justice, slip op. at 12-13 (requiring agency to determine present "specific life situations" of individuals who were referenced in 30-year-old treason/sedition investigation) (Exemption 7(C)).

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ad hoc adjudication may be avoided."<sup>65</sup>

Likewise, it has been held that the FOIA does not require an agency "to track down an individual about whom another has requested information merely to obtain the former's permission to comply with the request."<sup>66</sup> However, several pre-Reporters Committee cases held that the fact that a requester has not submitted authorizations from third parties may not in and of itself justify the automatic withholding of all information regarding those third parties on privacy grounds.<sup>67</sup>

### Factoring in the Public Interest

Once it has been determined that a personal privacy interest is threatened by a requested disclosure, the second step in the balancing process comes into play; this stage of the analysis requires an assessment of the public interest in disclosure.<sup>68</sup> The burden of establishing that disclosure would serve the public interest is on the requester.<sup>69</sup> In its Reporters Committee decision, the Supreme Court has limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted it: To "shed[] light on an agency's performance of its statutory duties."<sup>70</sup> Information that does not directly reveal the operations or activities of the federal government,<sup>71</sup> the Supreme

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<sup>65</sup> 489 U.S. at 780; accord Halloran v. VA, 874 F.2d 315, 322 (5th Cir. 1989); see also FOIA Update, Spring 1989, at 4.

<sup>66</sup> Blakey v. Department of Justice, 549 F. Supp. 362, 365 (D.D.C. 1982) (Exemption 7(C)), aff'd in part, vacated in part, 720 F.2d 215 (D.C. Cir. 1983). But cf. War Babes v. Wilson, 770 F. Supp. 1, 4-5 (D.D.C. 1990) (allowing agency 60 days to meet burden of establishing privacy interest by obtaining affidavits from World War II servicemen who object to release of their addresses to British citizens seeking to locate their natural fathers).

<sup>67</sup> See Ray v. United States Dep't of Justice, No. 86-5972, slip op. at 1 (6th Cir. June 22, 1987) (Exemption 7(C) "is not absolute simply because the person implicated in the sought-after documents refuses to consent to their disclosure."); McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 15 (D.D.C. Dec. 3, 1985) (failure of plaintiff to submit authorization does not alone justify withholding; burden is on government to establish information is within Exemption 7(C)).

<sup>68</sup> See FOIA Update, Spring 1989, at 7.

<sup>69</sup> See Carter v. United States Dep't of Commerce, 830 F.2d 388, 391 nn.8 & 13 (D.C. Cir. 1987).

<sup>70</sup> 489 U.S. 749, 773 (1989).

<sup>71</sup> See Landano v. United States Dep't of Justice, 956 F.2d 422, 430 (3d Cir.) (There is "no FOIA-recognized public interest in discovering wrongdoing by a state agency.") (Exemption 7(C)), cert. denied, 113 S. Ct. 197 (1992); see also FOIA Update, Spring 1991, at 6 (advising that "government" should mean federal government).

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Court has stressed, "falls outside the ambit of the public interest that the FOIA was enacted to serve."<sup>72</sup> If an asserted public interest is found to qualify under this narrowed standard, it then must be accorded some measure of value so that it can be weighed against the threat to privacy.<sup>73</sup>

Even prior to Reporters Committee the law was clear that disclosure must benefit the public overall and not just the requester himself. For example, a number of courts determined that a request made for purely commercial purposes does not further a public interest.<sup>74</sup> Likewise, a request made in order to obtain or supplement discovery in a private lawsuit does not thereby further a public interest.<sup>75</sup> In fact, one court has observed that if the requester truly had a great need for the records for purposes of litigation, he or she should seek

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<sup>72</sup> 489 U.S. at 775; see, e.g., Gallant v. NLRB, No. 92-873, slip op. at 8-10 (D.D.C. Nov. 6, 1992) (disclosure of names of individuals to whom NLRB member sent letters in attempt to secure reappointment would not add to understanding of NLRB's performance of its duties) (appeal pending); Andrews v. United States Dep't of Justice, 769 F. Supp. 314, 316-17 (E.D. Mo. 1991) (although release of individual's address, telephone number and place of employment might serve general public interest in satisfaction of monetary judgments, "the nature of the public interest inquiry under the FOIA . . . turns on the relationship of the information to the basic purpose of the FOIA, which is 'to open agency action to the light of public scrutiny'" (quoting Reporters Committee, 489 U.S. at 772, quoting, in turn, Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976))); see also FOIA Update, Spring 1989, at 4, 6.

<sup>73</sup> See, e.g., Rose, 425 U.S. at 372; Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1981); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 862 (D.C. Cir. 1981).

<sup>74</sup> See, e.g., Multnomah County Medical Soc'y v. Scott, 825 F.2d 1410, 1413 (9th Cir. 1987) (commercial solicitation of Medicare recipients); Minnis v. United States Dep't of Agric., 737 F.2d 784, 786-87 (9th Cir. 1984) (applicants for rafting permits requested by commercial establishment located on river), cert. denied, 471 U.S. 1053 (1985); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974) (individuals licensed to produce wine at home requested by distributor of amateur wine-making equipment); see also Aronson v. HUD, 822 F.2d 182, 185-86 (1st Cir. 1987) (Plaintiff's "commercial motivations are irrelevant for determining the public interest served by disclosure; they do, however, suggest one of the ways in which private interests could be harmed by disclosure and a reason why individuals would wish to keep the information confidential.")

<sup>75</sup> See FOIA Update, Sept. 1982, at 6 (citing, e.g., Lloyd & Henniger v. Marshall, 526 F. Supp. 485, 487 (M.D. Fla. 1981)); see also Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981) (private litigation); Harry v. Department of the Army, No. 92-1654, slip op. at 7-8 (D.D.C. Sept. 10, 1993) (to appeal negative officer efficiency report); National Treasury Employees Union v. United States Dep't of the Treasury, 3 Gov't Disclosure Serv. (P-H) ¶ 83,224, at 83,948 (D.D.C. June 17, 1983) (grievance proceeding).



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them in that forum, where it would be possible to provide them under an appropriate protective order.<sup>76</sup> The Court of Appeals for the Ninth Circuit alone had adopted a position which specifically factored into the balancing process the requester's personal interest in disclosure.<sup>77</sup>

In Reporters Committee, the Supreme Court clearly approved the majority view that the requester's personal interest is irrelevant. First, as the Court emphasized, the requester's identity can have "no bearing on the merits of his or her FOIA request."<sup>78</sup> In so declaring, the Court ruled unequivocally that agencies should treat all requesters alike in making FOIA disclosure decisions; the only exception to this, the Court specifically noted, is that of course an agency should not withhold from a requester any information that implicates only that requester's own interest.<sup>79</sup> Furthermore, the "public interest" balancing required under the privacy exemptions should not include consideration of the requester's "particular purpose" in making the request.<sup>80</sup> Instead, the Court has instructed, the proper approach to the balancing process is to focus on "the nature of the requested document" and to consider "its relationship to" the public interest generally.<sup>81</sup> This approach thus does not permit attention to the special circumstances of any particular FOIA requester.<sup>82</sup> Rather, it necessarily involves a more general "public interest" assessment based upon the contents and context of the records sought and their connection to any "public interest" that would be served by disclosure. In making such assessments, agencies should look to the possible effects of disclosure to the public in general.

One purpose that the FOIA was designed for is to "check against corrup-

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<sup>76</sup> Gilbey v. Department of the Interior, No. 89-801, slip op. at 4-5 (D.D.C. Oct. 22, 1990).

<sup>77</sup> See, e.g., Multnomah County Medical Soc'y v. Scott, 825 F.2d at 1413; Minnis v. United States Dep't of Agric., 737 F.2d at 786; Van Bourg. Alien. Weinberg & Roger v. NLRB, 728 F.2d 1270, 1273 (9th Cir. 1984), vacated, 756 F.2d 692 (9th Cir.), reinstated, 762 F.2d 831 (9th Cir. 1985); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 747 (9th Cir. 1979).

<sup>78</sup> 489 U.S. at 771; see also FOIA Update, Spring 1989, at 5-6.

<sup>79</sup> See 489 U.S. at 771; FOIA Update, Spring 1989, at 5; see also, e.g., Frets v. Department of Transp., No. 88-404-W-9, slip op. at 9-10 (W.D. Mo. Dec. 14, 1989) (withholding names of third parties mentioned in plaintiffs' own statements).

<sup>80</sup> 489 U.S. at 772.

<sup>81</sup> Id.

<sup>82</sup> See id. at 771-72 & n.20.

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tion and to hold the governors accountable to the governed."<sup>83</sup> Indeed, information which would inform the public of violations of the public trust has a strong public interest and is accorded great weight in the balancing process. As a general rule, proven wrongdoing of a serious and intentional nature by a high-level government official is of sufficient public interest to outweigh the privacy interest of the official.<sup>84</sup> By contrast, less serious misconduct by low-level agency employees generally is not considered of sufficient public interest to outweigh the privacy interest of the employee.<sup>85</sup> Nor is there likely to be

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<sup>83</sup> Multnomah County Medical Soc'y v. Scott, 825 F.2d at 1415 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)); see also Washington Post Co. v. HHS, 690 F.2d 252, 264 (D.C. Cir. 1982); Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983); National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, 583 F. Supp. 1483, 1487 (D.D.C. 1984).

<sup>84</sup> See, e.g., Cochran v. United States, 770 F.2d 949, 956-57 (11th Cir. 1985) (nonjudicial punishment findings and discipline imposed on Army major general for misuse of government funds and facilities) (Privacy Act "wrongful disclosure" suit); Stern v. FBI, 737 F.2d 84, 93-94 (D.C. Cir. 1984) (name of high-level FBI official censured for deliberate and knowing misrepresentation) (Exemption 7(C)); Columbia Packing Co. v. United States Dep't of Agric., 563 F.2d 495, 499 (1st Cir. 1977) (federal employees found guilty of accepting bribes); Sullivan v. VA, 617 F. Supp. 258, 260-61 (D.D.C. 1985) (reprimand of senior official for misuse of government vehicle and failure to report accident) (Privacy Act "wrongful disclosure" suit/Exemption 7(C)); Congressional News Syndicate v. United States Dep't of Justice, 438 F. Supp. 538, 544 (D.D.C. 1977) (misconduct by White House staffers); cf. Castaneda v. United States, 757 F.2d 1010, 1012 (9th Cir.) (identity of USDA investigator ordered disclosed where court found his reports "were inconsistent and may have been unreliable" and his motives and truthfulness were "in doubt") (Exemption 7(C)), amended upon denial of panel reh'g, 773 F.2d 251, 251 (9th Cir. 1985); Ferri v. Bell, 645 F.2d 1213, 1218 (3d Cir. 1981) (attempt to expose alleged deal between prosecutor and witness found to be in public interest) (Exemption 7(C)), vacated & reinstated in part on reh'g, 671 F.2d 769 (3d Cir. 1982); Stern v. SBA, 516 F. Supp. 145, 149 (D.D.C. 1980) (names of agency personnel charged with discriminatory violations).

<sup>85</sup> See, e.g., Department of the Air Force v. Rose, 425 U.S. at 381 (names of cadets found to have violated Academy honor code protected); Beck v. Department of Justice, 997 F.2d 1489, 1493 (D.C. Cir. 1993) ("The identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct."); Stern v. FBI, 737 F.2d at 94 (protecting names of mid-level employees censured for negligence); Chamberlain v. Kurtz, 589 F.2d 827, 842 (5th Cir.) (names of disciplined IRS agents protected), cert. denied, 444 U.S. 842 (1979); Cotton v. Adams, 798 F. Supp. 22, 26-27 (D.D.C. 1992) (release of Inspector General reports on conduct of low-level Smithsonian Institution employees would not allow public to evaluate Institution's discharge of duties); Heller v. United States Marshals Serv., 655 F. Supp. 1088, 1091 (D.D.C. 1987) (pro-

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strong public interest in the names of censured employees when the case has not "occurred against the backdrop of a well-publicized scandal" which has resulted in "widespread knowledge" that certain employees were disciplined.<sup>86</sup> And any general public interest in mere allegations of wrongdoing does not outweigh an individual's privacy interest in unwarranted association with such allegations.<sup>87</sup>

Prior to Reporters Committee, some courts held that the public interest in disclosure may be embodied in other federal statutes.<sup>88</sup> In light of Reporters Committee and National Association of Retired Federal Employees v. Horner [hereinafter NARFE],<sup>89</sup> the D.C., First, Second, Sixth, Seventh, Tenth and Eleventh Circuit Courts of Appeals have flatly rejected this approach, refusing to order disclosure of the home addresses of government employees on the explicit basis that the public interest in disclosure evidenced in the Federal Service Labor-Management Relations Act cannot be factored into the balance under the

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<sup>85</sup>(...continued)

tecting names of agency personnel found to have committed "only minor, if any, wrongdoing") (Exemption 7(C)).

<sup>86</sup> Beck v. Department of Justice, 997 F.2d at 1493-94.

<sup>87</sup> See, e.g., Hunt v. FBI, 972 F.2d 286, 288-90 (9th Cir. 1992) (Exemption 7(C)); Dunkelberger v. Department of Justice, 906 F.2d 779, 781-82 (D.C. Cir. 1990) (Exemption 7(C)); Carter v. United States Dep't of Commerce, 830 F.2d at 391 (protecting identities of attorneys subject to disciplinary proceedings that were later dismissed); Varelli v. FBI, No. 88-1865, slip op. at 10-13 (D.D.C. Oct. 4, 1991). But see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 569 (1st Cir. 1992) (ordering disclosure of identities of high-ranking officers of Rhode Island National Guard accused of criminal wrongdoing even though allegations were mostly "unsubstantiated"); McCutchen v. HHS, No. 91-142, slip op. at 7-12 (D.D.C. Aug. 24, 1992) (refusing to protect identities of scientists found not to have engaged in alleged scientific misconduct) (Exemptions 6 and 7(C)) (appeal pending); Dobronski v. FCC, No. 91-1295, slip op. at 3-4 (D. Ariz. June 16, 1992) (ordering release of employee's leave slips for period during which there were allegations of abuse of leave time) (appeal pending).

<sup>88</sup> See, e.g., International Bhd. of Elec. Workers Local No. 5 v. HUD, 852 F.2d 87, 90 (3d Cir. 1988) (wage rates payable by federal contractors regulated by Davis-Bacon Act); United States Dep't of Agric. v. FLRA, 836 F.2d 1139, 1143 (8th Cir.) (names and addresses of federal employees under federal labor relations statute), cert. granted & remanded, 488 U.S. 1025 (1988), vacated, 876 F.2d 50 (8th Cir. 1989); Common Cause v. National Archives & Records Serv., 628 F.2d 179, 183-85 (D.C. Cir. 1980) (political campaign activities under Federal Corrupt Practices Act) (Exemption 7(C)); Washington Post Co. v. HHS, 690 F.2d at 265 (public disclosure of financial statements required by Ethics in Government Act); see also Marzen v. HHS, 825 F.2d 1148, 1154 (7th Cir. 1987) (finding nondisclosure proper upon consideration of state statute mandating same).

<sup>89</sup> 879 F.2d 873 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

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FOIA.<sup>90</sup> On the other hand, the Third, Fifth and Ninth Circuit Courts of Appeals have reached the opposite conclusion and have ordered disclosure of the home addresses of bargaining unit employees to unions that requested them under the FSLMRA.<sup>91</sup> These circuit courts said the Supreme Court had not considered specifically whether the public policy favoring collective bargaining embodied in the FSLMRA could be considered in balancing under the FOIA; consequently, none of these courts found an inconsistency between its holding and the teaching of Reporters Committee.<sup>92</sup> Because of this split in the circuits, the Supreme Court has granted certiorari in the Fifth Circuit case<sup>93</sup> and should finally resolve this issue during the coming year.

On a related issue, two district courts have departed from the direction taken by Reporters Committee with regard to another federal statute, the Davis-

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<sup>90</sup> D.C. Circuit: FLRA v. United States Dep't of the Treasury, 884 F.2d 1446, 1453 (D.C. Cir. 1989) (court not "entitled to engage in the sort of imaginative reconstruction that would be necessary to introduce collective bargaining values into the balancing process"), cert. denied, 493 U.S. 1056 (1990); First Circuit: FLRA v. United States Dep't of the Navy, 941 F.2d 49, 56-57 (1st Cir. 1991) (in balancing privacy and public interests under FOIA, court must disregard "public interest in labor organization and collective bargaining"); Second Circuit: FLRA v. VA, 958 F.2d 503, 511-12 (2d Cir. 1992) ("The public interest in fostering effective collective bargaining falls outside this central purpose of the FOIA."); Sixth Circuit: FLRA v. Department of the Navy, 963 F.2d 124, 125 (6th Cir. 1992) (adopting reasoning of First, Second and D.C. Circuits); Seventh Circuit: FLRA v. United States Dep't of the Navy, 975 F.2d 348, 354-55 (7th Cir. 1992) ("Neither [Privacy Act], nor FOIA, makes a further exception for information requests that originate under some other federal statute."); Tenth Circuit: FLRA v. DOD, 984 F.2d 370, 375 (10th Cir. 1993) ("disclosure of federal employees' home addresses has nothing to do with public scrutiny of government activities"); Eleventh Circuit: FLRA v. DOD, 977 F.2d 545, 548 (11th Cir. 1992) (finding "no authority for allowing Labor Statute principles to override FOIA principles"). See also Reed v. NLRB, 927 F.2d 1249, 1251 (D.C. Cir. 1991) (disclosure of "Excelsior" list [names and addresses of employees eligible to vote in union representation elections] would not reveal anything about NLRB's operations), cert. denied, 112 S. Ct. 912 (1992).

<sup>91</sup> Third Circuit: FLRA v. United States Dep't of the Navy, 966 F.2d 747, 758-59 (3d Cir. 1992) (en banc) (alternative holding); Fifth Circuit: FLRA v. DOD, 975 F.2d 1106, 1113-15 (5th Cir.), cert. granted, 113 S. Ct. 1642 (1993); Ninth Circuit: FLRA v. United States Dep't of the Navy, 958 F.2d 1490, 1497 (9th Cir. 1992) (petition for rehearing en banc pending); see also FLRA v. Department of Commerce, 954 F.2d 994, 997 (4th Cir. 1992), vacated & petition for reh'g en banc granted, No. 90-1852 (4th Cir. Apr. 22, 1992).

<sup>92</sup> FLRA v. United States Dep't of the Navy, 966 F.2d at 757-59; FLRA v. United States Dep't of the Navy, 958 F.2d at 1496-97.

<sup>93</sup> 113 S. Ct. 1642 (1993).

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Bacon Act,<sup>94</sup> which requires that contractors on federal projects pay to their laborers no less than the wages prevailing for comparable work in the geographical area. Three years ago, the District Court in Hawaii decided that the analyses comparing the public interest expressed in other federal statutes to that underlying the FOIA survive Reporters Committee and held that the public interest in monitoring compliance with the Davis-Bacon Act is cognizable under FOIA.<sup>95</sup> Subsequently, the District Court for the Western District of Washington agreed.<sup>96</sup> However, while both of these cases remain on appeal, the D.C. and Second Circuits, the first post-Reporters Committee courts of appeals to confront this issue, have firmly held that although there may be a minimal public interest in facilitating the monitoring of compliance with federal labor statutes, disclosure of personal information that reveals nothing "directly about the character of a government agency or official" bears only an "attenuated . . . relationship to governmental activity."<sup>97</sup> Accordingly, it has been held that such an "attenuated public interest in disclosure does not outweigh the construction workers' significant privacy interest in [their names and addresses]."<sup>98</sup>

Even though public oversight of government operations is the essence of public interest under the FOIA, one who claims such a purpose must support his claim by more than mere allegation. He must show that the information in question is "of sufficient importance to warrant such" oversight,<sup>99</sup> and he must show how the public interest would be served by disclosure in the particular case.<sup>100</sup> Assertions of "public interest" should be scrutinized carefully to ensure that they legitimately warrant the overriding of privacy interests. As stated by the Second Circuit in Hopkins v. HUD, "[t]he simple invocation of a legitimate public interest . . . cannot itself justify the release of personal information. Rather, a court must first ascertain whether that interest would be served

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<sup>94</sup> 40 U.S.C. § 276a (1988).

<sup>95</sup> Painting Indus. of Hawaii Mkt. Recovery Fund v. United States Dep't of the Air Force, 751 F. Supp. 1410, 1417 (D. Haw. 1990), reconsideration denied, 756 F. Supp. 452 (D. Haw. 1990) (appeal pending).

<sup>96</sup> Seattle Bldg. & Constr. Trades Council, AFL-CIO v. HUD, No. C89-1346C, slip op. at 10-11 (W.D. Wash. Oct. 30, 1990) (appeal pending).

<sup>97</sup> Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991); see Painting & Drywall Work Preservation Fund, Inc. v. HUD, 936 F.2d 1300, 1303 (D.C. Cir. 1991).

<sup>98</sup> Painting & Drywall Work Preservation Fund, Inc. v. HUD, 936 F.2d at 1303; see Hopkins v. HUD, 929 F.2d at 88.

<sup>99</sup> Miller v. Bell, 661 F.2d 623, 630 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982); see also Allard v. HHS, No. 4:90-CV-156, slip op. at 10-11 (W.D. Mich. Feb. 14, 1992) ("conclusory allegations" of plaintiff--a prisoner with violent tendencies--concerning ex-wife's misuse of children's Social Security benefits do not establish public interest), aff'd, 972 F.2d 346 (6th Cir. 1992) (table cite).

<sup>100</sup> See Halloran v. VA, 874 F.2d 315, 323 (5th Cir. 1989).

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by disclosure."<sup>101</sup> The Second Circuit in Hopkins acknowledged a legitimate public interest in monitoring HUD's enforcement of prevailing wage laws but found that disclosure of the names and addresses of workers employed on HUD-assisted public housing projects would shed no light on the agency's performance of that duty.<sup>102</sup> Thus, in Minnis v. United States Department of Agriculture, while the Ninth Circuit recognized a valid public interest in questioning the fairness of an agency lottery system which awarded permits to raft down the Rogue River, it found, upon careful analysis, that the release of the names and addresses of the applicants would in no way further that interest.<sup>103</sup> Similarly, in Heights Community Congress v. VA,<sup>104</sup> the Sixth Circuit found that the release of names and home addresses would result only in the "involuntary personal involvement" of innocent purchasers rather than appreciably furthering a concededly valid public interest in determining whether anyone had engaged in "racial steering."

Such holdings are entirely consistent with the Supreme Court's determination in Reporters Committee that the "rap sheet" of a defense contractor, if such existed, would reveal nothing directly about the behavior of the Congressman with whom the contractor allegedly had an improper relationship, nor would it reveal anything about the conduct of the DOD.<sup>105</sup> The information must

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<sup>101</sup> 929 F.2d at 88 (citing Halloran v. VA, 874 F.2d at 323).

<sup>102</sup> Id.; see also Gannett Satellite Info. Network, Inc. v. United States Dep't of Educ., No. 90-1392, slip op. at 13-14 (D.D.C. Dec. 21, 1990) ("If in fact a student has defaulted, [his] name, address and social security number would reveal nothing about the Department's attempts to collect on those defaulted loans. Nor would [they] reveal anything about the potential misuse of public funds.").

<sup>103</sup> 737 F.2d at 787; see Hunt v. FBI, 972 F.2d at 289 (disclosure of single internal investigation file "will not shed any light on whether all such FBI investigations are comprehensive or whether sexual misconduct by agents is common"); New York Times Co. v. NASA, 782 F. Supp. 628, 632-33 (D.D.C. 1991) (release of audiotape of Challenger astronauts' voices just prior to explosion would not serve "undeniable interest in learning about NASA's conduct before, during and after the Challenger disaster").

<sup>104</sup> 732 F.2d 526, 530 (6th Cir.), cert. denied, 469 U.S. 1034 (1984).

<sup>105</sup> See 489 U.S. at 774; see also NARFE, 879 F.2d at 879 (names and home addresses of federal annuitants reveal nothing directly about workings of government); Halloran v. VA, 874 F.2d at 323 ("[M]erely stating that the interest exists in the abstract is not enough; rather, the court should have analyzed how that interest would be served by compelling disclosure."); Kimberlin v. Department of the Treasury, 774 F.2d 204, 208 (7th Cir. 1985) ("The record fails to reflect any benefit which would accrue to the public from disclosure and [the requester's] self-serving assertions of government wrongdoing and coverup do not rise to the level of justifying disclosure.") (Exemption 7(C)); Johnson v. United States Dep't of Justice, 739 F.2d 1514, 1519 (10th Cir. 1984) (finding that because allegations of improper use of law enforcement

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clearly reveal official government activities; it is not enough that the information would permit speculative inferences about the conduct of an agency or a government official.<sup>106</sup> Nor is it enough that the information would allow a union to question private-sector employees and thus determine whether the agency is adequately monitoring compliance with prevailing wage laws,<sup>107</sup> or that the information might aid the requester in lobbying efforts that would result in passage of laws and thus benefit the public in that respect.<sup>108</sup>

The most significant recent development concerning this issue occurred in United States Department of State v. Ray,<sup>109</sup> when the Supreme Court recognized a legitimate public interest in whether the State Department was adequately monitoring Haiti's promise not to prosecute Haitians who were returned to their country after failed attempts to enter the United States, but it determined that this public interest had been "adequately served" by release of redacted summaries of the agency's interviews with the returnees and that "[t]he addition of the redacted identifying information would not shed any additional light on

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<sup>105</sup>(...continued)

authority were not at all supported in requested records, disclosure of FBI special agent names would not serve public interest) (Exemption 7(C)); Stern v. FBI, 737 F.2d at 92 (finding that certain specified public interests "would not be satiated in any way" by disclosure) (Exemption 7(C)); Miller v. Bell, 661 F.2d at 630 (noting that plaintiff's broad assertions of government cover-up were unfounded as investigation was of consequence to plaintiff only and therefore did not "warrant probe of FBI efficiency") (Exemption 7(C)); KTVY-TV v. United States, No. 87-1432-T, slip op. at 9-10 (W.D. Okla. May 4, 1989) ("The plaintiff has failed to establish any nexus between the information requested and the asserted public interest of determining whether the defendant has made an effort to prevent like occurrences.") (Exemption 7(C)), aff'd per curiam, 919 F.2d 1465 (10th Cir. 1990).

<sup>106</sup> See Reporters Committee, 489 U.S. at 774, 766 n.18; see also Gannett Satellite Info. Network, Inc. v. United States Dep't of Educ., slip op. at 12 (names, addresses and social security numbers of student loan defaulters would reveal nothing directly about Department of Education's administration of student loan program). But see International Diatomite Producers Ass'n v. United States Social Sec. Admin., No. C-92-1634, slip op. at 12-13 (N.D. Cal. Apr. 28, 1993) (release of vital status information concerning diatomite industry workers serves "public interest in evaluating whether public agencies (OSHA, MSHA, and EPA) carry out their statutory duties to protect the public from the potential health hazards from crystalline silica exposure") (appeal pending).

<sup>107</sup> Hopkins v. HUD, 929 F.2d at 88.

<sup>108</sup> NARFE, 879 F.2d at 875; see also FOIA Update, Spring 1989, at 6. But cf. Aronson v. HUD, No. 88-1524, slip op. at 1 (1st Cir. Apr. 6, 1989) (affirming award of attorney fees on basis that disclosure of names and addresses of mortgagors to whom HUD owes money sheds light on HUD's performance of statutory reimbursement duty).

<sup>109</sup> 112 S. Ct. 541 (1991).

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the Government's conduct of its obligation."<sup>110</sup> Although the plaintiff claimed that disclosure of the identities of the unsuccessful emigrants would allow him to reinterview them and elicit further information concerning their treatment, the Court found "nothing in the record to suggest that a second set of interviews with the already-interviewed returnees would produce any relevant information . . . . Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy."<sup>111</sup>

Finally, if alternative, less intrusive means are available to obtain information that would serve the public interest, there is less need to require disclosure of information that would cause a substantial invasion of an individual's privacy. Accordingly, "[w]hile [this is] certainly not a *per se* defense to a FOIA request," it is entirely appropriate, when assessing the public interest side of the balancing equation, to consider "the extent to which there are alternative sources of information available that could serve the public interest in disclosure."<sup>112</sup> If there are alternative sources, the D.C. Circuit has firmly ruled, the public interest in disclosure should be "discounted" accordingly.<sup>113</sup>

### The Balancing Process

Once both the privacy interest at stake and the public interest in disclosure have been ascertained, the two competing interests must be weighed

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<sup>110</sup> *Id.* at 549; see also Public Citizen, Inc. v. Resolution Trust Corp., No. 92-0010, slip op. at 8-9 (D.D.C. Mar. 19, 1993) (public interest in agency's compliance with Affordable Housing Disposition Program served by release of information with identities of bidders and purchasers redacted).

<sup>111</sup> 112 S. Ct. at 549.

<sup>112</sup> DOD v. FLRA, 964 F.2d 26, 29-30 (D.C. Cir. 1992); see FLRA v. United States Dep't of Commerce, 962 F.2d 1055, 1060 n.2 (D.C. Cir. 1992) (union may "distribute questionnaires or conduct confidential face-to-face interviews" to obtain rating information about employees); Painting & Drywall Work Preservation Fund, Inc. v. HUD, 936 F.2d at 1303 (contact at workplace is alternative to disclosing home addresses of employees); Multnomah County Medical Soc'y v. Scott, 825 F.2d at 1416 (Medical Society can have members send literature to their patients as alternative to disclosure of identities of all Medicare beneficiaries); Hemenway v. Hughes, 601 F. Supp. 1002, 1007 (D.D.C. 1985) (personal contact with individuals whose names and work addresses were released to plaintiff is alternative to agency releasing personal information he seeks); cf. Cotton v. Adams, 798 F. Supp. at 27 n.9 (suggesting that request for all Inspector General reports, from which identifying information could be redacted, would better serve public interest in overseeing discharge of Inspector General duties than does request for only two specific investigative reports involving known individuals).

<sup>113</sup> DOD v. FLRA, 964 F.2d at 29-30. But cf. FLRA v. United States Dep't of the Navy, 958 F.2d at 1497 (union's ability to approach employees at work place is not adequate alternative to disclosing home addresses).



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against one another.<sup>114</sup> In other words, it must be determined which is the greater result of disclosure: the harm to personal privacy or the benefit to the public.<sup>115</sup> In balancing these interests, "the 'clearly unwarranted' language of Exemption 6 weights the scales in favor of disclosure."<sup>116</sup> If the public benefit is weaker than the threat to privacy, the latter will prevail, and the information should be withheld.<sup>117</sup> The threat to privacy need not be obvious; it need only outweigh the public interest.<sup>118</sup>

Although "the presumption in favor of disclosure is as strong [under Exemption 6] as can be found anywhere in the Act,"<sup>119</sup> the courts have vigorously protected the personal, intimate details of an individual's life, the release of which is likely to cause distress or embarrassment. Courts regularly uphold the nondisclosure of information concerning marital status, legitimacy of children, welfare payments, family fights and reputation,<sup>120</sup> medical details and conditions,<sup>121</sup> date of birth,<sup>122</sup> religious affiliation,<sup>123</sup> citizenship,<sup>124</sup> social security account numbers,<sup>125</sup> criminal history records (most commonly

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<sup>114</sup> Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

<sup>115</sup> Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); see FOIA Update, Spring 1989, at 7.

<sup>116</sup> Ripskis, 746 F.2d at 3.

<sup>117</sup> See FOIA Update, Spring 1989, at 6 (emphasizing possible applicability of Privacy Act disclosure prohibitions, particularly in light of Reporters Committee).

<sup>118</sup> See Public Citizen Health Research Group v. United States Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978).

<sup>119</sup> Washington Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982).

<sup>120</sup> See, e.g., Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d 73, 77 (D.C. Cir. 1974).

<sup>121</sup> See, e.g., id.; Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 23-24 (C.D. Cal. May 10, 1993).

<sup>122</sup> See, e.g., Centracchio v. FBI, No. 92-357, slip op. at 15 (D.D.C. Mar. 16, 1993).

<sup>123</sup> See, e.g., Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 747 (9th Cir. 1979).

<sup>124</sup> See, e.g., Hemenway v. Hughes, 601 F. Supp. 1002, 1006 (D.D.C. 1985) ("Nationals from some countries face persistent discrimination . . . [and] are potential targets for terrorist attacks.").

<sup>125</sup> See, e.g., Rice v. Department of Transp., No. 91-3306, slip op. at 1 (D.D.C. Nov. 17, 1992); Fidelity Nat'l Title Ins. Co. v. HHS, No. 91-5484, slip op. at 6-7 (C.D. Cal. Feb. 13, 1992).

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referred to as "rap sheets"),<sup>126</sup> incarceration of United States citizens in foreign prisons,<sup>127</sup> sexual inclinations or associations,<sup>128</sup> and financial status.<sup>129</sup> Even "favorable information," such as the details of an employee's outstanding performance evaluation, can be protected on the basis that it "may well embarrass an individual or incite jealousy" among co-workers.<sup>130</sup> Moreover, release of such information "reveals by omission the identities of employees who did not receive high ratings, creating an invasion of their privacy."<sup>131</sup>

A subject which has generated extensive litigation and which warrants special discussion is requests for compilations of names and home addresses of individuals. Traditionally, prior to the Reporters Committee decision, the courts' analyses in "mailing list" cases turned on the requester's purpose, or the "use" to which the requested information was intended to be put. As noted before, many courts have held that requests made for the sole purpose of obtaining mailing lists for solicitation are purely commercial and consequently involve no public interest.<sup>132</sup> In those cases where "mailing list" requests were made for noncommercial purposes, however, the courts prior to Reporters Committee recognized a variety of public interest factors entitled to heavy and

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<sup>126</sup> See, e.g., United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

<sup>127</sup> See Harbolt v. Department of State, 616 F.2d 772, 774 (5th Cir.), cert. denied, 449 U.S. 856 (1980).

<sup>128</sup> See, e.g., Siminoski v. FBI, No. 83-6499, slip op. at 28 (C.D. Cal. Jan. 16, 1990).

<sup>129</sup> See, e.g., Public Citizen, Inc. v. Resolution Trust Corp., No. 92-0010, slip op. at 6-10 (D.D.C. Mar. 19, 1993); Oklahoma Publishing Co. v. HUD, No. 87-1935, slip op. at 4 (W.D. Okla. June 17, 1988). But see Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 472 (W.D.N.Y. 1987) (ordering disclosure of information concerning recipients of disaster loans, including payment and default status).

<sup>130</sup> Ripskis v. HUD, 746 F.2d at 3; see HHS v. FLRA, No. 92-1012, slip op. at 2 (D.C. Cir. Dec. 10, 1992); FLRA v. United States Dep't of Commerce, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992).

<sup>131</sup> FLRA v. United States Dep't of Commerce, 962 F.2d at 1059.

<sup>132</sup> See, e.g., Multnomah County Medical Soc'y v. Scott, 825 F.2d 1410, 1411 (9th Cir. 1987) (names and addresses of Medicare beneficiaries not disclosed to physicians' professional organization); Minnis v. United States Dep't of Agric., 737 F.2d 784, 788 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985) (names and addresses of applicants for rafting permits not released to commercial establishment located on river); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974) (names and addresses of individuals licensed to produce wine at home for their own consumption not released to distributor of amateur wine-making equipment).

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often dispositive weight.<sup>133</sup>

The Supreme Court in Reporters Committee, however, firmly repudiated any analysis based on either the identity, circumstances or intended purpose of the particular FOIA requester at hand.<sup>134</sup> Rather, it said, the analysis must turn on the nature of the document and its relationship to the basic purpose of the FOIA.<sup>135</sup> Following Reporters Committee, the Court of Appeals for the District of Columbia Circuit found that those cases relying on the stated "beneficial" purpose of the requester were grounded on the now-disapproved proposition that "Exemption 6 carries with it an implicit limitation that the information, once disclosed, [may] be used only by the requesting party and for the public interest purpose upon which the balancing was based."<sup>136</sup>

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<sup>133</sup> See, e.g., Aronson v. HUD, 822 F.2d 182, 185-87 (1st Cir. 1987) (public interest in "the disbursement of funds the government owes its citizens" outweighs the privacy interest of such citizens to be free from others' attempts "to secure a share of that sum" when the government's efforts at disbursal are inadequate); Van Bourg, Allen, Weinberg & Roger v. NLRB, 728 F.2d 1270, 1273 (9th Cir. 1984) (strong public interest in determining whether election fairly conducted), vacated, 756 F.2d 692 (9th Cir.), reinstated, 762 F.2d 831 (9th Cir. 1985); Getman v. NLRB, 450 F.2d, 670, 675-76 (D.C. Cir. 1971) (public interest need for study of union elections held sufficient to warrant release to professor); Florida Rural Legal Servs., Inc. v. United States Dep't of Justice, No. 87-1264, slip op. at 6 (S.D. Fla. Feb. 10, 1988) (names and addresses of illegal aliens ordered disclosed so legal services group can inform them of citizenship registration requirement where INS not informing of such); National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, 583 F. Supp. 1483, 1487-88 (D.D.C. 1984) (names and addresses of veterans involved in atomic testing ordered disclosed because of public interest in increasing their knowledge of benefits and possible future health testing); Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 458 (D.D.C. 1977) (nonprofit organization serving needs of retired military officers held entitled to names and addresses of such personnel), aff'd, 574 F.2d 636 (D.C. Cir. 1979) (table cite).

<sup>134</sup> See 489 U.S. at 771-72.

<sup>135</sup> Id. at 772; see also FOIA Update, Spring 1989, at 5-6 (old "use" test has been overruled and should no longer be followed).

<sup>136</sup> National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990) [hereinafter NARFE]; see also Pennies From Heaven, Inc. v. Department of the Treasury, No. 88-1808, slip op. at 7-9 (D.D.C. Aug. 14, 1992) (withholding names and addresses of individuals who own United States treasury securities that are matured but unredeemed or on which interest is owed); Gannett Satellite Info. Network, Inc. v. United States Dep't of Educ., No. 90-1392, slip op. at 15 (D.D.C. Dec. 21, 1990) (denying access to names, social security numbers and addresses of individuals who have defaulted on government-backed student loans); Schoettle v. Kemp, 733 F. Supp. 1395, 1397-98 (D. Haw. 1990) (rely-  
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Because agencies may neither distinguish between requesters nor limit the use to which disclosed information is put, an analysis of the consequences of disclosure of a mailing list cannot turn on the identity or purpose of the requester.<sup>137</sup> Thus, it was found to be irrelevant in NARFE that the requester's purpose was to use the list of federal retirees to aid in its lobbying efforts on behalf of those retirees.<sup>138</sup> Although stopping short of creating a nondisclosure category encompassing all mailing lists, the D.C. Circuit in NARFE did hold that mailing lists consisting of names and home addresses of federal annuitants are categorically withholdable under Exemption 6.<sup>139</sup> Thus, though the issue is not yet finally settled, all mailing lists involving home addresses would appear to be well suited for "categorical" protection. (See discussion of home addresses of bargaining unit employees requested by unions under the Federal Service Labor-Management Relations Act, above.)

Another area which merits particular discussion is the applicability of Exemption 6 to requests for information about civilian and military federal employees. Generally, civilian employees' names, present and past position titles, grades, salaries and duty stations are releasable as no viable privacy interest exists in such data.<sup>140</sup> In addition, the Justice Department recommends the release of additional items, particularly those relating to professional qualifica-

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<sup>136</sup>(...continued)

ing upon both Reporters Committee's observation that "public interest" is not equivalent to "interesting or socially beneficial in some broad sense" and HUD's improved methods of tracing people to withhold identities of mortgagors eligible for distributions of money). But see Aronson v. HUD, No. 88-1524, slip op. at 1 (1st Cir. Apr. 6, 1989) (affirming award of attorney fees to plaintiff on basis that disclosure of list of mortgagors to whom HUD owes money sheds light on agency's performance of its duty to reimburse those mortgagors); Aronson v. IRS, 767 F. Supp. 378, 391-92 (D. Mass. 1991) (public interest in information concerning individuals who are owed tax refunds is related to basic purpose of FOIA, in this case "evaluating the efforts of the IRS to locate those owed refunds"), aff'd in part & rev'd in part on other grounds, 973 F.2d 962 (1st Cir. 1992).

<sup>137</sup> NARFE, 879 F.2d at 875.

<sup>138</sup> Id.; Center for Auto Safety v. National Highway Traffic Safety Admin., 809 F. Supp. 148, 150 (D.D.C. 1993) (requester's function as "significant consumer rights advocate" does not imply right to "take over the functions of NHTSA") (appeal pending).

<sup>139</sup> NARFE, 879 F.2d at 879; see also Retired Officers Ass'n v. Department of the Navy, No. 88-2054, slip op. at 3-4 (D.D.C. May 14, 1990) (upon reconsideration) (names and home addresses of retired military officers exempt); cf. Reed v. NLRB, 927 F.2d 1249, 1251-52 (D.C. Cir. 1991) (categorically protecting "Excelsior" list [names and addresses of employees eligible to vote in union representation elections]), cert. denied, 112 S. Ct. 912 (1992).

<sup>140</sup> See 5 C.F.R. § 293.311 (1993); see also FOIA Update, Summer 1986, at 3.

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tions for federal employment.<sup>141</sup>

Certain military personnel, though, are properly afforded greater privacy protection than other servicemen and nonmilitary employees. Courts have found that because of the threat of terrorism, servicemen stationed outside the United States have a greater expectation of privacy.<sup>142</sup> Courts have, however, ordered the release of names of military personnel stationed in the United States.<sup>143</sup> In addition, certain other federal employees such as law enforcement personnel possess, by virtue of the nature of their work, protectible privacy interests in their identities and work addresses.<sup>144</sup> (See also discussions of Exemption 2, above, and Exemption 7(C), below.)

Purely personal details pertaining to government employees are protectible under Exemption 6.<sup>145</sup> Indeed, courts generally have recognized the sen-

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<sup>141</sup> See FOIA Update, Sept. 1982, at 3; see also Core v. United States Postal Serv., 730 F.2d 946, 948 (4th Cir. 1984) (qualifications of successful federal applicants); Associated Gen. Contractors, Inc. v. United States, 488 F. Supp. 861, 863 (D. Nev. 1980) (education, former employment, academic achievements and employee qualifications).

<sup>142</sup> See Hudson v. Department of the Army, No. 86-1114, slip op. at 8-9 (D.D.C. Jan. 29, 1987) (finding threat of terrorism creates privacy interest in names, ranks and addresses of Army personnel stationed in Europe, Middle East and Africa), aff'd, 926 F.2d 1215 (D.C. Cir. 1991) (table cite); Falzone v. Department of the Navy, No. 85-3862, slip op. at 2-3 (D.D.C. Nov. 21, 1986) (finding same with respect to names and addresses of naval officers serving overseas or in classified, sensitive or readily deployable positions).

<sup>143</sup> See Hopkins v. Department of the Navy, No. 84-1868, slip op. at 4 (D.D.C. Feb. 5, 1985) (ordering disclosure of "names, ranks and official duty stations of servicemen stationed at Quantico" to life insurance salesman); Jafari v. Department of the Navy, 3 Gov't Disclosure Serv. (P-H) ¶ 83,250, at 84,014 (E.D. Va. May 11, 1983) (finding no privacy interest in "duty status" or attendance records of reserve military personnel) (Privacy Act "wrongful disclosure" suit), aff'd on other grounds, 728 F.2d 247 (4th Cir. 1984).

<sup>144</sup> See New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir. 1984) (Exemption 7(C)); Lesar v. United States Dep't of Justice, 636 F.2d 472, 487-88 (D.C. Cir. 1980) (same); see also FOIA Update, Summer 1986, at 3-4.

<sup>145</sup> See, e.g., American Fed'n of Gov't Employees v. United States, 712 F.2d 931, 932-33 (4th Cir. 1983) (employees' home addresses); Plain Dealer Publishing Co. v. United States Dep't of Labor, 471 F. Supp. 1023, 1028-30 (D.D.C. 1979) (medical, personnel and related documents of employees filing claims under Federal Employees Compensation Act); Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 463-64 (D.D.C. 1978) ("core" personal information, such as marital status or college grades). But see Washington Post Co. v. HHS, 690 F.2d at 258-65 (personal financial information required for appointment as HHS scientific consultant not exempt when (continued...))

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sitivity of information contained in personnel-related files and have accorded protection to the personal details of a federal employee's service.<sup>146</sup> In addition, the identities of persons who apply but are not selected for federal government employment may be protected.<sup>147</sup>

Similarly, the courts customarily have extended protection to the identities of mid- and low-level federal employees accused of misconduct, as well as to the details and results of any internal investigations into such allegations of

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<sup>145</sup>(...continued)

balanced against need for oversight of awarding of government grants); Husek v. IRS, No. 90-CV-923, slip op. at 1 (N.D.N.Y. Aug. 16, 1991) (citizenship, date of birth, educational background and veteran's preference of federal employees not exempt), aff'd, 956 F.2d 1161 (2d Cir. 1992) (table cite).

<sup>146</sup> See, e.g., Ripskis v. HUD, 746 F.2d at 3-4 (names and identifying data contained on evaluation forms of HUD employees who received outstanding performance ratings); Gilbey v. Department of the Interior, No. 89-801, slip op. at 3-4 (D.D.C. Oct. 22, 1990) (United States Park Police officer's job performance evaluations); Tannehill v. Department of the Air Force, No. 87-1335, slip op. at 4-5 (D.D.C. Feb. 4, 1988) (identities of, and reasons why, Air Force officers not eligible for reassignment); Ferri v. United States Dep't of Justice, 573 F. Supp. 852, 862-63 (W.D. Pa. 1983) (FBI background investigation of Assistant U.S. Attorney); Rosenfeld v. HHS, 3 Gov't Disclosure Serv. (P-H) ¶ 83,082, at 83,617 (D.D.C. Jan. 31, 1983) (names of those on proposed reduction-in-force list), aff'd on other grounds, No. 83-1341 (D.C. Cir. Nov. 11, 1983); Dubin v. Department of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981) (studies of supervisors' performance and recommendations for performance awards), aff'd, 697 F.2d 1093 (11th Cir. 1983) (table cite); Ferris v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,084, at 82,362-63 (D.D.C. Dec. 23, 1981) (forms reflecting supervisors' performance objectives and expectations); Information Acquisition Corp. v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,149, at 83,782-83 (D.D.C. Dec. 14, 1981) (FBI background investigation concerning federal judicial appointment); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 167-69 (D.D.C. 1976) (job performance evaluations, reasons for termination and affirmative action program reports), aff'd on other grounds sub nom. National Org. for Women v. Social Sec. Admin., 736 F.2d 727 (D.C. Cir. 1984); cf. Professional Review Org., Inc. v. HHS, 607 F. Supp. 423, 427 (D.D.C. 1985) (resume data of proposed staff of government contract bidder).

<sup>147</sup> Core v. United States Postal Serv., 730 F.2d at 948-49 (protecting identities and qualifications of unsuccessful applicants for federal employment); Holland v. CIA, No. 91-1233, slip op. at 26-29 (D.D.C. Aug. 31, 1992) (protecting identity of person not selected as CIA General Counsel); Commodity News Serv., Inc. v. Farm Credit Admin., No. 88-3146, slip op. at 6-8 (D.D.C. July 31, 1989) (protecting identity of person not selected as receiver of failed bank).

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impropriety.<sup>148</sup> The D.C. Circuit has reaffirmed this position in Dunkelberger v. Department of Justice.<sup>149</sup> It made very clear in Dunkelberger that, even post-Reporters Committee, the D.C. Circuit's decision in Stern v. FBI remains solid guidance for the balancing of the privacy interests of federal employees accused of wrongdoing against the public interest in shedding light on agency activities.<sup>150</sup>

In the early 1980's, a peculiar line of cases began to develop within the D.C. Circuit regarding the professional or business conduct of an individual. Specifically, the courts began to require the disclosure of information concerning an individual's business dealings with the federal government; indeed, even embarrassing information, if related to an individual's professional life, was

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<sup>148</sup> See, e.g., Stern v. FBI, 737 F.2d 84, 94 (D.C. Cir. 1984) (protecting identities of mid-level employees censured for negligence, but requiring disclosure of identity of high-level employee found guilty of serious, intentional misconduct) (Exemption 7(C)); Chamberlain v. Kurtz, 589 F.2d 827, 841-42 (5th Cir.) (names of disciplined IRS agents), cert. denied, 444 U.S. 842 (1979); Atkin v. EEOC, No. 91-2508, slip op. at 30-36 (D.N.J. July 14, 1993) (Inspector General's investigation of low-level employees of EEOC) (Exemption 7(C)); Cotton v. Adams, 798 F. Supp. 22, 25-28 (D.D.C. 1992) (report of Inspector General's investigation of low-level employees of Smithsonian Institution Museum Shops); Schonberger v. National Transp. Safety Bd., 508 F. Supp. 941, 944-45 (D.D.C. 1981) (results of complaint by employee against supervisor), aff'd, 672 F.2d 896 (D.C. Cir. 1981) (table cite); Iglesias v. CIA, 525 F. Supp. 547, 561 (D.D.C. 1981) (agency attorney's response to Office of Professional Responsibility misconduct allegations); cf. Heller v. United States Marshals Serv., 655 F. Supp. 1088, 1091 (D.D.C. 1987) ("extremely strong interest" in protecting privacy of individual who cooperated with internal investigation of possible criminal activity by fellow employees). But see McCutchen v. HHS, No. 91-142, slip op. at 7-12 (D.D.C. Aug. 24, 1992) (ordering disclosure of identities of both federally and privately employed scientists investigated for possible scientific misconduct) (Exemptions 6 and 7(C)) (appeal pending); Gannett River States Publishing Corp. v. Bureau of the Nat'l Guard, No. J91-455, slip op. at 12-14 (S.D. Miss. Mar. 2, 1992) (given previous disclosure of investigative report of helocasting accident, disclosure of actual discipline received would result in "insignificant burden" on soldiers' privacy interests).

<sup>149</sup> 906 F.2d 779, 782 (D.C. Cir. 1990) (upholding FBI's refusal to confirm or deny existence of letters of reprimand or suspension for alleged misconduct by undercover agent) (Exemption 7(C)).

<sup>150</sup> See id. at 781; see also Beck v. Department of Justice, 997 F.2d 1489, 1494 (D.C. Cir. 1993) (upholding agency's refusal to either confirm or deny existence of records concerning alleged wrongdoing of named DEA agents); Hunt v. FBI, 972 F.2d 286, 288-90 (9th Cir. 1992) (protecting contents of investigative file of nonsupervisory FBI agent accused of unsubstantiated misconduct).

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subject to disclosure.<sup>151</sup> Similarly, the Court of Appeals for the Sixth Circuit has suggested that the disclosure of a document prepared by a government employee during the course of his employment "will not constitute a clearly unwarranted invasion of personal privacy simply because it would invite a negative reaction or cause embarrassment in the sense that a position is thought by others to be wrong or inadequate."<sup>152</sup>

It is quite significant, however, that in five later cases--Beck v. Department of Justice, Dunkelberger v. Department of Justice, Carter v. United States Department of Commerce, Stern v. FBI and Ripskis v. HUD--the D.C. Circuit, in reaching firm nondisclosure decisions, paid no heed to this consideration at all.<sup>153</sup> Moreover, under Reporters Committee, an individual doing business

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<sup>151</sup> See, e.g., Sims v. CIA, 642 F.2d 562, 574 (D.C. Cir. 1980) (names of persons who conducted scientific and behavioral research under contracts with or funded by CIA); Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 399-400 (D.C. Cir. 1980) (identities of trade sources who supplied information to CFTC); Cohen v. EPA, 575 F. Supp. 425, 430 (D.D.C. 1983) (names of suspected EPA "Superfund" violators) (Exemption 7(C)); Stern v. SBA, 516 F. Supp. 145, 149 (D.D.C. 1980) (names of agency personnel accused of discriminatory practices).

<sup>152</sup> Schell v. HHS, 843 F.2d 933, 939 (6th Cir. 1988); see also Kurzon v. HHS, 649 F.2d 65, 69 (1st Cir. 1981) (names and addresses of unsuccessful grant applicants to National Cancer Institute); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) ("disclosure [of names of State Department's officers and staff members involved in highly publicized case] merely establishes State employees' professional relationships or associates these employees with agency business").

<sup>153</sup> Beck v. Department of Justice, 997 F.2d at 1492 (where no evidence of wrongdoing exists, there is "no public interest to be balanced against the two [DEA] agents' obvious interest in the continued confidentiality of their personnel records"); Dunkelberger v. Department of Justice, 906 F.2d at 781-82 (recognizing that FBI agent has privacy interest in protecting his employment records against public disclosure); Carter v. United States Dep't of Commerce, 830 F.2d at 391-92 (withholding identities of private-sector attorneys subject to Patent and Trademark Office disciplinary investigations); Stern v. FBI, 737 F.2d at 91 (federal employees have privacy interest in information about their employment); Ripskis v. HUD, 746 F.2d at 3-4 ("substantial privacy interests" in performance appraisals of federal employees); see also Professional Review Org., Inc. v. HHS, 607 F. Supp. at 427 (finding protectible privacy interests in resumes of professional staff of successful government contract applicant sought by unsuccessful bidder); Hemenway v. Hughes, 601 F. Supp. at 1006 (citizenship information on journalists accredited to attend press briefings held protectible). But see Washington Post Co. v. United States Dep't of Justice, 863 F.2d 96, 100-01 (D.C. Cir. 1988) (information relating to business judgments and decisions made during development of pharmaceutical not protectible under Exemption 7(C)); McCutchen v. HHS, slip op. at 7-12 (finding diminished privacy interest in professional activities in connection with allegations of scientific misconduct).



## EXEMPTION 6

with the federal government certainly may have some protectible privacy interest, and such dealings with the government do not alone necessarily implicate a public interest that furthers the purpose of the FOIA.<sup>154</sup>

In applying Exemption 6, it must be remembered that all reasonably segregable, nonexempt portions of requested records must be released.<sup>155</sup> For example, in Department of the Air Force v. Rose, the Supreme Court ordered the release of case summaries of disciplinary proceedings, provided that personal identifying information was deleted.<sup>156</sup> Likewise, circuit courts of appeals have upheld the nondisclosure of the names and identifying information of employee-witnesses where disclosure would link each witness to a particular previously disclosed statement,<sup>157</sup> have ordered the disclosure of computerized lists of numbers and types of drugs routinely ordered by the congressional pharmacy after deletion of any item identifiable to a specific individual,<sup>158</sup> and have ordered the disclosure of documents concerning disciplined IRS employ-

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<sup>154</sup> See 489 U.S. at 774 (information concerning a defense contractor, if such exists, would reveal nothing directly about the behavior of the Congressman with whom he allegedly dealt or about the conduct of the Department of Defense in awarding contracts to his company); accord Halloran v. VA, 874 F.2d 315, 324 (5th Cir. 1989) (public interest in learning about VA's relationship with its contractor is served by release of documents with redactions of identities of company employees suspected of fraud). But cf. Commodity News Serv., Inc. v. Farm Credit Admin., No. 88-3146, slip op. at 4-5 (D.D.C. July 31, 1989) (personal resume of appointed receiver of failed bank not protectible).

<sup>155</sup> See 5 U.S.C. § 552(b) (1988) (final sentence); see also Krikorian v. Department of State, 984 F.2d 461, 466-67 (D.C. Cir. 1993) ("The 'segregability' requirement applies to all documents and all exemptions in the FOIA." (quoting Center for Auto Safety v. EPA, 731 F.2d 16, 21 (D.C. Cir. 1984))) (Exemptions 1, 3 and 5).

<sup>156</sup> 425 U.S. at 380-81; see also FOIA Update, Winter 1986, at 6; cf. Ripskis v. HUD, 746 F.2d at 4 (agency voluntarily released outstanding performance rating forms with identifying information deleted); Church of Scientology v. IRS, 816 F. Supp. 1138, 1160 (W.D. Tex. 1993) (agency ordered to protect employees' privacy in handwriting by typing records at requester's expense) (appeal pending).

<sup>157</sup> L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 923 (11th Cir. 1984) (Exemption 7(C)); cf. United States Dep't of State v. Ray, 112 S. Ct. 541, 548 (1991) (de minimis privacy invasion from release of personal information about unidentified person becomes significant when information is linked to particular individual).

<sup>158</sup> Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1468-69 (D.C. Cir. 1983); cf. Frets v. Department of Transp., No. 88-404-W-9, slip op. at 9 (W.D. Mo. Dec. 14, 1989) (urinalysis reports of air traffic controllers ordered disclosed with identities deleted).

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ees, provided that all names and other identifying information were deleted.<sup>159</sup>

Nevertheless, in some situations the deletion of personal identifying information may not be adequate to provide privacy protection. It is significant in this regard that in Department of the Air Force v. Rose, the Supreme Court specifically admonished that if it were determined on remand that the deletions of personal references were not sufficient to safeguard privacy, the summaries of disciplinary hearings should not be released.<sup>160</sup>

Despite the admonition of the Supreme Court in Rose, though, two courts recently have permitted redaction only of information that directly identifies the individuals to whom it pertains. In ordering the disclosure of information pertaining to air traffic controllers who were reinstated in their jobs shortly after the 1982 strike, the Sixth Circuit held that only items that "by themselves" would identify the individual--names, present and pre-removal locations, and social security numbers--could be withheld.<sup>161</sup> It later modified its opinion to state that, although there might be instances in which an agency could justify the withholding of "information other than 'those items which "by themselves" would identify the individuals,'" the FAA in this case had "made no such particularized effort, relying generally on the claim that 'fragments of information' might be able to be pieced together into an identifiable set of circumstances."<sup>162</sup> Similarly, the District Court for the Northern District of California ordered the disclosure of application packages for candidates for an Air Force graduate degree program with the redaction of only the applicants' names, addresses and social security numbers.<sup>163</sup> Although the packets regularly contained detailed descriptions of the applicants' education, careers, projects and achievements, the court concluded that it could not "discern how there is anything more than a 'mere possibility' that [plaintiff] or others will be able to discern to which particular applicant each redacted application corresponds."<sup>164</sup>

The majority of courts, however, take a broader view of the redaction process. For example, to protect those persons who were the subjects of disciplinary actions which were later dismissed, the D.C. Circuit has upheld the nondisclosure of public information contained in such disciplinary files where

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<sup>159</sup> Chamberlain v. Kurtz, 589 F.2d at 841-42; cf. Senate of P.R. v. Department of Justice, No. 84-1829, slip op. at 23 (D.D.C. Aug. 24, 1993) (information concerning cooperating inmate released after redaction of identifying details).

<sup>160</sup> 425 U.S. at 381.

<sup>161</sup> Norwood v. FAA, 993 F.2d 570, 575 (6th Cir.), modified, No. 92-5820 (6th Cir. July 9, 1993), reh'g denied (6th Cir. Aug. 12, 1993).

<sup>162</sup> Norwood v. FAA, No. 92-5820, slip op. at 1 (6th Cir. July 9, 1993).

<sup>163</sup> Manos v. United States Dep't of the Air Force, No. C-92-3986, slip op. at 2-5 (N.D. Cal. Mar. 24, 1993), reconsideration denied (N.D. Cal. Apr. 9, 1993), stay of disclosure order denied, No. 93-15672 (9th Cir. Apr. 28, 1993).

<sup>164</sup> Id. at 3.

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the redaction of personal information would not be adequate to protect the privacy of the subjects because the requester could easily obtain and compare unredacted copies of the documents from public sources.<sup>165</sup> Likewise, when a FOIA request is by its very terms limited to privacy-sensitive information pertaining to an identified or identifiable individual, segregation is not possible.<sup>166</sup>

When a request is focused on records concerning an identifiable individual and the records are of a particularly sensitive nature, it may be necessary to go a step further than withholding in full without segregation: It may be necessary to follow special "Glomarization" procedures to protect the "targeted" individual's privacy. If a request is formulated in such a way that even acknowledgment of the existence of responsive records would cause harm, then the subject's privacy can be protected only by refusing to confirm or deny that responsive records exist. This special procedure is a widely accepted method of protecting, for example, even the mere mention of a person in law enforcement records.<sup>167</sup> (For a more detailed explanation of such privacy "Glomarization," see the discussion of Exemption 7(C), below.)

This procedure is equally applicable to protect an individual's privacy

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<sup>165</sup> Carter v. United States Dep't of Commerce, 830 F.2d at 391; see also, e.g., Marzen v. HHS, 825 F.2d 1148, 1152 (7th Cir. 1987) (redaction of "identifying characteristics" would not protect privacy of deceased infant's family because others could ascertain identity and "would learn the intimate details connected with the family's ordeal"); Alirez v. NLRB, 676 F.2d 423, 428 (10th Cir. 1982) (mere deletion of names and other identifying data concerning small group of co-workers determined to be inadequate to protect them from embarrassment or reprisals because requester could still possibly identify individuals) (Exemption 7(C)); Harry v. Department of the Army, No. 92-1654, slip op. at 9 (D.D.C. Sept. 13, 1993) (redaction of ROTC personnel records impossible because "intimate character" of ROTC corps at requester's university would make records recognizable to him); Frets v. Department of Transp., slip op. at 7 (disclosure of handwritten statements would identify those who came forward with information concerning drug use by air traffic controllers even if names were redacted); Singer v. Rourke, No. 87-1213, slip op. at 11 (D. Kan. Dec. 30, 1988) (given the particularity of the information and the parties' familiarity with each other, redaction would be impracticable and would not sufficiently protect identities).

<sup>166</sup> See, e.g., Hunt v. FBI, 972 F.2d at 288 ("public availability" of accused FBI agent's name does not defeat privacy protection and "would make redactions of [the agent's name in] the file a pointless exercise"); Cotton v. Adams, 798 F. Supp. at 27 (releasing any portion of documents would "abrogate the privacy interests" when request is for documents pertaining to two named individuals); Schonberger v. National Transp. Safety Bd., 508 F. Supp. at 945 (no segregation possible where request was for one employee's file).

<sup>167</sup> See, e.g., Dunkelberger v. Department of Justice, 906 F.2d at 782; Antonelli v. FBI, 721 F.2d 615, 617-19 (7th Cir. 1983), cert. denied, 467 U.S. 1210 (1984); see also FOIA Update, Winter 1986, at 3.

## EXEMPTION 7

interest in sensitive non-law enforcement records.<sup>168</sup> For example, many agencies maintain an Employee Assistance Program for their employees, operating it on a confidential basis in which privacy is assured. An agency would release neither a list of the employees who participate in such a program nor any other information concerning the program without redacting the names of participants. Logically, then, in responding to a request for any employee assistance counseling records pertaining to a named employee, the agency could protect the privacy of that individual only by refusing to confirm or deny the existence of responsive records.

Similarly, the "Glomarization" approach would be appropriate in responding to a request targeting such matters as a particular citizen's welfare records or the disciplinary records of an employee accused of relatively minor misconduct.<sup>169</sup> Generally, this approach is proper whenever mere acknowledgment of the existence of records would be tantamount to disclosing an actual record the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy."<sup>170</sup> It must be remembered, however, that this response is effective only so long as it is given consistently for a distinct category of requests.<sup>171</sup> If it were to become known that an agency gave a "Glomarization" response only when records do exist and a "no records" response otherwise, the purpose of this special approach would be defeated.<sup>172</sup>

## EXEMPTION 7

Exemption 7 of the FOIA, as amended, protects from disclosure "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

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<sup>168</sup> See FOIA Update, Spring 1986, at 2.

<sup>169</sup> See Beck v. Department of Justice, 997 F.2d at 1493 (refusing to confirm or deny existence of disciplinary records pertaining to named DEA agents) (Exemptions 6 and 7(C)); Dunkelberger v. Department of Justice, 906 F.2d at 782 (refusal to confirm or deny existence of letter of reprimand or suspension of FBI agent) (Exemption 7(C)); Cotton v. Adams, 798 F. Supp. at 26 n.8 (suggesting that "the better course would have been for the Government to refuse to confirm or deny the existence of responsive materials"); Ray v. United States Dep't of Justice, 778 F. Supp. 1212, 1213-15 (S.D. Fla. 1991) (upholding INS's refusal to confirm or deny existence of investigative records concerning INS officer) (Exemptions 6 and 7(C)).

<sup>170</sup> See FOIA Update, Spring 1986, at 2; see also Ray v. United States Dep't of Justice, 558 F. Supp. 226, 228 (D.D.C. 1982) (dicta) (upholding agency's refusal to confirm or deny existence of records pertaining to plaintiff's former attorney), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (table cite).

<sup>171</sup> See FOIA Update, Winter 1986, at 3.

<sup>172</sup> See id.

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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 a 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."<sup>1</sup>

As originally enacted, this exemption permitted the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."<sup>2</sup> As such, it was consistently construed to exempt all material contained in an investigatory file, regardless of the status of the underlying investigation or the nature of the documents requested.<sup>3</sup> In 1974, Congress rejected the application of a "blanket" exemption for investigatory files and narrowed the scope of Exemption 7 by requiring that withholding be justified by one of six specified types of harm. Under this revised Exemption 7 structure, an analysis of whether a record was protected by this exemption involved two steps. First, the record had to qualify as an "investigatory record compiled for law enforcement purposes." Second, its disclosure had to be found to threaten one of the enumerated harms of Exemption 7's six subparts.<sup>4</sup>

In 1986, after many years of administrative and legislative consideration of the need for FOIA reform legislation, Congress amended Exemption 7 once again, retaining its basic structure as established by the 1974 FOIA amendments, but significantly broadening the protection given to law enforcement records virtually throughout the exemption and its subparts.<sup>5</sup> The Freedom of In-

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<sup>1</sup> 5 U.S.C. § 552(b)(7) (1988).

<sup>2</sup> 5 U.S.C. § 552(b)(7) (1970) (amended 1974 and 1986).

<sup>3</sup> See, e.g., Weisberg v. United States Dep't of Justice, 489 F.2d 1195, 1198-1202 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974).

<sup>4</sup> See FBI v. Abramson, 456 U.S. 615, 622 (1982).

<sup>5</sup> United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989) (shift from "would constitute" standard to "could reasonably be expected to constitute" standard "represents a congressional effort to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7]"); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989) ("The 1986 amendment broadened the scope of exemption 7's threshold requirement . . ."), cert. denied, 497 U.S. 1010 (1990); Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 22 (D.D.C. Sept. 25, 1987) (magistrate's recommendation) (holding that record created by  
(continued...)

## EXEMPTION 7

formation Reform Act of 1986 modified the existing threshold requirement of Exemption 7 in several distinct respects. It deleted the word "investigatory" and added the words "or information," such that Exemption 7 protections are now potentially available to all "records or information compiled for law enforcement purposes."<sup>6</sup> And, except for Exemption 7(B) and part of Exemption 7(E), it altered the requirement that an agency demonstrate that disclosure "would" cause the harm each subsection seeks to prevent, to the lesser standard that disclosure "could reasonably be expected to" cause the specified harm.<sup>7</sup>

The most technical of these language modifications is the expansion of the exemption to cover "information" compiled for law enforcement purposes. This modification, by its terms, permits Exemption 7 to apply not only to compilations of information as they are preserved in particular records requested, but also to any information within the record itself, so long as that information was compiled for law enforcement purposes.<sup>8</sup> It plainly was designed "to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which [it] is maintained."<sup>9</sup> It was intended to avoid use of any mechanical process for determining the purpose for which a physical record was created and to instead establish a focus on the purpose for which information contained in a record has been generated.<sup>10</sup> In making their determinations of threshold Exemption 7 applicability, agencies should now focus on the content and compilation purpose of each item of information involved, regardless of the overall character of the record in which it happens to be maintained.<sup>11</sup>

The amendment altering the unit of focus under Exemption 7 from a "record" to an item of "information" builds upon the approach to Exemption 7's threshold that was employed by the Supreme Court in FBI v. Abramson,<sup>12</sup> in which the Court pragmatically focused on the "kind of information" contained

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<sup>5</sup>(...continued)

nongovernmental entity independent of Department's investigation but later compiled for that investigation satisfied threshold of Exemption 7 as "broadened" by 1986 amendments and noting that an "[a]gency's burden of proof in this threshold test has been lightened considerably"), adopted (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96 (D.C. Cir. 1988).

<sup>6</sup> Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48.

<sup>7</sup> Id.; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 9-13 (Dec. 1987) [hereinafter Attorney General's Memorandum].

<sup>8</sup> Attorney General's Memorandum at 5.

<sup>9</sup> S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983).

<sup>10</sup> See id.

<sup>11</sup> Id.

<sup>12</sup> 456 U.S. at 626.

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in the law enforcement records before it. The amendment essentially codifies prior judicial determinations that an item of information originally compiled by an agency for a law enforcement purpose does not lose Exemption 7 protection merely because it is maintained in or recompiled into a non-law enforcement record.<sup>13</sup> This properly places "emphasis on the contents, and not the physical format of documents."<sup>14</sup>

A particularly difficult "compilation" issue has finally been put to rest by the Supreme Court. In resolving whether information which the government did not initially obtain or generate for law enforcement purposes that subsequently was compiled for a valid law enforcement purpose qualifies for Exemption 7 protection, an issue in which lower court decisions were in conflict,<sup>15</sup> the Supreme Court decisively held that the "compilation for law enforcement purposes" need not occur at the time the information was created, but merely must occur prior to "when the Government invokes the Exemption."<sup>16</sup> In rejecting the distinction between documents originally compiled or obtained for law enforcement purposes and those later assembled for such purposes, the Court held that the term "compiled" must be accorded its ordinary meaning--which includes "materials collected and assembled from various

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<sup>13</sup> See, e.g., Lesar v. United States Dep't of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980).

<sup>14</sup> Center for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 590 (D.D.C. 1983) (applying Abramson to hold duplicate copy of congressional record maintained in agency files is not an "agency record"); see also, e.g., ISC Group v. DOD, No. 88-631, slip op. at 13 (D.D.C. May 22, 1989) (failure to protect investigatory report prepared by private company expressly for agency criminal investigation pursuant to Exemption 7 "would elevate form over substance and frustrate the purpose of the exemption"); cf. In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988) (law enforcement privilege protects testimony about contents of files which would themselves be protected, because public interest in safeguarding ongoing investigations is identical in both situations).

<sup>15</sup> Compare Crowell & Moring v. DOD, 703 F. Supp. 1004, 1009-10 (D.D.C. 1989) (solicitation and contract bids protected) and Gould Inc. v. GSA, 688 F. Supp. 688, 691 (D.D.C. 1988) (routine audit reports protected) with John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) (routine audit reports not protected), rev'd & remanded, 493 U.S. 146 (1989), reh'g denied, 493 U.S. 1064 (1990) and Hatcher v. United States Postal Serv., 556 F. Supp. 331, 335 (D.D.C. 1982) (routine contract negotiation and oversight material not protected).

<sup>16</sup> John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989), reh'g denied, 493 U.S. 1064 (1990); see also KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (applying John Doe Agency to hold that information regarding personnel interview conducted before investigation commenced and later recompiled for law enforcement purposes satisfied Exemption 7 threshold); Africa Fund v. Mosbacher, No. 92-289, slip op. at 9 (S.D.N.Y. May 26, 1993) (applying John Doe Agency to hold "original purpose for which the documents were collected is irrelevant to Exemption 7(A)").

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sources or other documents"--and it found that the plain meaning of the statute contains "no requirement that the compilation be effected at a specific time."<sup>17</sup>

A considerably greater expansion of Exemption 7's scope results from the FOIA Reform Act's removal of the requirement that records or information be "investigatory" in character in order to qualify for Exemption 7 protection.<sup>18</sup> Under the former formulations, agencies and courts considering Exemption 7 issues often found themselves struggling with the "investigatory" requirement, which held the potential of disqualifying sensitive law enforcement information from Exemption 7 protection. Courts construing this statutory term generally interpreted it as requiring that the records in question result from specifically focused law enforcement inquiries as opposed to more routine monitoring or oversight of government programs.<sup>19</sup>

The distinction between "investigatory" and "noninvestigatory" law enforcement records, however, was not always so clear.<sup>20</sup> Moreover, the "investigatory" requirement per se was frequently blurred together with the "law enforcement purposes" aspect of the exemption, so that it sometimes became difficult to distinguish between the two.<sup>21</sup> Law enforcement manuals containing sensitive information about specific procedures and guidelines followed by an agency were held not to qualify as "investigatory records" because they had not originated in connection with any specific investigation, even though they clearly had been compiled for law enforcement purposes.<sup>22</sup>

By eliminating the "investigatory" requirement under Exemption 7, the FOIA Reform Act should put an end to such troublesome distinctions and

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<sup>17</sup> John Doe Agency v. John Doe Corp., 493 U.S. at 153.

<sup>18</sup> Attorney General's Memorandum at 6.

<sup>19</sup> Compare, e.g., Sears, Roebuck & Co. v. GSA, 509 F.2d 527, 529-30 (D.C. Cir. 1974) (records submitted for mere monitoring of employment discrimination found not "investigatory") with Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974) (records of agency review of public schools suspected of discriminatory practices found "investigatory").

<sup>20</sup> Compare, e.g., Gregory v. FDIC, 470 F. Supp. 1329, 1334 (D.D.C. 1979) (bank examination report "typifies routine oversight" and thus is not "investigatory"), rev'd on other grounds, 631 F.2d 896 (D.C. Cir. 1980) with Copus v. Rougeau, 504 F. Supp. 534, 538 (D.D.C. 1980) (compliance review forecast report "clearly" an investigative record).

<sup>21</sup> See, e.g., Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d 73, 81 & n.47 (D.C. Cir. 1974).

<sup>22</sup> See Sladek v. Bensinger, 605 F.2d 899, 903 (5th Cir. 1979) (holding Exemption 7 inapplicable to DEA manual that "was not compiled in the course of a specific investigation"); Cox v. United States Dep't of Justice, 576 F.2d 1302, 1310 (8th Cir. 1978) (same).



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broaden the potential sweep of the exemption's coverage.<sup>23</sup> The protections of Exemption 7's six subparts are now available to all records or information that have been compiled for "law enforcement purposes."<sup>24</sup> Even records generated pursuant to routine agency activities that could never be regarded as "investigatory" now qualify for Exemption 7 protection where those activities involve a law enforcement purpose. This includes records generated for general law enforcement purposes that do not necessarily relate to specific investigations. Records such as law enforcement manuals, for example, which previously were found unqualified for Exemption 7 protection only because they were not "investigatory" in character,<sup>25</sup> now should readily satisfy the exemption's revised threshold requirement.<sup>26</sup> The sole issue thus remaining is the application of the phrase "law enforcement purposes" in the context of the amended Exemption 7.

Although there is still relatively little case law under the 1986 FOIA amendments addressing the parameters of this new, less demanding threshold standard of Exemption 7, it is useful to examine the cases interpreting the identical "law enforcement purposes" language under the prior version of this exemption, as all law enforcement records found qualified for exemption protection under the pre-1986 language of Exemption 7 undoubtedly remain so.<sup>27</sup> The "law" to be enforced within the meaning of "law enforcement purposes"

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<sup>23</sup> Attorney General's Memorandum at 7.

<sup>24</sup> Id.

<sup>25</sup> See, e.g., Sladek v. Bensinger, 605 F.2d at 903; Cox v. United States Dep't of Justice, 576 F.2d at 1310.

<sup>26</sup> Attorney General's Memorandum at 7; see also, e.g., Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 14-15 (D.D.C. Dec. 19, 1990) (documents which relate to INS's law enforcement procedures meet threshold requirement as "purpose in preparing these documents relat[es] to legitimate concerns that federal immigration laws have been or may be violated"). But see Cowsen-El v. United States Dep't of Justice, 826 F. Supp. 532, 533 (D.D.C. 1992) (threshold not met by Bureau of Prisons' guidelines covering how prison officials should count and inspect prisoners).

<sup>27</sup> See Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d at 80-82 (threshold of Exemption 7 met if investigation focuses directly on specific illegal acts which could result in civil or criminal penalties); Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (based upon pre-1986 language, Service Lookout Book used to assist in exclusion of inadmissible aliens found to satisfy threshold requirement); U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 4 (D.D.C. Mar. 26, 1986) (records pertaining to acquisition of two armored limousines for President meet threshold test; activities involved investigation of how best to safeguard President); Nader v. ICC, No. 82-1037, slip op. at 10-11 (D.D.C. Nov. 23, 1983) (disbarment proceeding meets Exemption 7 threshold because it is "quasi-criminal" in nature).

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includes both civil and criminal statutes,<sup>28</sup> as well as those statutes authorizing administrative (i.e., regulatory) proceedings.<sup>29</sup> In addition to federal law enforcement, Exemption 7 applies to records compiled to enforce state law,<sup>30</sup> as

<sup>28</sup> See, e.g., McDonnell v. United States, No. 91-5916, slip op. at 61 (3d Cir. Sept. 21, 1993) (threshold satisfied where FBI investigated allegations of crimes involved in Morro Castle incident); Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d at 81 & n.46; Williams v. IRS, 479 F.2d 317, 318 (3d Cir.), cert. denied, 414 U.S. 1024 (1973); Durham v. United States Dep't of Justice, No. 91-2636, slip op. at 8 (D.D.C. Aug. 17, 1993) (threshold met by investigation of murder of Postal Service employee); Assassination Archives & Research Ctr. v. United States Dep't of Justice, No. 92-2193, slip op. at 6-7 (D.D.C. Apr. 29, 1993) (threshold met where file compiled in course of FBI investigatory activities to determine possible violations of federal statutes); Stone v. Defense Investigative Serv., 816 F. Supp. 782, 787 (D.D.C. 1993) (threshold met in foreign counterintelligence investigation and by investigation into possible violation of Interstate Transportation of Stolen Property Act) (appeal pending); Abdullah v. FBI, No. 92-356, slip op. at 4 (D.D.C. Aug. 10, 1992) (threshold met by records compiled in course of FBI investigation of drug trafficking) (appeal pending); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 394 (W.D.N.Y. 1992) (USBP form meets threshold because it is generated in investigations of violations of federal immigration law); May v. IRS, No. 90-1123-W-2, slip op. at 6 (W.D. Mo. Dec. 9, 1991) (threshold satisfied by documents compiled as part of criminal and civil investigations involving tax liability); Rodriguez v. United States Postal Serv., No. 90-1886, slip op. at 12 (D.D.C. Oct. 2, 1991) (threshold met where Postal Service information came from documents recording law enforcement agencies' criminal investigations).

<sup>29</sup> See, e.g., Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d at 373 (administrative determination has "salient characteristics of 'law enforcement' contemplated" by Exemption 7 threshold requirement); Johnson v. Federal Bureau of Prisons, No. 90-H-645-E, slip op. at 5-6 (N.D. Ala. Nov. 1, 1990) (documents pertaining to investigation of assault in federal correctional institution, of which plaintiff was found guilty by administrative hearing, meet threshold of Exemption 7); Ehringhaus v. FTC, 525 F. Supp. 21, 22-23 (D.D.C. 1980) (documents prepared as part of FTC investigation into advertising practices of cigarette manufacturers satisfy Exemption 7 threshold).

<sup>30</sup> See Hopkinson v. Shillinger, 866 F.2d at 1222 n.27; Wojtczak v. United States Dep't of Justice, 548 F. Supp. 143, 146-48 (E.D. Pa. 1982); see also Shaw v. FBI, 749 F.2d 58, 64 (D.C. Cir. 1984) (authorized federal investigation into the commission of state crime constitutes valid criminal law enforcement investigation, which qualifies confidential source-provided information for protection under the second half of Exemption 7(D)); Rojem v. United States Dep't of Justice, 775 F. Supp. 6, 10 (D.D.C. 1991) (material provided to FBI by state law enforcement agency for assistance in that state agency's criminal investigation is "compiled for law enforcement purposes").

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well as foreign law.<sup>31</sup> However, if the agency lacks the authority to pursue a particular law enforcement matter, Exemption 7 protection may not be afforded.<sup>32</sup>

Additionally, "[b]ackground security investigations by governmental units which have authority to conduct such functions" have been held by most courts to meet the threshold tests under the former formulations of Exemption 7.<sup>33</sup>

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<sup>31</sup> See, e.g., Bevis v. Department of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986); see also FOIA Update, Spring 1984, at 6-7.

<sup>32</sup> See, e.g., Weissman v. CIA, 565 F.2d 692, 696 (D.C. Cir. 1977) (CIA's "full background check within the United States of a citizen who never had any relationship with the CIA is not authorized and the law enforcement exemption is accordingly unavailable."); Kuzma v. IRS, 775 F.2d 66, 69 (2d Cir. 1985) ("[u]nauthorized or illegal investigative tactics may not be shielded from public by use of FOIA exemptions"); Miscavige v. IRS, No. 91-3721, slip op. at 2, 5 (C.D. Cal. Dec. 9, 1992) (no law enforcement purpose for post-1986 documents because IRS investigation concluded in 1985) (appeal pending). But see Pratt v. Webster, 673 F.2d 408, 423 (D.C. Cir. 1982) ("Exemption 7 refers to purposes rather than methods"; questionable methods do not defeat exemption's coverage where law enforcement is primary purpose); Iglesias v. FBI, No. G79-350, slip op. at 15 (W.D. Mich. July 3, 1985) (provided a rational nexus can be found between investigation and agency's law enforcement duties, courts will not inquire into legality of agency's methods), subsequent opinion (W.D. Mich. Nov. 18, 1985); Hrones v. CIA, 685 F.2d 13, 19 (1st Cir. 1982) (legality of agency's actions in national security investigation falls outside scope of judicial review in FOIA action); Edwards v. CIA, 512 F. Supp. 689, 694 (D.D.C. 1981) (dictum) (disclosure of sources, methods and identities of those involved in actions outside agency charter not necessarily required because of risks attendant upon public scrutiny).

<sup>33</sup> S. Conf. Rep. 1200, 93d Cong., 2d Sess. 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6291; see, e.g., Doe v. United States Dep't of Justice, 790 F. Supp. 17, 20-21 (D.D.C. 1992) (threshold met by background investigation of individual conditionally offered employment as attorney); Miller v. United States, 630 F. Supp. 347, 349 (E.D.N.Y. 1986) (USIA background security investigation of federal job applicant meets Exemption 7 threshold); Block v. FBI, No. 83-813, slip op. at 14-15 (D.D.C. Nov. 19, 1984) (FBI background investigation of applicant for federal employment protectible under Exemption 7); Meeropol v. Smith, No. 85-1121, slip op. at 78 (D.D.C. Feb. 29, 1984) (CIA background investigation falls within threshold of Exemption 7), aff'd in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986); Information Acquisition Corp. v. United States Dep't of Justice, No. 77-839, slip op. at 4-5 (D.D.C. May 23, 1979) (citizen complaint in pre-appointment background investigation of Supreme Court Justice Rehnquist protected pursuant to Exemption 7); DeFina v. FAA, No. 75-1526, slip op. at 16 (S.D.N.Y. Feb. 26, 1976) (FBI background investigation protectible pursuant to Exemption 7); Koch v. Department of Justice, 376 F. Supp. 313, 315 (D.D.C. 1974) (background investigations fell within Exemption 7 because they involved determina-

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Personnel investigations of government employees also are protected if they focus on "specific and potentially unlawful activity by particular employees" of a civil or criminal nature.<sup>34</sup> By contrast, "an agency's general monitoring of its own employees to ensure compliance with the agency's statutory mandate and regulations" does not satisfy Exemption 7's threshold requirement.<sup>35</sup>

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<sup>33</sup>(...continued)

tions as to whether applicants had engaged in criminal conduct which would disqualify them for federal employment); see also FOIA Update, Fall 1985, at 6. But see Benson v. United States, No. 80-15-MC, slip op. at 3 (D. Mass. June 12, 1980) (court "not satisfied" that background investigations conducted by the Civil Service Commission are "investigatory records compiled for law enforcement purposes"); Information Acquisition Corp. v. United States Dep't of Justice, No. 77-840, slip op. at 3 (D.D.C. Apr. 7, 1978) (court "not persuaded" that records of pre-appointment background investigation of former Chief Justice Burger qualify for protection under Exemption 7).

<sup>34</sup> Stern v. FBI, 737 F.2d 84, 89 (D.C. Cir. 1984); see also Strang v. Arms Control & Disarmament Agency, 864 F.2d 859, 862 (D.C. Cir. 1989) (agency investigation into employee violation of national security laws); Jackson v. Federal Bureau of Prisons, No. 87-5186, slip op. at 4 (D.C. Cir. Jan. 5, 1988) (prison investigation into allegation that prison official improperly disclosed inmate's personal file does not satisfy threshold without showing that investigation focused on law violation rather than internal personnel matters); Atkin v. EEOC, No. 91-2508, slip op. at 28-29 (D.N.J. June 24, 1993) (threshold met by documents compiled in investigation of agency employees conducted in response to allegations which, if proven, could result in disciplinary proceedings, as well as criminal sanctions); Taylor v. Office of Special Counsel, No. 91-N-734, slip op. at 6-8 (D. Colo. Mar. 22, 1993) (investigation meets threshold where it pertains to violation of particular federal personnel law); Housley v. United States Dep't of the Treasury, 697 F. Supp. 3, 5 (D.D.C. 1988) (investigation concerning misconduct by special agent, which if proved could have resulted in federal civil or criminal sanctions, satisfies Exemption 7 threshold); Snider v. Mossinghoff, No. 82-2903, slip op. at 2 (D.D.C. Sept. 14, 1983) (investigation concerning attorney's professional conduct meets Exemption 7 threshold); Schwartz v. Department of Justice, No. 76-2039, slip op. at 1-2 (D.D.C. Feb. 9, 1978) (investigation concerning alleged improprieties by Assistant United States Attorney in prosecution of criminal case satisfies Exemption 7 threshold); cf. In re Dep't of Investigation of City of New York, 856 F.2d 481, 485 (2d Cir. 1988) (law enforcement privilege found applicable in discovery context where investigation served "dual purposes of evaluating conduct in office and enforcing the criminal law").

<sup>35</sup> Stern v. FBI, 737 F.2d at 89 (dictum); see also Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d at 81 (distinguishing between oversight of performance of employees and investigations focusing on specific illegal acts of employees); Fine v. United States Dep't of Energy, 823 F. Supp. 888, 907-08 (D.N.M. 1993) (threshold met by agency with both administrative and law enforcement functions where documents compiled during investigation of specific allegations and not as part of routine oversight); Maryland Coalition for In-  
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In determining whether a document was "compiled for law enforcement purposes" under Exemption 7, the courts have in the past generally distinguished between agencies with both law enforcement and administrative functions and those whose principal function is criminal law enforcement.<sup>36</sup> An agency whose functions are "mixed" usually had to show that the records at issue involved the enforcement of a statute or regulation within its authority.<sup>37</sup> Courts have additionally required that the records be compiled for "adjudicative

<sup>35</sup>(...continued)

Integrated Educ., Inc. v. United States Dep't of Educ., No. 89-2851, slip op. at 9-10 (D.D.C. July 20, 1992) (mixed-function agency's documents, compiled as result of its "routine oversight responsibilities," do not meet threshold) (appeal pending); Cotton v. Adams, 798 F. Supp. 22, 25 (D.D.C. 1992) (citing Stern and Rural Hous. Alliance, holding agency's internal investigation of its own employees satisfies threshold only if it focuses directly on illegal acts which could result in criminal or civil sanctions); Greenpeace USA, Inc. v. EPA, 735 F. Supp. 13, 15 (D.D.C. 1990) (threshold not met for internal investigation into whether employee complied with agency conflict-of-interest regulations); Frets v. Department of Transp., No. 88-404-CV-W-9, slip op. at 4-5 (W.D. Mo. Dec. 14, 1989) (records compiled for FAA investigation into possible drug use by air traffic controller, which could result in dismissal, held not compiled for law enforcement purposes); Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 15 (D. Ariz. July 9, 1987) (internal investigation of shooting death of FBI Special Agent does not meet Exemption 7 threshold). But cf. Nagel v. HEW, 725 F.2d 1438, 1441 (D.C. Cir. 1984) (An "employer's determination whether a federal employee is performing his job adequately constitutes an authorized law enforcement activity" within the meaning of subsection (e)(7) of the Privacy Act of 1974.).

<sup>36</sup> Attorney General's Memorandum at 7.

<sup>37</sup> See Lewis v. IRS, 823 F.2d 375, 379 (9th Cir. 1987) (threshold met where IRS "had a purpose falling within its sphere of enforcement authority in compiling particular documents"); Birch v. United States Postal Serv., 803 F.2d 1206, 1210-11 (D.C. Cir. 1986) (threshold met because enforcement of laws regarding use of mails falls within statutory authority of Postal Service); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 748 (9th Cir. 1979) (remanded for Naval Investigative Service to show investigation involved enforcement of statute or regulation within its authority); Irons v. Bell, 596 F.2d 468, 473 (1st Cir. 1979) (mixed-function agency must demonstrate purpose falling within its sphere of enforcement authority); McCutchen v. HHS, No. 91-142, slip op. at 7 (D.D.C. Aug. 24, 1992) (law enforcement purpose satisfied because records involve enforcement of statute and regulation within agency's authority to investigate scientific fraud) (appeal pending on other grounds); Author Servs., Inc. v. IRS, No. 90-2187, slip op. at 2 n.1 (C.D. Cal. July 30, 1992) (law enforcement purpose not satisfied where documents compiled after termination of IRS investigation); cf. Church of Scientology Int'l v. IRS, 995 F.2d 916, 919 (9th Cir. 1993) ("This court has clearly held that the IRS has the 'requisite law enforcement mandate'" through its enforcement provisions of the federal tax code.).

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or enforcement purposes."<sup>38</sup>

In the case of criminal law enforcement agencies, the courts have accorded the government varying degrees of special deference when considering whether their records meet the threshold requirement of Exemption 7.<sup>39</sup> Indeed, the First, Second, and Eighth Circuit Courts of Appeals have adopted a per se rule that qualifies all "investigative" records of criminal law enforcement agencies for protection under Exemption 7.<sup>40</sup> Other courts, while still accord-

<sup>38</sup> Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d at 81. See Church of Scientology Int'l v. IRS, 995 F.2d at 919 (IRS Exempt Organizations Division "performs law enforcement function by enforcing provisions of the federal tax code"); see also Church of Scientology v. IRS, No. 90-11069, slip op. at 25 (D. Mass. Apr. 22, 1992) (magistrate's recommendation) (records compiled for law enforcement purpose in connection with IRS inquiry into tax exempt status); Becker v. IRS, No. 91-C-1203, slip op. at 12-13 (N.D. Ill. Mar. 27, 1992) (documents compiled for law enforcement purposes where IRS authorized to investigate illegal tax protesters' strategies and activities); Church of Scientology Int'l v. United States Nat'l Cent. Bureau-Interpol, No. 89-707, slip op. at 6-7 (C.D. Cal. Sept. 10, 1991) (law enforcement purpose met where documents compiled for crimes within scope of enforcement authority); May v. IRS, slip op. at 6-7 (documents compiled for law enforcement purposes as part of criminal and civil investigation); see, e.g., Reed v. NLRB, 927 F.2d 1249, 1252 (D.C. Cir. 1991) (dictum) (court gratuitously noted its "skepticism" of government's alternative argument regarding application of Exemption 7(C)'s threshold to lists of names and addresses of eligible voters in union representative election compiled for NLRB compliance purposes), cert. denied, 112 S. Ct. 912 (1992); Author Servs., Inc. v. IRS, slip op. at 6 (IRS has not met burden of identifying alleged illegal act with sufficient specificity for court to determine whether mixed-function agency acting within its law enforcement mandate).

<sup>39</sup> Compare, e.g., Pratt v. Webster, 673 F.2d at 416-18 with Kuehnert v. FBI, 620 F.2d 662, 666-67 (8th Cir. 1980).

<sup>40</sup> First Circuit: Curran v. Department of Justice, 813 F.2d 473, 475 (1st Cir. 1987) (investigatory records of law enforcement agencies are "inherently" compiled for law enforcement purposes); Irons v. Bell, 596 F.2d at 474-76 ("investigatory records of law enforcement agencies are inherently records compiled for 'law enforcement purposes' within the meaning of Exemption 7"); Second Circuit: Ferguson v. FBI, 957 F.2d 1059, 1070 (2d Cir. 1992) ("no room for [a] district court's inquiry into whether the FBI's asserted law enforcement purpose was legitimate"); Williams v. FBI, 730 F.2d 882, 884-85 (2d Cir. 1984) (records of a law enforcement agency given "absolute protection" even if "records were compiled in the course of an unwise, meritless or even illegal investigation"); Eighth Circuit: Kuehnert v. FBI, 620 F.2d at 666 (FBI need not show law enforcement purpose of particular investigation as precondition to invoking Exemption 7). See also Arenberg v. DEA, 849 F.2d 579, 581 (11th Cir. 1988) (applicable standard not articulated, but suggesting courts should be "hesitant" to reexamine law enforcement agency's decision to (continued...))

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ing significant deference to criminal law enforcement agencies, have held that an agency must demonstrate some specific nexus between the records and a proper law enforcement purpose.<sup>41</sup>

The existing standard for review of criminal records in the Court of Appeals for the District of Columbia Circuit is somewhat more stringent than the per se rule discussed above. The D.C. Circuit held in Pratt v. Webster that records generated as part of a counterintelligence program of questionable legality which was part of an otherwise clearly authorized law enforcement investigation met the threshold requirement for Exemption 7 and rejected the per

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<sup>40</sup>(...continued)

investigate if there is plausible basis for agency's decision); Binion v. United States Dep't of Justice, 695 F.2d 1189, 1193-94 (9th Cir. 1983) ("a fortiori" approach appropriate where FBI pardon investigation was "clearly legitimate"); Struth v. FBI, 673 F. Supp. 949, 961 (E.D. Wis. 1987) (interpreting Stein v. Department of Justice, 662 F.2d 1245, 1260-61 (7th Cir. 1981), as following per se approach); Black v. FBI, No. 82-370, slip op. at 3 (N.D. Ohio May 30, 1986) ("court will conclusively presume that the investigation which generated the document was undertaken for a law enforcement purpose").

<sup>41</sup> See, e.g., Jones v. FBI, No. C77-1001, slip op. at 10-11 (N.D. Ohio Aug. 12, 1992) (holding that even under rational nexus test, FBI documents involving alleged abduction and shooting plainly were compiled for proper law enforcement purpose because "even if the investigation was part of COINTELPRO, COINTELPRO investigations were not per se illegitimate") (appeal pending); Rosenfeld v. United States Dep't of Justice, 761 F. Supp. 1440, 1445-48 (N.D. Cal. 1991) (FBI investigation of Free Speech Movement "was begun in good faith and with a plausible basis," but ceased to have "colorable claim [of rationality] as the evidence accumulated" and became "a case of routine monitoring . . . for intelligence purposes"; date at which FBI's initial law enforcement-related suspicions were "demonstrably unfounded" was "cut-off point for the scope of a law enforcement purpose" under Exemption 7) (appeal pending); Siminoski v. FBI, No. 83-6499, slip op. at 25 (C.D. Cal. Jan. 16, 1990) (question is not whether investigations were "upstanding" or "appealing," but whether agency was authorized to undertake investigations of such nature); Friedman v. FBI, 605 F. Supp. 306, 321 (N.D. Ga. 1984) (review of records showed that FBI was "'gathering information with the good faith belief that the subject may violate or has violated federal law' rather than 'merely monitoring the subject for purposes unrelated to enforcement of federal law'" (quoting Lamont v. Department of Justice, 475 F. Supp. 761, 770 (S.D.N.Y. 1979))); Malizia v. United States Dep't of Justice, 519 F. Supp. 338, 347 (S.D.N.Y. 1981) (in order to qualify for Exemption 7 protection, "agency must demonstrate at least a 'colorable claim of a rational nexus' between activities being investigated and violations of federal laws"); see also Powell v. United States, 584 F. Supp. 1508, 1522 (N.D. Cal. 1984) (in camera inspection required to determine whether FBI investigation of legal defense committees was "realistically based on a legitimate concern" that the committees' actions threatened the national security), summary judgment granted in pertinent part, No. C-82-326 (N.D. Cal. Mar. 27, 1985).

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se approach.<sup>42</sup> Instead, it adopted a two-part test for determining whether the threshold for Exemption 7 has been met: (1) whether the agency's investigatory activities that give rise to the documents sought are related to the enforcement of federal laws or to the maintenance of national security; and (2) whether 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 rationality.<sup>43</sup>

Since the removal of the word "investigatory" from the threshold requirement of Exemption 7, the D.C. Circuit has had few opportunities to reconsider the Pratt test, a portion of which expressly requires a nexus between requested records and an investigation.<sup>44</sup> In Keys v. United States Department of Justice, however, the D.C. Circuit modified the language of the Pratt test to reflect those amendments and to require that an agency demonstrate the existence of a nexus "between [its] activity" (rather than its investigation) "and its law enforcement duties."<sup>45</sup> Although not specifically relying on the amended test, the D.C. Circuit in Keys held that records compiled solely because the subject had a known affiliation with organizations that were strongly suspected of harboring Communists met the Exemption 7 threshold.<sup>46</sup> Nevertheless, as no

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<sup>42</sup> See 673 F.2d at 416 n.17.

<sup>43</sup> Id. at 420-21; see also, e.g., Keys v. United States Dep't of Justice, 830 F.2d 337, 340 (D.C. Cir. 1987); King v. United States Dep't of Justice, 830 F.2d 210, 229 (D.C. Cir. 1987); Laborers' Int'l Union v. United States Dep't of Justice, 772 F.2d 919, 921 (D.C. Cir. 1984) (Pratt is "governing legal standard"); Founding Church of Scientology v. Smith, 721 F.2d 828, 829 n.1 (D.C. Cir. 1983); cf. Shaw v. FBI, 749 F.2d at 63 (Pratt standard applies as well to second half of Exemption 7(D)).

<sup>44</sup> See, e.g., King v. United States Dep't of Justice, 830 F.2d at 229 n.141 (dictum) (1986 FOIA amendments did not "qualif[y]" the authority of Pratt test).

<sup>45</sup> 830 F.2d at 340; see also Rochon v. Department of Justice, No. 88-5075, slip op. at 3 (D.C. Cir. Sept. 14, 1988) (agency must demonstrate nexus between its compilation of records and its law enforcement duties); Abdullah v. FBI, slip op. at 3 ("[L]aw enforcement agencies such as the FBI must show that the records at issue are related to the enforcement of federal laws and that the law enforcement activity was within the law enforcement duty of that agency."); Beck v. United States Dep't of Justice, No. 87-3356, slip op. at 26-27 (D.D.C. Nov. 7, 1989) ("[D]efendants must merely establish that the nexus between the agency's activity and its law enforcement duty" is based on a "colorable claim of rationality."). But see Simon v. Department of Justice, 980 F.2d 782, 783 (D.C. Cir. 1992) (agency must demonstrate nexus between investigation and one of its law enforcement duties (citing Pratt v. Webster, 673 F.2d at 420-21); Assassination Archives & Research Ctr. v. United States Dep't of Justice, slip op. at 6 (government must establish that investigation related to enforcement of federal law and raise colorable claim investigation rationally related to one or more of agency's law enforcement duties).

<sup>46</sup> 830 F.2d at 341-42.



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appellate decision has yet employed the modified Pratt test adopted by Keys, the impact of this change in the threshold is still not entirely clear.

Even under the test enunciated in Pratt, significant deference has been accorded criminal law enforcement agencies.<sup>47</sup> Nevertheless, the D.C. Circuit has indicated in Pratt and elsewhere that if an investigation is shown to have been in fact conducted for an improper purpose, Exemption 7 may not be applicable to the records of that investigation.<sup>48</sup>

The full effects of the 1986 FOIA amendments on the parameters of Exemption 7's threshold still remain to be seen. As courts now apply the plain meaning of its language in the absence of any "investigatory" requirement, it will command the careful attention of all federal agencies who wish to consider the extent to which, if at all, any of their records may now qualify for possible Exemption 7 protection. For the principal federal law enforcement agencies, this means that any record previously not considered covered by Exemption 7

<sup>47</sup> See 673 F.2d at 421 ("a court should be hesitant to second-guess a law enforcement agency's decision to investigate if there is a plausible basis for its decision"); see also, e.g., Keys v. United States Dep't of Justice, 830 F.2d at 344 (court generally "understood" former requirement that records be "investigatory" "to impose little substantive limitation on the exemption independent of the finding of a qualifying purpose"); King v. United States Dep't of Justice, 830 F.2d at 230-32 (subject's close association with "individuals and organizations . . . of investigative interest to the FBI" and consequent investigation of subject during the McCarthy era for possible violation of national security laws meets threshold in the absence of evidence supporting the existence of an improper purpose); Simon v. United States Dep't of Justice, 752 F. Supp. 14, 18 (D.D.C. 1990) (Given the subject's prior passivist activities, it was not "irrational or implausible for [FBI]--operating in the climate existing during the early 1950's--[to conduct] what appears to have been a brief criminal investigation into the possibility that the plaintiff harbored Communist affiliations."), aff'd on other grounds, 980 F.2d 782 (D.C. Cir. 1992); Doe v. United States Dep't of Justice, No. 86-1050, slip op. at 2-4 (D.D.C. Sept. 4, 1987) (citing pre-amendment language of Exemption 7, court noted that expense and other administrative records concerning FBI informant met lesser burden imposed on law enforcement agencies to show records are compiled for law enforcement purposes); Abramson v. FBI, 566 F. Supp. 1371, 1375 (D.D.C. 1983) (dictum) (plausible though unlikely explanation of law enforcement purpose is "colorable" explanation sufficient to meet second part of Pratt test).

<sup>48</sup> See Pratt v. Webster, 673 F.2d at 420-21 (Exemption 7 not intended to "include investigatory activities wholly unrelated to law enforcement agencies' legislated functions of preventing risks to the national security and violations of the criminal laws and of apprehending those who do violate the laws"); Shaw v. FBI, 749 F.2d at 63 ("mere existence of a plausible criminal investigatory reason to investigate would not protect the files of an inquiry explicitly conducted . . . for purposes of harassment"); Lesar v. United States Dep't of Justice, 636 F.2d at 487 (questioning whether records that were generated after investigation "wrongly strayed beyond its original law enforcement scope" would meet threshold test for Exemption 7).

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due solely to its noninvestigatory character likely is sufficiently related to the agency's general law enforcement mission that it can be considered for Exemption 7 protection.

Because of the significance of this change in the coverage of Exemption 7, it is important that other agencies be alert to and carefully consider the extent to which any of their records, albeit noninvestigatory, are so directly related to a specific law enforcement activity that they might reasonably qualify for any necessary protection under one of Exemption 7's subparts; such records as law enforcement manuals, background investigation documents, and program oversight reports can be prime candidates for such consideration.<sup>49</sup> The full effects of these amendments, however, will be realized only upon the case-by-case identification of particular items of noninvestigatory law enforcement information, the continued disclosure of which could cause one of the harms specified in Exemption 7's six subparts.

## EXEMPTION 7(A)

The first subpart of Exemption 7, Exemption 7(A), authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."<sup>1</sup> The Freedom of Information Reform Act of 1986 lessened the showing of harm required from a demonstration that release "would interfere with" to "could reasonably be expected to interfere with" enforcement proceedings.<sup>2</sup>

Determining the applicability of this Exemption 7 subsection thus requires a two-step analysis focusing on: (1) whether a law enforcement proceeding is pending or prospective; and (2) whether release of information about it could reasonably be expected to cause some articulable harm. The courts have held that the mere pendency of enforcement proceedings is an inadequate basis for the invocation of Exemption 7(A); the government must also establish that some distinct harm is likely to result if the record or information requested is disclosed.<sup>3</sup> The Court of Appeals for the District of Columbia Circuit has gone

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<sup>49</sup> Attorney General's Memorandum at 8-9.

<sup>1</sup> 5 U.S.C. § 552(b)(7)(A) (1988).

<sup>2</sup> Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 10 (Dec. 1987) [hereinafter Attorney General's Memorandum].

<sup>3</sup> See, e.g., Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F.2d 64, 65-67 (D.C. Cir. 1986); Abdullah v. FBI, No. 92-356, slip op. at 4-5 (D.D.C. Aug. 10, 1992) (simple fact that information related to pending or prospective law enforcement proceeding does not, in and of itself, justify "wholesale" withholding; agency "must show that disclosure could reasonably be expected perceptibly to interfere with an enforcement proceeding") (appeal (continued...))

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so far as to hold that the fact that a judge in a criminal trial specifically delayed disclosure of certain documents until the end of the trial is alone insufficient to establish interference with that ongoing proceeding.<sup>4</sup>

Although it still remains for further development of case law under the 1986 FOIA amendments to determine the precise applicability of Exemption 7(A) in its amended form, it is instructive to look at pre-amendment cases. With regard to the first step of the Exemption 7(A) analysis, the legislative history as well as judicial interpretations of congressional intent of this subsection as it was originally enacted make clear that Exemption 7(A) was not intended to "endlessly protect material simply because it [is] in an investigatory file."<sup>5</sup> Rather, Exemption 7(A) is temporal in nature and, as a general rule, may be invoked as long as the proceeding remains pending,<sup>6</sup> or so long as the proceeding is fairly regarded as prospective<sup>7</sup> or as preventative.<sup>8</sup>

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<sup>3</sup>(...continued)

pending); LeMaine v. IRS, No. 89-2914, slip op. at 13 (D. Mass. Dec. 10, 1991) (no showing that release would result in any specific harm).

<sup>4</sup> North v. Walsh, 881 F.2d 1088, 1100 (D.C. Cir. 1989) (standard is "whether disclosure can reasonably be expected to interfere in a palpable, particular way" with enforcement proceedings).

<sup>5</sup> NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978).

<sup>6</sup> See, e.g., Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 886-87 (6th Cir. 1984) (NLRB administrative practice of continuing to assert Exemption 7(A) for six-month "buffer period" after termination of proceedings found to be "arbitrary and capricious"); Barney v. IRS, 618 F.2d 1268, 1273-74 (8th Cir. 1980) (once enforcement proceedings are "either concluded or abandoned, exemption 7(A) will no longer apply"); Kilroy v. NLRB, 633 F. Supp. 136, 142, 143 (S.D. Ohio 1985) (Exemption 7(A) "applies only when a law enforcement proceeding is pending."), aff'd, 823 F.2d 553 (6th Cir. 1987) (table cite); Antonsen v. United States Dep't of Justice, No. K-82-008, slip op. at 9-10 (D. Alaska Mar. 20, 1984) ("It is difficult to conceive how the disclosure of these materials could have interfered with any enforcement proceedings" after a criminal defendant had been tried and convicted.).

<sup>7</sup> See, e.g., Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (Service Lookout Book, containing "names of violators, alleged violators and suspected violators," is protected as proceedings clearly are at least prospective against each violator.); Marzen v. HHS, 632 F. Supp. 785, 805 (N.D. Ill. 1985) (Exemption 7(A) prohibits disclosure of law enforcement records where release "would interfere with enforcement proceedings, pending, contemplated, or in the future."), aff'd, 825 F.2d 1148 (7th Cir. 1987); Ehringhaus v. FTC, 525 F. Supp. 21, 22-23 (D.D.C. 1980) (Exemption 7(A) applicable where enforcement proceeding "in prospect").

<sup>8</sup> See, e.g., Moorefield v. United States Secret Serv., 611 F.2d 1021, 1026 (5th Cir. 1980) (material pertaining to "Secret Service investigations carried out pursuant to the Service's protective function," i.e., to prevent harm to protec-  
(continued...))

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Exemption 7(A) remains viable throughout the duration of long-term investigations.<sup>9</sup> For example, it has been held applicable to the FBI's 16-year investigation into the disappearance of Jimmy Hoffa.<sup>10</sup> Even where an investigation is dormant, Exemption 7(A) has been held to be applicable because of the possibility that the investigation could lead to a "prospective law enforcement proceeding."<sup>11</sup> The "prospective" proceeding, however, must be a concrete possibility, rather than a mere hypothetical one.<sup>12</sup>

Further, even after an investigation is closed the exemption may be applicable if disclosure could be expected to interfere with a related, pending enforcement proceeding.<sup>13</sup> Indeed, in one of the first district court cases to ap-

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<sup>8</sup>(...continued)

tees, held eligible for Exemption 7(A) protection), cert. denied, 449 U.S. 909 (1980); see also Brinkerhoff v. Montoya, 3 Gov't Disclosure Serv. (P-H) ¶ 82,421, at 83,055 (N.D. Tex. July 1, 1981) (fact that judicial adjudication is not "imminent" held not dispositive of applicability of Exemption 7(A)).

<sup>9</sup> See Africa Fund v. Mosbacher, No. 92-289, slip op. at 10 (S.D.N.Y. May 26, 1993) (documents that would interfere with lengthy or delayed investigation fall within protective ambit of Exemption 7(A)).

<sup>10</sup> Dickerson v. Department of Justice, 992 F.2d 1426, 1432 (6th Cir. 1993) (affirming district court's conclusion that FBI's investigation into 1975 disappearance of Jimmy Hoffa remains ongoing and therefore is still a "prospective" law enforcement proceeding).

<sup>11</sup> See, e.g., National Pub. Radio v. Bell, 431 F. Supp. 509, 514-15 (D.D.C. 1977); see also FOIA Update, Spring 1984, at 6.

<sup>12</sup> See Badran v. United States Dep't of Justice, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987) (relying on pre-amendment language, court held that mere possibility that person mentioned in file might some day violate law was insufficient to invoke Exemption 7(A)); National Pub. Radio v. Bell, 431 F. Supp. at 514 (Exemption 7(A) applicable where investigation, though in dormant stage, "is nonetheless an 'active' one which will hopefully lead to a 'prospective law enforcement proceeding'"); see also 120 Cong. Rec. S9329 (daily ed. May 30, 1974) (statement of Sen. Hart).

<sup>13</sup> See, e.g., New England Medical Ctr. Hosp. v. NLRB, 548 F.2d 377, 386 (1st Cir. 1976) (Exemption 7(A) applicable "where subject matter of closed file complaint is contemporaneous and so intimately connected with that of the pending enforcement proceeding"); Engelking v. DEA, No. 91-165, slip op. at 6 (D.D.C. Nov. 30, 1992) (fugitive discussed in requester's file was still at large and release of information could jeopardize current investigation) (appeal pending); Warmack v. Huff, No. 88-H-1191-E, slip op. at 22-23 (N.D. Ala. May 16, 1990) (Exemption 7(A) applicable to documents in multidefendant case involving four untried fugitives), aff'd, 949 F.2d 1162 (11th Cir. 1991) (table cite); Freedberg v. Department of the Navy, 581 F. Supp. 3, 4 (D.D.C. 1982) (Exemption 7(A) applicable where two murderers convicted, but two others remained at large); Automobile Importers of Am., Inc. v. FTC, 3 Gov't Dis-

(continued...)

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ply Exemption 7(A)'s amended language, it was held that records concerning proceedings now closed that were still a part of a related case in which an indictment had been issued remained protected under the exemption.<sup>14</sup> Exemption 7(A) protection also applies to concluded proceedings that are subject to pending motions for new trials.<sup>15</sup>

Similarly, Exemption 7(A) also may be invoked where an investigation has been terminated but an agency retains oversight or some other continuing enforcement-related responsibility.<sup>16</sup> In a case decided under Exemption 7(A) as amended, it was held that although the unfair labor practice proceeding involved had been closed, the exemption still protected impounded ballots because their disclosure could interfere with the NLRB's responsibility to conduct and

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<sup>13</sup>(...continued)

closure Serv. (P-H) ¶ 82,488, at 83,227 (D.D.C. Sept. 28, 1982) (FTC memoranda discussing general remedies found properly withheld pursuant to Exemption 7(A) because some proceedings still pending); see also FOIA Update, Spring 1984, at 6; cf. Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 578 (D.C. Cir. 1987) (relying on language of statute prior to 1986 amendments, case remanded for additional explanation of why no segregable portions of documents could be released without interference to related proceedings).

<sup>14</sup> Dickie v. Department of the Treasury, No. 86-649, slip op. at 8 (D.D.C. Mar. 31, 1987) (release of documents from closed federal prosecution could jeopardize pending state criminal proceedings).

<sup>15</sup> Neill v. United States Dep't of Justice, No. 91-3319, slip op. at 5 (D.D.C. July 20, 1993) (requester granted new trial; release of records "could reasonably be expected to harm the pending proceeding"); Helmsley v. United States Dep't of Justice, No. 90-2413, slip op. at 10 (D.D.C. Sept. 24, 1992) (Exemption 7(A) protection for information where "only pending criminal proceeding" is appeal of denial of new trial motion; "disclosures reasonably could be expected to genuinely harm" government's case).

<sup>16</sup> See, e.g., Alaska Pulp Corp. v. NLRB, No. 90-1510D, slip op. at 2 (W.D. Wash. Nov. 4, 1991) (Exemption 7(A) remains applicable where corporation found liable for unfair labor practices, but parties remain embroiled in controversy as to compliance); Crooker v. Bureau of Alcohol, Tobacco & Firearms, No. 83-1646, slip op. at 1-2 (D.D.C. Apr. 30, 1984) (Exemption 7(A) remains applicable while motion to withdraw guilty plea still pending); Erb v. United States Dep't of Justice, 572 F. Supp. 954, 956 (W.D. Mich. 1983) (investigation "concluded 'for the time being'" subsequently reopened); ABC Home Health Servs., Inc. v. HHS, 548 F. Supp. 555, 556, 559 (N.D. Ga. 1982) ("final settlement" subject to reevaluation for at least three years); Timken Co. v. United States Customs Serv., 531 F. Supp. 194, 199-200 (D.D.C. 1981) (final determination could be challenged or appealed); Zeller v. United States, 467 F. Supp. 487, 501 (S.D.N.Y. 1979) (records compiled to determine whether party is complying with consent decree). But see Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 751-55 (D.D.C. 1983) (records concerning modification of consent decree held not exempt).

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process future collective bargaining representation elections.<sup>17</sup>

The "law enforcement proceedings" to which Exemption 7(A) may be applicable have been interpreted broadly. Such proceedings have been held to include not only criminal actions,<sup>18</sup> but civil actions<sup>19</sup> and regulatory proceedings<sup>20</sup> as well. They include "cases in which the agency has the initiative in bringing an enforcement action and those . . . in which it must be prepared to respond to a third party's challenge."<sup>21</sup> Enforcement proceedings in state courts<sup>22</sup> and foreign courts<sup>23</sup> also qualify for Exemption 7(A) protection. However, in order to satisfy the "law enforcement proceedings" requirement of Exemption 7(A), an agency must be able to point to a specific pending or contemplated law enforcement proceeding which could be harmed by disclosure.<sup>24</sup>

<sup>17</sup> Injex Indus. v. NLRB, 699 F. Supp. 1417, 1420 (N.D. Cal. 1986).

<sup>18</sup> See, e.g., Gould Inc. v. GSA, 688 F. Supp. 689, 701 (D.D.C. 1988); National Pub. Radio v. Bell, 431 F. Supp. at 510.

<sup>19</sup> See, e.g., Bender v. Inspector Gen. NASA, No. 90-2059, slip op. at 1-2, 8 (N.D. Ohio May 24, 1990) (information relating to "official reprimand" reasonably expected to interfere with government's proceeding to recover damages "currently pending" before same court).

<sup>20</sup> See, e.g., Farm Fresh, Inc. v. NLRB, No. 91-603-N, slip op. at 1, 7-9 (E.D. Va. Nov. 15, 1991) (NLRB's unfair labor practice action constitutes law enforcement proceedings; disclosure of audiotape of meeting between employees and managers likely to interfere with NLRB's ongoing enforcement proceeding); Alaska Pulp Corp. v. NLRB, slip op. at 2, 5 (after finding of unfair labor practice, compliance investigation to determine back pay awards constitutes enforcement proceedings); Concrete Constr. Co. v. United States Dep't of Labor, No. C2-89-649, slip op. at 2-6 (S.D. Ohio Oct. 26, 1990) (Department of Labor's regulation and inspection of construction sites constitute enforcement proceedings); Injex Indus. v. NLRB, 699 F. Supp. at 1420 (NLRB's responsibility to process collective bargaining representation elections constitutes law enforcement proceedings); Fedders Corp. v. FTC, 494 F. Supp. 325, 327-28 (S.D.N.Y.), aff'd, 646 F.2d 560 (2d Cir. 1980) (table cite).

<sup>21</sup> Mapother v. Department of Justice, No. 92-5261, slip op. at 13 (D.C. Cir. Sept. 17, 1993) (to be published).

<sup>22</sup> See, e.g., Dickie v. Department of the Treasury, slip op. at 8 (release could jeopardize pending state criminal proceedings).

<sup>23</sup> See, e.g., Bevis v. Department of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986).

<sup>24</sup> See Mapother v. Department of Justice, slip op. at 16-17 ("We believe that a categorical approach is appropriate in determining the likelihood of enforcement proceedings in cases where an alien is excluded from entry into the United States because of his alleged participation in Nazi persecutions on  
(continued...)

## EXEMPTION 7(A)

With respect to the showing of harm to law enforcement proceedings required to invoke Exemption 7(A), the Supreme Court has rejected the position that "interference" must always be established on a document-by-document basis, and it has held that a determination of the exemption's applicability may be made "generically," based on the categorical types of records involved.<sup>25</sup> Indeed, the Supreme Court in United States Department of Justice v. Reporters Committee for Freedom of the Press emphatically affirmed the vitality of its Robbins Tire approach and further extended it to include situations arising under other FOIA exemptions in which records can be entitled to protection on a "categorical" basis.<sup>26</sup> Thus, almost all courts have accepted affidavits in Exemption 7(A) cases that specify the distinct, generic categories of documents at issue and the harm that would result from their release, rather than requiring extensive detailed itemizations of each document.<sup>27</sup>

<sup>24</sup>(...continued)

genocide. Otherwise, we must exercise our faculties as mind-readers."); National Sec. Archive v. FBI, 759 F. Supp. 872, 883 (D.D.C. 1991) (FBI's justification that disclosure would interfere with its overall counterintelligence program "must be rejected" as too general to be type of proceeding cognizable under Exemption 7(A); FBI permitted to demonstrate whether there existed any specific pending or contemplated law enforcement proceedings).

<sup>25</sup> NLRB v. Robbins Tire & Rubber Co., 437 U.S. at 236.

<sup>26</sup> 489 U.S. 749, 776-80 (1989) (Exemption 7(C)).

<sup>27</sup> Dickerson v. Department of Justice, 992 F.2d at 1431 ("often feasible for courts to make 'generic determinations' about interference"); accord In re Dep't of Justice, 999 F.2d 1302, 1308 (8th Cir. 1993) (en banc) ("Supreme Court has consistently interpreted Exemption 7 of the FOIA (specifically so far subsections 7(A), 7(C), and 7(D))" to permit government to proceed on "categorical basis" to justify nondisclosure; government not required to produce document-by-document Vaughn Index); see, e.g., Wright v. OSHA, 822 F.2d 642, 646 (7th Cir. 1987); Spannaus v. United States Dep't of Justice, 813 F.2d 1285, 1288-89 (4th Cir. 1987); Curran v. Department of Justice, 813 F.2d 473, 475 (1st Cir. 1987); Bevis v. Department of State, 801 F.2d at 1389 (agency may take "generic approach, grouping documents into relevant categories"); Campbell v. HHS, 682 F.2d 256, 265 (D.C. Cir. 1982) ("The government may focus upon categories of records . . . under Exemption 7(A)."); Barney v. IRS, 618 F.2d at 1271 n.5; Moorefield v. United States Secret Serv., 611 F.2d at 1022; Abdullah v. FBI, slip op. at 5 (agency's categorical affidavit demonstrates disclosure could reasonably be expected to interfere with ongoing drug trafficking investigation); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 806 (D.N.J. 1993) (agency's generic affidavit demonstrates disclosure would interfere with ongoing criminal investigation); Spannaus v. United States Dep't of Justice, No. 85-1015-K, slip op. at 3 (D. Mass. Jan. 6, 1992) (government may take generic approach and group documents by categories); Kacilauskas v. Department of Justice, 565 F. Supp. 546, 548-49 (N.D. Ill. 1983) (noting that with exception of one case, "all post-Robbins district and appellate court decisions have heeded the Supreme Court's teachings" and "have focused on the

(continued...)

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Specific guidance has been provided by the Courts of Appeals for the First, Fourth and D.C. Circuits as to what constitutes an adequate "generic category" in an Exemption 7(A) affidavit.<sup>28</sup> The general principle uniting these cases is that affidavits must provide at least a general, "functional" description of the types of documents at issue sufficient to indicate the type of interference threatening the law enforcement proceeding.<sup>29</sup> It should be noted, however, that both the First and the Fourth Circuits have approved a "miscellaneous" category of "other sundry items of information."<sup>30</sup> The D.C. Circuit has not yet specifically addressed an affidavit with such a category.

The functional test set forth by the D.C. Circuit does not require a detailed showing that release of the records is likely to interfere with the law enforcement proceedings; it is sufficient for the agency to make a generalized showing that release of these particular kinds of documents would generally

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<sup>27</sup>(...continued)

type of records involved rather than their individual content"); see also FOIA Update, Spring 1984, at 3-4 ("FOIA Counselor: The 'Generic' Aspect of Exemption 7(A)"); cf. Lewis v. IRS, 823 F.2d 375, 378-79 (9th Cir. 1987) (records described in opinion only as containing information relating to pending criminal investigation found sufficient).

<sup>28</sup> See Spannaus v. United States Dep't of Justice, 813 F.2d at 1287, 1289 ("details regarding initial allegations giving rise to this investigation; notification of [FBI Headquarters] of the allegations and ensuing investigation; interviews with witnesses and subjects; investigative reports furnished to the prosecuting attorneys," and similar categories all sufficient); Curran v. Department of Justice, 813 F.2d at 476 (same); Bevis v. Department of State, 801 F.2d at 1390 ("identities of possible witnesses and informants, reports on the location and viability of potential evidence, and polygraph reports" sufficient; categories "identified only as 'teletypes,' 'airtels,' or 'letters'" insufficient).

<sup>29</sup> See, e.g., Curran v. Department of Justice, 813 F.2d at 475 ("Withal, a tightrope must be walked: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag."); Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F.2d at 67 ("The hallmark of an acceptable Robbins category is thus that it is functional; it allows the court to trace a rational link between the nature of the document and the alleged likely interference."); cf. SafeCard Servs., Inc. v. SEC, No. 84-3073, slip op. at 6 n.3 (D.D.C. May 19, 1988) (agency "file" is not sufficient generic category to justify withholding pursuant to Exemption 7(A)), aff'd in part, rev'd in part on other grounds & remanded, 926 F.2d 1197 (D.C. Cir. 1991); Pruitt Elec. Co. v. United States Dep't of Labor, 587 F. Supp. 893, 895-96 (N.D. Tex. 1984) (disclosure of reference material consulted by investigator that might aid an unspecified target in unspecified manner found not to cause interference).

<sup>30</sup> Spannaus v. United States Dep't of Justice, 813 F.2d at 1287, 1289; Curran v. Department of Justice, 813 F.2d at 476 (wide range of records made some generality "understandable--and probably essential").



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interfere with enforcement proceedings.<sup>31</sup> Making this showing should be easier under the amended language of the statute.<sup>32</sup>

On a related procedural issue, the D.C. Circuit in Bevis v. Department of State, held that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs."<sup>33</sup> (See discussion of "Vaughn Index" under Litigation Considerations, below.)

It has generally been recognized that once Exemption 7(A) applicability ceases with changed circumstances, an agency then may invoke other applicable exemptions. As a result, when entire documents are determined to be protectible under Exemption 7(A), agencies generally need not consider what other exemptions are appropriate until the underlying investigation reaches a point at which the documents no longer merit Exemption 7(A) protection.<sup>34</sup> (See Waiver of Exemptions subsection under Litigation Considerations, below.) It also has been held that an agency is not expected to monitor the investigation after completion of the FOIA administrative process and to process the documents once the investigation is closed.<sup>35</sup>

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<sup>31</sup> See Gould Inc. v. GSA, 688 F. Supp. at 703-04 n.34; Alyeska Pipeline Serv. Co. v. EPA, No. 86-2176, slip op. at 6-7 (D.D.C. Sept. 9, 1987) (government need not "show that intimidation will certainly result," but it must "show that the possibility of witness intimidation exists"), aff'd, 856 F.2d 309 (D.C. Cir. 1988).

<sup>32</sup> See Gould Inc. v. GSA, 688 F. Supp. at 703 n.33 (1986 FOIA amendments "relaxed the standard of demonstrating interference with enforcement proceedings").

<sup>33</sup> 801 F.2d at 1389; accord In re Dep't of Justice, 999 F.2d at 1309 (The "government may meet its burden by . . . conducting a document-by-document review to assign documents to proper categories."); Hillcrest Equities, Inc. v. United States Dep't of Justice, No. CA3-85-2351-R, slip op. at 7 (N.D. Tex. Jan. 26, 1987) (government must review each document to determine category in which it belongs).

<sup>34</sup> See Senate of P.R. v. United States Dep't of Justice, 823 F.2d at 589 ("district court did not abuse its discretion in permitting the DOJ to press additional FOIA exemptions after its original, all-encompassing (7)(A) exemption claim became moot"); Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982) (government not barred from invoking other exemptions after reliance on Exemption 7(A) rendered untenable by conclusion of underlying law enforcement proceeding). But see Curcio v. FBI, No. 89-941, slip op. at 11-12 (D.D.C. Nov. 2, 1990) (where Exemption 7(A) no longer applicable, agency may not raise additional exemption claims at later stage of district court litigation) (motion for reconsideration pending).

<sup>35</sup> Church of Scientology v. IRS, 816 F. Supp. 1138, 1157 (W.D. Tex. 1993) (An "agency is not required to monitor the investigation and release the documents once the investigation is closed and there is no reasonable possibility (continued...)

## EXEMPTION 7(A)

The courts have long accepted that Congress intended that Exemption 7(A) apply "whenever the government's case in court would be harmed by the premature release of evidence or information,"<sup>36</sup> or where disclosure would impede any necessary investigation prior to the enforcement proceeding.<sup>37</sup> In

<sup>35</sup>(...continued)

of future proceedings.") (appeal pending); see also Bonner v. United States Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) ("To require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing."); cf. Lesar v. United States Dep't of Justice, 636 F.2d 472, 480 (D.C. Cir. 1980) (remanding FOIA cases whenever new classification schemes are established would delay FOIA processing).

<sup>36</sup> NLRB v. Robbins Tire & Rubber Co., 437 U.S. at 232; Mapother v. Department of Justice, slip op. at 18 (release of prosecutor's index of all documents he deems relevant would provide "critical insightss into [government's] legal thinking and strategy"); Durham v. United States Postal Serv., No. 91-2234, slip op. at 3 (D.D.C. Nov. 25, 1992) (release of investigative memoranda, witness files and electronic surveillance material would substantially interfere with pending homicide investigation by impeding government's ability to prosecute its strongest case); Starkey v. IRS, No. C91-20040, slip op. at 6-7 (C.D. Cal. Dec. 6, 1991) (release would reveal evidence and impair government's ability to present its best case). But see LeMaine v. IRS, slip op. at 11 (agency failed to demonstrate that release would "seriously impair any ongoing effort to collect taxes or penalties . . . or to pursue criminal charges").

<sup>37</sup> See, e.g., Dickerson v. Department of Justice, 992 F.2d at 1429 (public disclosure of information in Hoffa kidnapping file could reasonably be expected to interfere with enforcement proceedings); Church of Scientology Int'l v. IRS, No. 91-1025, slip op. at 10 (C.D. Cal. Aug. 26, 1993) (release of documents likely to interfere with IRS's ability to investigate requester pursuant to Church Audit Procedures Act); Atkin v. EEOC, No. 91-2508, slip op. at 37 (D.N.J. June 24, 1993) (disclosure of information provided by EEOC to FBI would interfere with investigation); Church of Scientology v. IRS, 816 F. Supp. at 1157 (disclosure could reasonably be expected to interfere with enforcement proceedings, subject IRS employees to harassment or reprisal and reveal direction and scope of IRS investigation); Dusenberry v. FBI, No. 91-0665, slip op. at 4 (D.D.C. May 5, 1992) (disclosure would compromise ongoing law enforcement investigations); Computer Professionals for Social Responsibility v. United States Secret Serv., No. 91-248, transcript at 8 (D.D.C. Mar. 12, 1992) (bench order) (disclosure would interfere with enforcement proceedings by revealing "total package of the government's approach" in ongoing investigation) (appeal pending); May v. IRS, No. 90-1123-W-2, slip op. at 7 (W.D. Mo. Dec. 9, 1991) (release of third-party correspondence, witness statements, worksheets, and travel vouchers would interfere with pending law enforcement actions); Church of Scientology Int'l v. United States Nat'l Cent. Bureau-Interpol, No. 89-707, slip op. at 9 (C.D. Cal. Sept. 10, 1991) (disclosure would impede ongoing investigation); National Pub. Radio v. Bell, 431 F. Supp. at 514-15 (disclosure would impair continued, long-term investigation into suspicious

(continued...)

## EXEMPTION 7(A)

Robbins Tire, the Supreme Court found that the NLRB had established interference with its unfair labor practice enforcement proceeding by showing that release of its witness statements would create a great potential for witness intimidation and could deter their cooperation.<sup>38</sup> Other courts have ruled that interference has been established where, for example, the disclosure of information could prevent the government from obtaining data in the future.<sup>39</sup> Indeed, the D.C. Circuit in Alyeska Pipeline Service Co. v. EPA ruled that disclosure of documents that might identify which of the requester's employees had provided those documents to a private party (who in turn had provided them to EPA) would "thereby subject them to potential reprisals and deter them from providing further information to [the] EPA."<sup>40</sup>

The exemption has been held to be properly invoked when release would hinder an agency's ability to control or shape investigations,<sup>41</sup> would enable targets of investigations to elude detection<sup>42</sup> or suppress or fabricate evi-

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<sup>37</sup>(...continued)

death of nuclear-safety whistleblower). But see also Wrenn v. Kemp, No. 91-5383, slip op. at 1-2 (D.C. Cir. Dec. 2, 1992) (agency failed to explain its reasons for withholding and failed to demonstrate how disclosure could reasonably be expected to interfere with enforcement investigation).

<sup>38</sup> 437 U.S. at 239.

<sup>39</sup> See, e.g., Manna v. United States Dep't of Justice, 815 F. Supp. at 808 (disclosure of FBI reports could result in chilling effect on potential witnesses); Crowell & Moring v. DOD, 703 F. Supp. 1004, 1011 (D.D.C. 1989) (disclosure of identities of witnesses would impair grand jury's ability to obtain cooperation and would impede government's preparation of its case); Gould Inc. v. GSA, 688 F. Supp. at 703 (disclosure of information would have chilling effect on sources who are employees of requester); Nishnic v. United States Dep't of Justice, 671 F. Supp. 776, 794 (D.D.C. 1987) (disclosure of identity of foreign source would end its ability to provide information in unrelated ongoing law enforcement activities); Timken Co. v. United States Customs Serv., 531 F. Supp. at 199-200 (Disclosure of investigation records would cause interference with agency's ability "in the future to obtain this kind of information.").

<sup>40</sup> 856 F.2d at 311. But cf. Clyde v. United States Dep't of Labor, No. 85-139, slip op. at 6 (D. Ariz. July 3, 1986) (possible reluctance of contractors to enter into voluntary conciliations with government if substance of negotiations released does not constitute open law enforcement proceeding when specific conciliation process has ended); Cohen v. EPA, 575 F. Supp. 425, 428-29 (D.D.C. 1983) (Exemption 7(A) held inapplicable to protect letters sent to entities suspected of unlawfully releasing hazardous substances; disclosure not shown to deter parties from cooperating with voluntary cleanup programs).

<sup>41</sup> See, e.g., J.P. Stevens & Co. v. Perry, 710 F.2d 136, 143 (4th Cir. 1983).

<sup>42</sup> See, e.g., Moorefield v. United States Secret Serv., 611 F.2d at 1026.

## EXEMPTION 7(A)

dence,<sup>43</sup> or would prematurely reveal evidence or strategy in the government's case.<sup>44</sup> Exemption 7(A) protection also has been extended to circumstances involving prospective new trials where "[k]nowledge of potential witnesses and documentary evidence that were not used during the first trial would allow the plaintiff to inhibit further investigation, destroy undiscovered evidence, intimidate witnesses, and fabricate evidence."<sup>45</sup> Additionally, information that would reveal investigative trends, emphasis, and targeting schemes has been determined to be eligible for protection under Exemption 7(A) where disclosure would provide targets with the ability to perform a "cost/ benefit analysis" of compliance with agency regulations.<sup>46</sup>

Still other courts have indicated that any premature disclosure, by and of itself, can constitute interference with an enforcement proceeding.<sup>47</sup> In contrast, the D.C. Circuit has held that the mere fact that defendants in related ongoing criminal proceedings might obtain documents through the FOIA that

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<sup>43</sup> See, e.g., Mapother v. Department of Justice, slip op. at 18 (release of prosecutor's index of all documents he deems relevant would afford a "virtual roadmap through the [government's] evidence . . . which would provide critical insights into its legal thinking and strategy"); Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d at 312; Nishnic v. United States Dep't of Justice, 671 F. Supp. at 794; Vosburgh v. IRS, No. 87-1179, slip op. at 5 (D. Kan. Nov. 24, 1987).

<sup>44</sup> See, e.g., Africa Fund v. Mosbacher, slip op. at 11 (disclosure "risks alerting targets to the existence and nature" of investigation); Manna v. United States Dep't of Justice, 815 F. Supp. at 808 (disclosure would obstruct justice by revealing agency's strategy and extent of its knowledge); Starkey v. IRS, slip op. at 6-7 (release of internal memoranda "would reveal evidence and impair [government's] ability to present its best case"); Lyons v. OSHA, No. 88-1562-T, slip op. at 3 (D. Mass. Dec. 2, 1991) (release would interfere with law enforcement proceedings); Raytheon Co. v. Department of the Navy, 731 F. Supp. 1097, 1101 (D.D.C. 1989) (information "could be particularly valuable to [target] in the event of settlement negotiations"); Ehringhaus v. FTC, 525 F. Supp. at 22-23.

<sup>45</sup> Helmsley v. United States Dep't of Justice, slip op. at 10; see also Neill v. United States Dep't of Justice, slip op. at 5 (where requester was granted new trial, release of information "could reasonably be expected to harm the pending proceeding through the circumvention of investigative leads, destruction of evidence, or intimidation of witnesses").

<sup>46</sup> Concrete Constr. Co. v. United States Dep't of Labor, slip op. at 3-5 (disclosure of past fiscal year's Field Operation Program Plans, containing projections for inspections and areas of concentration, would be "obviously a detriment to the enforcement objectives of the Department of Labor"); see also Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1374 (E.D.N.C. 1986) (Exemption 7(A) applicable to information pertaining to agency's "targeting scheme," disclosure of which "would 'reveal the amount of investigative resources targeted and allocated'" for inspections).

<sup>47</sup> See Lewis v. IRS, 823 F.2d at 378-79, 380; Barney v. IRS, 618 F.2d at 1273; Steinberg v. IRS, 463 F. Supp. 1272, 1273 (S.D. Fla. 1979).

## EXEMPTION 7(A)

were ruled unavailable "through discovery, or at least before [they] could obtain them through discovery," is insufficient alone to "constitute interference with a law enforcement proceeding."<sup>48</sup>

Exemption 7(A) ordinarily will not afford protection where the target of the investigation has possession of or submitted the information in question.<sup>49</sup> Nevertheless, it is now increasingly clear that courts will protect such material if an agency can demonstrate that its "selectivity of recording" information provided by the target would suggest the nature and scope of the investigation,<sup>50</sup> or if it can articulate with specificity how each category of documents, if disclosed, would cause interference.<sup>51</sup>

Thus far, only relatively few cases have been decided addressing the statutory changes in the language of Exemption 7(A) since the enactment of the FOIA Reform Act. No Exemption 7(A) decision to date has dispositively based its holding on the new language, but several decisions recognize that the change in the language of this exemption effectively broadens its protection.<sup>52</sup>

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<sup>48</sup> North v. Walsh, 881 F.2d at 1097; cf. Senate of P.R. v. United States Dep't of Justice, 823 F.2d at 579, 589 (trial court's failure to describe harm from release of undescribed documents developed for closed law enforcement investigation but allegedly relevant to open criminal law enforcement proceeding did not permit upholding Exemption 7(A) applicability).

<sup>49</sup> See, e.g., Wright v. OSHA, 822 F.2d at 646; Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986); Campbell v. HHS, 682 F.2d at 262.

<sup>50</sup> Willard v. IRS, 776 F.2d 100, 103 (4th Cir. 1985); Gould Inc. v. GSA, 688 F. Supp. at 704 n.37; Brinkerhoff v. Montoya, 3 Gov't Disclosure Serv. (P-H) at 83,055.

<sup>51</sup> See Campbell v. HHS, 682 F.2d at 265; Linsteadt v. IRS, 729 F.2d 998, 1004-05 (5th Cir. 1984); Doe v. United States Dep't of Justice, No. 86-1050, slip op. at 5-6 (D.D.C. Sept. 4, 1987) ("defendant must recite with particularity how revelation of the requested information will interfere with enforcement proceedings"); cf. Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d at 314 (mere assertions that requester knows scope of investigation not sufficient to present genuine issue of material fact that would preclude summary judgment).

<sup>52</sup> See Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d at 311 n.18 (improper reliance of lower court on pre-amendment version of Exemption 7(A) irrelevant as it simply "required EPA to meet a higher standard than FOIA now demands"); Curran v. Department of Justice, 813 F.2d at 474 n.1 ("the drift of the changes is to ease--rather than to increase--the government's burden in respect to Exemption 7(A)"); Gould Inc. v. GSA, 688 F. Supp. at 703 n.33 (The "1986 amendments relaxed the standard of demonstrating interference with enforcement proceedings."); Korkala v. United States Dep't of Justice, No. 86-242, slip op. at 6 n.\* (D.D.C. July 31, 1987); see also Wright v. OSHA, 822 F.2d at 647; Spannaus v. United States Dep't of Justice, 813 F.2d at 1289; cf. John Doe Agency v. John Doe Corp., 493 U.S. 146, 157 (1989) (Court takes "practical approach" when confronted with interpretation of FOIA and applies (continued...))

## EXEMPTION 7(B)

As a final Exemption 7(A)-related matter, agencies should be aware of the "(c)(1) exclusion,"<sup>53</sup> which was enacted by the FOIA Reform Act in 1986.<sup>54</sup> This special record exclusion applies to situations in which the very fact of a criminal investigation's existence is as yet unknown to the investigation's subject, and disclosure of the existence of the investigation (which would be revealed by any acknowledgment of the existence of responsive records) could reasonably be expected to interfere with enforcement proceedings. In such circumstances, an agency may treat the records as not subject to the requirements of the FOIA. (See discussion under Exclusions, below.)

## EXEMPTION 7(B)

Exemption 7(B) of the FOIA, which is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."<sup>1</sup> Despite the possible constitutional significance of its function, in practice this exemption is rarely invoked. In the situation in which it would most logically be employed--i.e., an ongoing law enforcement proceeding--an agency's application of Exemption 7(A) to protect its institutional law enforcement interests invariably would serve to protect the interests of the defendants to the prosecution as well. Even in the non-law enforcement realm, the circumstances which call for singular reliance upon Exemption 7(B) occur only rarely.

Consequently, Exemption 7(B) has been featured prominently in only one case to date, Washington Post Co. v. United States Department of Justice.<sup>2</sup> At issue there was whether public disclosure of a pharmaceutical company's internal self-evaluative report, submitted to the Justice Department in connection with a grand jury investigation, would jeopardize the company's ability to receive a fair and impartial civil adjudication of several personal injury cases

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<sup>52</sup>(...continued)

"workable balance" between interests of public in greater access and needs of government to protect certain kinds of information); United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 777-78 n.22 (1989) (Congress intended identical modification of language of Exemption 7(C) to provide greater "flexibility in responding to FOIA requests for law enforcement records" and replaced "a focus on the effect of a particular disclosure" with a "standard of reasonableness" which supports "categorical" approach to documents of similar character); Allen v. DOD, 658 F. Supp. 15, 23 (D.D.C. 1986) (parallel change of language of Exemption 7(C) created "broader protection" than available under former language).

<sup>53</sup> 5 U.S.C. § 552(c)(1) (1988).

<sup>54</sup> Pub. L. No. 99-570, § 1802, 100 Stat. at 3207-49; see Attorney General's Memorandum at 18-22.

<sup>1</sup> 5 U.S.C. § 552(b)(7)(B) (1988).

<sup>2</sup> 863 F.2d 96, 101-02 (D.C. Cir. 1988).

## EXEMPTION 7(C)

pending against it.<sup>3</sup> In remanding the case for further consideration, the Court of Appeals for the District of Columbia Circuit articulated a two-part standard to be employed in determining Exemption 7(B)'s applicability: "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings."<sup>4</sup> Although the D.C. Circuit in Washington Post offered a single example of proper Exemption 7(B) applicability--i.e., where "disclosure through FOIA would furnish access to a document not available under the discovery rules and thus would confer an unfair advantage on one of the parties"--it did not limit the scope of the exemption to privileged documents only.<sup>5</sup>

## EXEMPTION 7(C)

Exemption 7(C) provides protection for personal information in law enforcement records. This exemption is the law enforcement counterpart to Exemption 6, providing protection for law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>1</sup> Despite their similarities in language, though, the sweep of the two exemptions can be significantly different. (See discussion of Exemption 6, above.)

Whereas Exemption 6 routinely requires an identification and balancing of the relevant privacy and public interests, Exemption 7(C) can be even more "categorized" in its application. Indeed, the Court of Appeals for the District of Columbia Circuit recently held in SafeCard Services, Inc. v. SEC<sup>2</sup> that, based upon the traditional recognition of the strong privacy interests inherent in law enforcement records and the logical ramifications of United States Department of Justice v. Reporters Committee for Freedom of the Press,<sup>3</sup> the "categorical withholding" of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C).<sup>4</sup> (See discussion of Reporters Committee under Exemption 6, above.)

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<sup>3</sup> Id. at 99.

<sup>4</sup> Id. at 102.

<sup>5</sup> Id.

<sup>1</sup> 5 U.S.C. § 552(b)(7)(C) (1988).

<sup>2</sup> 926 F.2d 1197 (D.C. Cir. 1991).

<sup>3</sup> 489 U.S. 749 (1989); see also FOIA Update, Spring 1989, at 3-7 (discussing mechanics of privacy-protection decisionmaking process employed under Exemptions 6 and 7(C) alike).

<sup>4</sup> 926 F.2d at 1206; see, e.g., Grove v. Department of Justice, 802 F. Supp. 506, 511 (D.D.C. 1992) (information concerning criminal investigations of private citizens held categorically exempt).

## EXEMPTION 7(C)

At the outset, certain distinctions between Exemption 6 and Exemption 7(C) are apparent. In contrast with Exemption 6, Exemption 7(C)'s language establishes a lesser burden of proof to justify withholding in two distinct respects. It is well established that the omission of the word "clearly" from the language of Exemption 7(C) eases the burden of the agency and stems from the recognition that law enforcement records are inherently more invasive of privacy than "personnel and medical files and similar files."<sup>5</sup> Indeed, the "'strong interest' of individuals, whether they be suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity'" has been repeatedly recognized.<sup>6</sup>

Additionally, the Freedom of Information Reform Act of 1986 has further broadened the protection afforded by Exemption 7(C) by lowering the risk-of-harm standard from "would" to "could reasonably be expected to."<sup>7</sup> The result of this amendment to the Act is an easing of the standard for evaluating a threatened privacy invasion through disclosure of law enforcement records.<sup>8</sup> One court, in interpreting the amended language, has pointedly observed that it affords the agency "greater latitude in protecting privacy interests" in the law enforcement context.<sup>9</sup> Such information "is now evaluated by the agency under a more elastic standard; exemption 7(C) is now more comprehensive."<sup>10</sup>

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<sup>5</sup> See Congressional News Syndicate v. United States Dep't of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977) ("[A]n individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo."); see also, e.g., Iglesias v. CIA, 525 F. Supp. 547, 562 (D.D.C. 1981).

<sup>6</sup> Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984)); see also Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992) (association of FBI "agent's name with allegations of sexual and professional misconduct could cause the agent great personal and professional embarrassment"); Dunkelberger v. Department of Justice, 906 F.2d 779, 781 (D.C. Cir. 1990) (refusing to confirm or deny existence of letter of reprimand or suspension of named FBI agent).

<sup>7</sup> Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 9-12 (Dec. 1987) [hereinafter Attorney General's Memorandum].

<sup>8</sup> Reporters Committee, 489 U.S. at 756 n.9; Stone v. FBI, 727 F. Supp. 662, 665 (D.D.C. 1990) (1986 FOIA amendments have "eased the burden of an agency claiming that exemption"), aff'd, No. 90-5065 (D.C. Cir. Sept. 14, 1990); Allen v. DOD, 658 F. Supp. 15, 23 (D.D.C. 1986).

<sup>9</sup> Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 31 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted (D.D.C. Dec. 15, 1987), rev'd on other grounds & remanded, 863 F.2d 96 (D.C. Cir. 1988).

<sup>10</sup> Id.; see also Keys v. United States Dep't of Justice, 830 F.2d 337, 346 (D.C. Cir. 1987) (at least after 1986 FOIA amendments, "government need not  
(continued...)



## EXEMPTION 7(C)

Under the balancing test that traditionally has been applied to both Exemption 6 and Exemption 7(C), the agency must first identify and evaluate the privacy interests, if any, implicated in the requested records.<sup>11</sup> But in the case of records related to investigations by criminal law enforcement agencies, the case law has long recognized, either expressly or implicitly, that "the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation."<sup>12</sup> Thus, Exemption 7(C) has been regularly applied to withhold references to persons who were of "investigatory interest" to a criminal law enforcement agency; indeed, the Supreme Court in Reporters Committee placed strong emphasis on such protection.<sup>13</sup>

<sup>10</sup>(...continued)

'prove to a certainty that release will lead to an unwarranted invasion of personal privacy'" (quoting Reporters Committee, 816 F.2d 730, 738 (D.C. Cir. 1987)), rev'd on other grounds, 489 U.S. 749 (1989); Nishnic v. Department of Justice, 671 F. Supp. 776, 788 (D.D.C. 1987) (holding phrase "could reasonably be expected to" to be more easily satisfied standard than "likely to materialize").

<sup>11</sup> See Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. 851, 855 (D.D.C. 1989) ("Our preliminary inquiry is whether a personal privacy interest is involved."); FOIA Update, Spring 1989, at 7.

<sup>12</sup> Fitzgibbon v. CIA, 911 F.2d at 767 (quoting Branch v. FBI, 658 F. Supp. 204, 209 (D.D.C. 1987)); see also Massey v. FBI, No. 92-6086, slip op. 5667, 5675 (2d Cir. Aug. 27, 1993) (same) (to be published); Miller v. Bell, 661 F.2d 623, 631-32 (7th Cir. 1981) ("real potential for harassment"), cert. denied, 456 U.S. 960 (1982); Lesar v. United States Dep't of Justice, 636 F.2d 472, 488 (D.C. Cir. 1980) ("It is difficult if not impossible, to anticipate all respects in which disclosure might damage reputation or lead to personal embarrassment or discomfort." (quoting Lesar v. United States Dep't of Justice, 455 F. Supp. 921, 925 (D.D.C. 1978))); Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977) (deletion of references to third parties "to minimize the public exposure or possible harassment"); Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (disclosure of identities of individuals excludable from U.S. "would result in derogatory inferences about and possible embarrassment to those individuals"); Stauss v. IRS, 516 F. Supp. 1218, 1222 n.7 (D.D.C. 1981) (disclosure could chill tax protestors' lawful expression of disagreement with tax policies); cf. Cerveney v. CIA, 445 F. Supp. 772, 776 (D. Colo. 1978) (mere mention of individual's name as subject of CIA file could be damaging to his or her reputation) (Exemption 6).

<sup>13</sup> See 489 U.S. at 779; see also, e.g., Maynard v. CIA, 986 F.2d 547, 566 (1st Cir. 1993) ("potential for harassment, reprisal or embarrassment" if names of individuals investigated by FBI disclosed); Davis v. United States Dep't of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992) ("embarrassment and reputational harm" would result from disclosure of taped conversations of individuals with boss of New Orleans organized crime family); Silets v. United States Dep't of Justice, 945 F.2d 227, 230 (7th Cir. 1991) (en banc) (protection of associates of Jimmy Hoffa who were subject to electronic surveillance), cert.

(continued...)

## EXEMPTION 7(C)

Hence, the small minority of older federal district court decisions that failed to appreciate the strong privacy interests inherent in the association of an individual with a law enforcement investigation should no longer be regarded as authoritative.<sup>14</sup>

The identities of federal, state and local law enforcement personnel referenced in investigatory files are also routinely withheld, usually for reasons similar to those described quite aptly by the Court of Appeals for the Fourth Circuit:

One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.<sup>15</sup>

<sup>13</sup>(...continued)

denied, 112 S. Ct. 2991 (1992); Antonelli v. FBI, 721 F.2d 615, 618 (7th Cir. 1983) ("revealing that a third party has been the subject of FBI investigations is likely to constitute an invasion of [personal privacy]"), cert. denied, 467 U.S. 1210 (1984); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 861-66 (D.C. Cir. 1981) (identities of those investigated but not charged must be withheld unless "exceptional interests militate in favor of disclosure"); Baez v. United States Dep't of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980) ("There can be no clearer example of an unwarranted invasion of privacy than to release to the public that another individual was the subject of an FBI investigation."); Maroscia v. Levi, 569 F.2d at 1002; Heller v. United States Marshals Serv., 655 F. Supp. 1088, 1090 (D.D.C. 1987) (federal employees "have a strong [privacy] interest in not being associated unwarrantedly with alleged criminal activity"); Rushford v. Civiletti, 485 F. Supp. 477, 479 (D.D.C. 1980) ("severe adverse impact upon both his personal life and his official performance"), aff'd sub nom. Rushford v. Smith, 656 F.2d 900 (D.C. Cir. 1981) (table cite).

<sup>14</sup> See Silets v. FBI, 591 F. Supp. 490, 498 (N.D. Ill. 1984); Cunningham v. FBI, 540 F. Supp. 1, 2 (N.D. Ohio 1981), rev'd & remanded with order to vacate, No. 84-3367, slip op. at 3 (6th Cir. May 9, 1985); Lamont v. Department of Justice, 475 F. Supp. 761, 778 (S.D.N.Y. 1979).

<sup>15</sup> Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978). See FOIA Update, Spring 1984, at 5; see also Massey v. FBI, slip op. at 5674-75 (disclosure of names of FBI agents and other law enforcement personnel "could subject them to embarrassment and harassment"); Church of Scientology Int'l v. IRS, 995 F.2d 916, 920-21 (9th Cir. 1993) (privacy interest exists in handwriting of IRS agents in official documents); Maynard v. CIA, 986 F.2d at 566 (names and initials of low-level FBI agents and support personnel protectible); Hale v. United States Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) (FBI employees have substantial privacy interest in concealing their identities), cert. granted, vacated & remanded on other grounds, 113 S. Ct. 3029 (1993);

(continued...)

## EXEMPTION 7(C)

It should be noted that prior to the Reporters Committee and SafeCard Services decisions, courts ordinarily held that because Exemption 7(C) involves a balancing of the private and public interests on a case-by-case basis, there existed no "blanket exemption for the names of all [law enforcement] personnel in all documents."<sup>16</sup> Nonetheless, absent proven, significant misconduct on the parts of investigators, the overwhelming majority of courts have held the identities of law enforcement personnel exempt pursuant to Exemption 7(C).<sup>17</sup>

<sup>15</sup>(...continued)

In re Wade, 969 F.2d 241, 246 (7th Cir. 1992) (risk of "annoyance and harassment" of FBI agent); Davis v. United States Dep't of Justice, 968 F.2d at 1281 ("undercover agents" held to have protectible privacy interests); Johnson v. United States Dep't of Justice, 739 F.2d 1514, 1518-19 (10th Cir. 1984) (quoting with approval Nix v. United States, 572 F.2d at 1006); New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir. 1984) (Inspector General investigator has "interest in retaining the capability to perform his tasks effectively by avoiding untoward annoyance or harassment"); Miller v. Bell, 661 F.2d at 630 ("It is not necessary that harassment rise to the level of endangering physical safety before the protections of 7(C) can be invoked."); Lesar v. United States Dep't of Justice, 636 F.2d at 487-88 (annoyance or harassment); Maroscia v. Levi, 569 F.2d at 1002; Church of Scientology v. IRS, 816 F. Supp. 1138, 1160 (W.D. Tex. 1993) (disclosure of identifying information and handwriting could subject IRS employees to "harassment and annoyance") (appeal pending); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 809 (D.N.J. 1993) (because La Cosa Nostra is so violent and retaliatory, names of law enforcement personnel must be safeguarded); Church of Scientology v. IRS, No. 90-11069, slip op. at 26-28 (D. Mass. Apr. 22, 1992) (magistrate's recommendation) (because IRS and Scientologists have long history of confrontation, IRS properly withheld identifying information, including handwriting of employees); Author Servs., Inc. v. IRS, No. 90-2187, slip op. at 7 (C.D. Cal. Nov. 14, 1991) (same); Malizia v. United States Dep't of Justice, 519 F. Supp. 338, 348-49 (S.D.N.Y. 1981) (protection against retaliation).

<sup>16</sup> Lesar v. United States Dep't of Justice, 636 F.2d at 487; see, e.g., Stern v. FBI, 737 F.2d at 94 (name of high-level FBI employee who directly participated in intentional wrongdoing ordered released; names of two mid-level employees whose negligence incidentally furthered cover-up held protectible).

<sup>17</sup> See, e.g., Hale v. United States Dep't of Justice, 973 F.2d at 901 (unsubstantiated allegations of government wrongdoing do not justify disclosing law enforcement personnel names); Davis v. United States Dep't of Justice, 968 F.2d at 1281 ("undercover agents"); In re Wade, 969 F.2d at 246 (FBI agent); Patterson v. FBI, 893 F.2d 595, 601 (3d Cir.), cert. denied, 498 U.S. 812 (1990); Doherty v. United States Dep't of Justice, 775 F.2d 49, 52 (2d Cir. 1985) ("Identities of FBI agents, of FBI non-agent personnel [and] of employees of the Immigration and Naturalization Service are embraced by exemption (b)(7)(C)."); Johnson v. United States Dep't of Justice, 739 F.2d at 1519 (FBI agents' identities found properly protectible absent evidence in record of impropriety); Manchester v. DEA, 823 F. Supp. 1259, 1271 (E.D. Pa. 1993) (agents' names protected despite plaintiff's sweeping allegations of government wrongdoing).  
(continued...)

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The few aberrational decisions ordering disclosure of the names of government investigators--other than where proven misconduct has been involved--all preceded Reporters Committee and contain no persuasive reasoning contrary to the overwhelming majority of decisions on this issue.<sup>18</sup>

The history of one case in the District Court for the District of Columbia illustrates the impact of the Reporters Committee decision in this area of law. In Southam News v. INS,<sup>19</sup> the district court initially held that the identities of FBI clerical personnel who performed administrative tasks with respect to requested records could not be withheld under Exemption 7(C). Even then, this position was inconsistent with other, contemporaneous decisions.<sup>20</sup> Following the Supreme Court's decision in Reporters Committee, the government sought reconsideration of the Southam News decision. Agreeing that revelation of identities and activities of low-level agency personnel ordinarily will shed no light on government operations, as required by Reporters Committee, the district court reversed its earlier disclosure order and held the names to be properly protected.<sup>21</sup> Significantly, the court also recognized that "the only imaginable contribution that this information could make would be to enable the public to seek out individuals who had been tangentially involved in investigations and to question them for unauthorized access to information as to what the investi-

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<sup>17</sup>(...continued)

mental misconduct); Ray v. United States Dep't of Justice, 778 F. Supp. 1212, 1215 (S.D. Fla. 1991) (government may neither confirm nor deny existence of records concerning results of INS investigation of alleged misconduct of employee); Heller v. United States Marshals Serv., 655 F. Supp. at 1090-91 (identities of federal marshals held protectible where there was "virtually no wrongdoing" on their parts).

<sup>18</sup> See, e.g., Castaneda v. United States, 757 F.2d 1010, 1012 (9th Cir.) (holding USDA investigator's privacy interest "not great" and noting that his "name would be discoverable in any civil case brought [against the agency]"), amended upon denial of panel reh'g, 773 F.2d 251 (9th Cir. 1985); Iglesias v. CIA, 525 F. Supp. at 563 (names of government employees involved in conducting investigation ordered disclosed); Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898, 904 (D.D.C. 1980) (names of SEC investigators ordered disclosed).

<sup>19</sup> 674 F. Supp. at 888.

<sup>20</sup> See, e.g., Doherty v. United States Dep't of Justice, 775 F.2d at 52 (identities of FBI agents and FBI nonagent personnel protected); Kirk v. United States Dep't of Justice, 704 F. Supp. 288, 292 (D.D.C. 1989) ("Just like FBI agents, administrative and clerical personnel could be subject to harassment, questioning, and publicity, and the Court concludes that the FBI did not need to separate the groups of employees for purposes of explaining why disclosure of their identities was opposed.").

<sup>21</sup> Southam News v. INS, No. 85-2721, slip op. at 3 (D.D.C. Aug. 30, 1989).

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gation entailed and what other FBI personnel were involved."<sup>22</sup> More recently, after undertaking a post-Reporters Committee analysis, the same district court strongly reaffirmed that identities of both FBI clerical personnel and low-level special agents are properly withheld as a routine matter under Exemption 7(C), even when they take part in a highly publicized investigation.<sup>23</sup>

Traditionally, it has been held that Exemption 7(C) cannot be invoked to shield the fact that a third party has been investigated once the agency has publicly confirmed the existence of such an investigation, because there is little or no privacy interest in such public-record information.<sup>24</sup> However, in Reporters Committee, the Supreme Court found that substantial privacy interests can exist in personal information such as is contained in "rap sheets," even though the information has been made available to the general public at some place and point in time. Applying a "practical obscurity" standard,<sup>25</sup> the Court observed that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to [them]."<sup>26</sup>

All courts of appeals to have addressed the issue have found protectible privacy interests--in conjunction with or in lieu of protection under Exemption 7(D)--in the identities of individuals who provide information to law enforce-

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<sup>22</sup> Id.; see also Manna v. United States Dep't of Justice, 815 F. Supp. at 809 (names of law enforcement personnel involved in La Cosa Nostra investigation); Simon v. United States Dep't of Justice, 752 F. Supp. 14, 19 (D.D.C. 1990) (identities of FBI agents and other government personnel involved in processing FOIA request), aff'd, 980 F.2d 782 (D.C. Cir. 1992).

<sup>23</sup> See Stone v. FBI, 727 F. Supp. at 663 n.1 (protecting identities of FBI special agents and FBI clerical employees who participated in investigation of assassination of Robert F. Kennedy).

<sup>24</sup> See, e.g., Rizzo v. United States Dep't of Justice, No. 84-2080, slip op. at 5-6 (D.D.C. Feb. 28, 1985) (facts elicited at public trial are matters of public knowledge); Tennessean Newspapers, Inc. v. Levi, 403 F. Supp. 1318, 1320-21 (M.D. Tenn. 1975) (identities of individuals recently arrested or indicted ordered disclosed); see also Akron Standard Div. of Eagle-Picher Indus. v. Donovan, 780 F.2d 568, 572 (6th Cir. 1986) (information relating to job performance that "had been fully explored in public proceedings" not exempt); Myers v. United States Dep't of Justice, No. 85-1746, slip op. at 5 (D.D.C. Sept. 22, 1986) (matters discussed in trial testimony of law enforcement officials not exempt). (See Exemption 7(D), below, for a discussion of the status of open-court testimony under that exemption.) But see Kimberlin v. Department of the Treasury, 774 F.2d 204, 209 (7th Cir. 1985) (Exemption 7(C) held applicable to third party's driver's license and passport "which were introduced into evidence" in federal criminal trial).

<sup>25</sup> 489 U.S. at 762-63, 780.

<sup>26</sup> Id. at 764.

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ment agencies.<sup>27</sup> Consequently, the names of witnesses, their home and business addresses, and their telephone numbers have been held properly protectible under Exemption 7(C).<sup>28</sup> Additionally, protection has been afforded to the

<sup>27</sup> See, e.g., Massey v. FBI, slip op. at 5674-75 (disclosure of names of cooperating witnesses and third parties, including cooperating law enforcement officials, could subject them to "embarrassment and harassment"); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (withholding interviewees' names as "necessary to avoid harassment and embarrassment"); Clery v. FBI, 811 F.2d 421, 424 (8th Cir. 1987) (disclosure would subject "sources to unnecessary questioning concerning the investigation [and] to subpoenas issued by private litigants in civil suits incidentally related to the investigation"); Cuccaro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) ("privacy interest of . . . witnesses who participated in OSHA's investigation outweighs public interest in disclosure"); L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 923 (11th Cir. 1984) (disclosure of identities of employee-witnesses in OSHA investigation could cause "problems at their jobs and with their livelihoods"); New England Apple Council v. Donovan, 725 F.2d at 144-45 ("Disclosure could have a significant, adverse effect on this individual's private or professional life."); Kiraly v. FBI, 728 F.2d 273, 278-80 (6th Cir. 1984); Holy Spirit Ass'n v. FBI, 683 F.2d 562, 564-65 (D.C. Cir. 1982) (concurring opinion) ("risk of harassment" and fear of reprisals); Alirez v. NLRB, 676 F.2d 423, 427 (10th Cir. 1982) (disclosure would result in "embarrassment or reprisals"); Lesar v. United States Dep't of Justice, 636 F.2d at 488 ("Those cooperating with law enforcement should not now pay the price of full disclosure of personal details.") (quoting Lesar v. United States Dep't of Justice, 455 F. Supp. at 925); Scherer v. Kelley, 584 F.2d 170, 176 (7th Cir. 1978), cert. denied, 440 U.S. 964 (1979); Maroscia v. Levi, 569 F.2d at 1002.

<sup>28</sup> See L&C Marine Transp., Ltd. v. United States, 740 F.2d at 922 ("employee-witnesses . . . have a substantial privacy interest"); Antonelli v. Sullivan, 732 F.2d 560, 562 (7th Cir. 1984) ("[The requester] has mentioned no legitimate need for the witnesses' phone numbers and we can well imagine the invasions of privacy that would result should he obtain them."); Taylor v. Office of Special Counsel, No. 91-N-734, slip op. at 10 (D. Colo. Mar. 22, 1993) (release of documents would subject witnesses to a reasonable likelihood of harassment and embarrassment); Brittany Dyeing & Printing Corp. v. EPA, No. 91-2711, slip op. at 3-4 (D.D.C. Mar. 12, 1993) (identities of witnesses who assisted in preparation of environmental report protectible); Manna v. United States Dep't of Justice, 815 F. Supp. at 809 (names of witnesses in La Cosa Nostra case safeguarded); Farese v. United States Dep't of Justice, 683 F. Supp. 273, 275 (D.D.C. 1987) (names and number of family members of participants in Witness Security Program, as well as funds authorized to each, held exempt because disclosure "would pose a possible danger to the persons named" or "might subject those persons to harassment"); United States Steel Corp. v. United States Dep't of Labor, 558 F. Supp. 80, 82-83 (W.D. Pa. 1983) (names, addresses and phone numbers of witnesses found exempt); Friedman v. FBI, 605 F. Supp. 306, 321 (N.D. Ga. 1981) ("names and other unique personal information" about witnesses held exempt); see also Harper v. United (continued...)

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identities of informants,<sup>29</sup> even where it was shown that "the information provided to law enforcement authorities was knowingly false."<sup>30</sup>

Although on occasion a pre-Reporters Committee decision found that an individual's testimony at trial precluded Exemption 7(C) protection,<sup>31</sup> under the Reporters Committee "practical obscurity" standard, trial testimony should not ordinarily diminish Exemption 7(C) protection.<sup>32</sup> Plainly, if a person who

<sup>28</sup>(...continued)

States Dep't of Justice, No. 86-5489, slip op. at 3 (D.C. Cir. Sept. 22, 1987) (names of potential witnesses held exempt); Kilroy v. NLRB, 633 F. Supp. 136, 145 (S.D. Ohio 1985) (names and telephone numbers of persons who provided affidavits held exempt), aff'd, 823 F.2d 553 (6th Cir. 1987) (table cite); cf. Brown v. FBI, 658 F.2d 71, 75-76 (2d Cir. 1981) (information concerning witness who testified against requester protected under Exemption 6). But see Ferri v. Bell, 645 F.2d 1213, 1218 (3d Cir. 1981) (public interest in "Brady material" concerning possible "deal" between witness and prosecution outweighs witness' privacy interests).

<sup>29</sup> Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1490 (11th Cir. 1992) ("Disclosure of the identities of the FBI's sources will disclose a great deal about those sources but in this case will disclose virtually nothing about the conduct of the government."); Canning v. United States Dep't of the Treasury, No. 91-2324, slip op. at 6 (D.D.C. Apr. 28, 1993) (information that would identify individuals who cooperated with law enforcement agency is protectible); Manna v. United States Dep't of Justice, 815 F. Supp. at 809 (because organization so retaliatory, names of informants in La Cosa Nostra case safeguarded); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 793 (D.D.C. 1992) (identities of third parties who provided information to agency properly withheld), summary affirmance granted in pertinent part, No. 92-5360 (D.C. Cir. Apr. 29, 1993); Johnson v. United States Dep't of Justice, No. 85-714, slip op. at 3 (D.D.C. Nov. 13, 1991) (requester's interest in overturning his conviction does not outweigh substantial privacy interests of informants).

<sup>30</sup> Gabrielli v. United States Dep't of Justice, 594 F. Supp. 309, 313 (N.D.N.Y. 1984); see also Block v. FBI, No. 83-813, slip op. at 11 (D.D.C. Nov. 19, 1984) ("[Requester's] personal interest in knowing who wrote letters concerning him . . . is not sufficient to demonstrate a public interest.") (Exemption 6).

<sup>31</sup> Compare Myers v. United States Dep't of Justice, slip op. at 3-6 ("no privacy interest exists" as to names of law enforcement personnel who testified at requester's trial) with Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 6 (D.D.C. Apr. 13, 1989) ("[T]he protection of Exemption 7(C) is not waived by the act of testifying at trial."), summary affirmance granted, No. 89-5185 (D.C. Cir. Feb. 26, 1990).

<sup>32</sup> See Burge v. Eastburn, 934 F.2d 577, 579 (5th Cir. 1991) (affirming refusal, under Exemption 7(C), to confirm or deny existence of information in FBI files regarding individuals who testified at plaintiff's murder trial); Engelking v. DEA, No. 91-0165, slip op. at 7-8 (D.D.C. Nov. 30, 1992) (even

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actually testifies retains a substantial privacy interest, the privacy of someone who is identified only as a potential witness likewise should be preserved.<sup>33</sup>

Moreover, courts have consistently recognized that the mere passage of time will not ordinarily diminish the applicability of Exemption 7(C).<sup>34</sup> This may be especially true in instances in which the information was obtained through questionable law enforcement investigations.<sup>35</sup> In fact, the "practical obscurity" concept expressly recognizes that the passage of time may increase the privacy interest at stake when disclosure would revive information that was

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<sup>32</sup>(...continued)

though information sought is available in requester's trial transcript, Exemption 7(C) protects information about people who were implicated, involved, or were associated with requester); Jones v. FBI, No. C77-1001, slip op. at 13 (N.D. Ohio Aug. 12, 1992) ("fact that a person has given testimony at trial does not mean that person has waived his or her privacy for all purposes") (appeal pending); Curro v. United States Dep't of Justice, No. 90-1887, slip op. at 5 (D.D.C. Mar. 20, 1991) ("[W]itness[es] who testify at criminal trial do not forfeit their privacy interests, except, perhaps, as to the public testimony."); see also Pittman v. Phillips, No. 91-3146, slip op. at 2-4 (D.D.C. Oct. 8, 1992) (protecting names of law enforcement officers in audiotape recordings made of requester's plea-bargain negotiations with government agents).

<sup>33</sup> See Watson v. United States Dep't of Justice, 799 F. Supp. 193, 196 (D.D.C. 1992) (identities of potential witnesses protectible); Harvey v. United States Dep't of Justice, 747 F. Supp. 29, 37 (D.D.C. 1990).

<sup>34</sup> See, e.g., Maynard v. CIA, 986 F.2d at 566 n.21 (effect of passage of time upon individual's privacy interests found "simply irrelevant"); Fitzgibbon v. CIA, 911 F.2d at 768 (passage of more than 30 years irrelevant where records reveal nothing about government activities); Keys v. United States Dep't of Justice, 830 F.2d at 348 (passage of 40 years did not "dilute the privacy interest as to tip the balance the other way"); King v. United States Dep't of Justice, 830 F.2d 210, 234 (D.C. Cir. 1987) (rejecting argument that passage of time diminished privacy interests at stake in records more than 35 years old); Diamond v. FBI, 707 F.2d 75, 77 (2d Cir. 1983) ("the danger of disclosure may apply to old documents"), cert. denied, 465 U.S. 1004 (1984); Simon v. United States Dep't of Justice, 752 F. Supp. at 20 (The "passage of almost forty years does not so abate the privacy interests at stake in a controversial case of this kind."); Stone v. FBI, 727 F. Supp. at 664 (FBI agents who participated in an investigation over 20 years ago, even one as well known as RFK assassination, "have earned the right to be 'left alone' unless an important public interest outweighs that right."); Branch v. FBI, 658 F. Supp. at 209 (The "privacy interests of the persons mentioned in the investigatory files do not necessarily diminish with the passage of time.").

<sup>35</sup> See, e.g., Dunaway v. Webster, 519 F. Supp. 1059, 1079 (N.D. Cal. 1981) ("[The target of a McCarthy era investigation] may . . . deserve greater protection, because the connection to such an investigation might prove particularly embarrassing or damaging.").



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once public knowledge but has long since faded from memory.<sup>36</sup>

An individual's Exemption 7(C) privacy interest is not extinguished merely because a requester might on his own be able to "piece together" the identities of third parties whose names have been deleted.<sup>37</sup> Nor do persons mentioned in law enforcement records lose all their rights to privacy merely because their names have been disclosed.<sup>38</sup> Similarly, "[t]he fact that one document does disclose some names . . . does not mean that the privacy rights of these or others are waived; [requesters] do not have the right to learn more about the activities and statements of persons merely because they are mentioned once in a public document about the investigation."<sup>39</sup>

<sup>36</sup> See Reporters Committee, 489 U.S. at 767 ("[O]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may at one time have been public."); Rose v. Department of the Air Force, 495 F.2d 261, 267 (2d Cir. 1974) ("[A] person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information.") (Exemption 6), aff'd, 425 U.S. 352 (1976). But see Outlaw v. United States Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. Mar. 25, 1993) (agency must release 25-year-old photographs of murder victim with no known surviving next of kin; murder is "surely long forgotten by whatever public noticed it at the time"); Silets v. FBI, 591 F. Supp. at 498 ("[W]here documents are exceptionally old, it is likely that their age has diminished the privacy interests at stake."); Wilkinson v. FBI, 633 F. Supp. 336, 345 (C.D. Cal. 1986) ("There is likely to be little fear of retaliation, humiliation, or embarrassment over twenty years after the events." (quoting Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1526 (N.D. Cal. 1984))).

<sup>37</sup> Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1491 (D.C. Cir. 1984); see also L&C Marine Transp., Ltd. v. United States, 740 F.2d at 922 ("An individual does not lose his privacy interest under 7(C) because his identity . . . may be discovered through other means."); Larson v. Executive Office for United States Attorneys, No. 85-2575, slip op. at 5 n.6 (D.D.C. Nov. 22, 1988) ("[T]he fact that [the requester] might know the names of some agents and witnesses who testified against him [as he alleges] does not justify release of documents that may or may not contain similar information.").

<sup>38</sup> See, e.g., Hunt v. FBI, 972 F.2d at 288 ("public availability" of accused FBI agent's name does not defeat privacy protection and "would make redaction of [the agent's name in] the file a pointless exercise"); Fitzgibbon v. CIA, 911 F.2d at 768 (fact that CIA or FBI may have released information about individual elsewhere does not diminish that individual's "substantial privacy interests"); Engelking v. DEA, slip op. at 7-8 (even though information sought is available in requester's trial transcript, Exemption 7(C) protection remains). But see Grove v. CIA, 752 F. Supp. 28, 32 (D.D.C. 1990) (FBI must further explain Exemption 7(C) withholdings in light of highly publicized nature of investigation and fact that CIA and Secret Service released other records pertaining to same individuals).

<sup>39</sup> Kirk v. United States Dep't of Justice, 704 F. Supp. at 292.

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Under the traditional Exemption 7(C) analysis, once a privacy interest had been identified and assessed, it is balanced against any public interest that would be served by disclosure.<sup>40</sup> And under Reporters Committee the standard of public interest to consider is one specifically limited to the FOIA's "core purpose" of "shed[ding] light on an agency's performance of its statutory duties."<sup>41</sup> Accordingly, for example, the courts have consistently refused to recognize any public interest, as defined by Reporters Committee, in disclosure of information to assist a convict in challenging his conviction.<sup>42</sup> Indeed, a

<sup>40</sup> See Massey v. FBI, slip op. at 5676 (once agency establishes that privacy interest exists, that interest must be balanced against value of information in furthering FOIA's disclosure objectives); Church of Scientology Int'l v. IRS, 995 F.2d at 921 (case remanded where district court failed to determine whether public interest in disclosure outweighed privacy concerns); Keys v. United States Dep't of Justice, 830 F.2d at 346; Globe Newspaper Co. v. FBI, No. 91-13257, slip op. at 10 (D. Mass. Dec. 29, 1992) (public interest in disclosing amount of money government paid to officially confirmed informant guilty of criminal wrongdoing outweighs informant's de minimis privacy interest); Church of Scientology v. IRS, 816 F. Supp. at 1160 (while employees have privacy interest in their handwriting, that interest does not outweigh public interest in disclosure of information contained in documents not otherwise exempt; agency must, at requester's expense, transcribe and disclose documents not otherwise exempt); Harvey v. United States Dep't of Justice, 747 F. Supp. at 36; Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. at 855; see also FOIA Update, Spring 1989, at 7.

<sup>41</sup> 489 U.S. at 773.

<sup>42</sup> See, e.g., Hale v. United States Dep't of Justice, 973 F.2d at 901 (no FOIA-recognized public interest in death-row inmate's allegation of unfair trial); Landano v. United States Dep't of Justice, 956 F.2d 422, 430 (3d Cir. 1992) (no public interest in disclosure of identities of individuals involved in murder investigation because such release would not shed light on how FBI fulfills its responsibilities), cert. denied, 113 S. Ct. 197 (1992); Burge v. Eastburn, 934 F.2d at 580 ("requester's need, however significant, does not warrant disclosure"); Neill v. United States Dep't of Justice, No. 91-3319, slip op. at 5-6 (D.D.C. July 20, 1993) (Exemption 7(C) protects information notwithstanding claim that withholding identities of individuals involved in investigation of plaintiff would violate "Brady doctrine"); Durham v. United States Postal Serv., No. 91-2234, slip op. at 4-5 (D.D.C. Nov. 25, 1992) ("Glomar" response appropriate even though plaintiff argues information would prove his innocence), summary affirmance granted, No. 92-5511 (D.C. Cir. July 27, 1993); Johnson v. United States Dep't of Justice, slip op. at 3 (in absence of compelling evidence of agency misconduct, plaintiff's contention of "indirect public purpose"--collateral attack on his criminal conviction--does not outweigh substantial privacy interests of informants); Wagner v. FBI, No. 90-1314, slip op. at 6-7 (D.D.C. June 4, 1991) (public interest "is that of the public at large in investigating the actions of government agencies, not plaintiff's interest"), summary affirmance granted, No. 91-5220 (D.C. Cir. Aug. 3, 1992); Curro v. United States Dep't of Justice, slip op. at 5 ("plaintiff cannot use the FOIA as a  
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FOIA requester's private need for information in connection with litigation plays no part in whether disclosure is warranted.<sup>43</sup> Unsubstantiated allegations of official misconduct have been held insufficient to establish a public interest in disclosure.<sup>44</sup> Further, it has been held that no public interest exists in federal records that might reveal alleged misconduct by state officials;<sup>45</sup> such an attenuated interest "falls outside the ambit of the public interest the FOIA was enacted to serve."<sup>46</sup>

It is important to remember that a requester must do more than identify a public interest that qualifies for consideration under Reporters Committee. He or she must demonstrate that the public interest in disclosure is sufficiently

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<sup>42</sup>(...continued)

substitute for criminal discovery"); Johnson v. United States Dep't of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991) ("Resort to Brady v. Maryland as grounds for waiving confidentiality [under Exemptions 7(C) and 7(D)] is . . . outside the proper role of the FOIA. Exceptions cannot be made because of the subject matter or [death-row status] of the requester.").

<sup>43</sup> Massey v. FBI, slip op. at 5677 (mere possibility that information sought may aid individual in pursuit of litigation does not give rise to public interest); Andrews v. United States Dep't of Justice, 769 F. Supp. 314, 317 (E.D. Mo. 1991) (no public interest in satisfaction of private judgments); see also Johnson v. Federal Bureau of Prisons, No. CV-90-H-645-E, slip op. at 8 (N.D. Ala. Nov. 1, 1990) (citing L&C Marine Transp., Ltd. v. United States, 740 F.2d at 923); Joslin v. United States Dep't of Labor, No. 88-1999, slip op. at 8 (10th Cir. Oct. 20, 1989) (no public interest in release of documents sought for use in private tort litigation). But see Outlaw v. United States Dep't of the Army, 815 F. Supp. at 506 (agency must release 25-year-old photographs of murder victim; obvious public interest in disclosure as check on administration of justice).

<sup>44</sup> See, e.g., Beck v. Department of Justice, 997 F.2d 1489, 1492-94 (D.C. Cir. 1993) (agency properly "Glomarized" request for records concerning alleged wrongdoing by two named employees; no public interest absent any evidence of wrongdoing); KTVY-TV v. United States, 919 F.2d at 1470 (allegations of "possible neglect"); Manchester v. DEA, 823 F. Supp. at 1271 (sweeping allegations of governmental misconduct); Wagner v. FBI, slip op. at 6-7 (allegations that agents conducted warrantless search of plaintiff's home). But see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 567-69 (1st Cir. 1992) (aberrational finding of public interest in disclosure of unsubstantiated allegations against two senior officials); McCutchen v. HHS, No. 91-142, slip op. at 10-13 (D.D.C. Aug. 24, 1992) (refusing to protect identities of agency scientists found not to be engaged in alleged scientific misconduct) (Exemptions 6 and 7(C)) (appeal pending).

<sup>45</sup> Landano v. United States Dep't of Justice, 956 F.2d at 430 (There is "no FOIA-recognized public interest in discovering wrongdoing by a state agency.").

<sup>46</sup> Reporters Committee, 489 U.S. at 775; see also FOIA Update, Spring 1991, at 6 (explaining that "government activities" in Reporter's Committee standard means activities of federal government).

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compelling to overcome legitimate privacy interests.<sup>47</sup> Of course, "[w]here the requester fails to assert a public interest purpose for disclosure, even a less than substantial invasion of another's privacy is unwarranted."<sup>48</sup> Moreover, it should be remembered that any special expertise claimed by the requester is irrelevant in assessing any public interest in disclosure.<sup>49</sup> In the wake of Reporters Committee, the public interest standard will ordinarily not be satisfied where FOIA requesters seek law enforcement information pertaining to living individuals.<sup>50</sup>

<sup>47</sup> See Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987) (general interest of legislature in "getting to the bottom" of highly controversial investigation held not sufficient to overcome "substantial privacy interests"); Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 59 (D.D.C. 1990) (public interest in alleged plot in United States by agents of now-deposed dictatorship held insufficient to overcome "strong privacy interests"); Stone v. FBI, 727 F. Supp. at 667-68 n.4 ("[N]ew information considered significant by zealous students of the RFK assassination investigation would be nothing more than minutia of little or no value in terms of the public interest."); Aleman v. Shapiro, No. 85-3313, slip op. at 5 (D.D.C. May 5, 1987) (plaintiff must assert sufficient public interest in disclosure to outweigh privacy interest of individuals mentioned in law enforcement files).

<sup>48</sup> King v. United States Dep't of Justice, 586 F. Supp. 286, 294 (D.D.C. 1983), *aff'd*, 830 F.2d 210 (D.C. Cir. 1987); see also Beck v. Department of Justice, 997 F.2d at 1494 (where request implicates no public interest at all, court "need not linger over the balance; something . . . outweighs nothing every time" (quoting National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990))) (Exemptions 6 and 7(C)); Fitzgibbon v. CIA, 911 F.2d at 768 (same); FOIA Update, Spring 1989, at 7.

<sup>49</sup> See Massey v. FBI, slip op. at 5677 (identity of requesting party and use that party plans to make of requested information "has no bearing" on assessment of public interest served by disclosure); Stone v. FBI, 727 F. Supp. at 668 n.4 (court looks to public interest served by release of information, "not to the highly specialized interests of those individuals who understandably have a greater personal stake in gaining access to that information").

<sup>50</sup> See, e.g., Maynard v. CIA, 986 F.2d at 566 (no public interest in disclosure of information concerning low-level FBI employees and third parties); Fitzgibbon v. CIA, 911 F.2d at 768 ("[T]here is no reasonably conceivable way in which the release of one individual's name . . . would allow citizens to know 'what their government is up to.'" (quoting Reporters Committee, 489 U.S. at 1481)); Stone v. FBI, 727 F. Supp. at 666-67 (no public interest in disclosure of identities of low-level FBI agents who participated in RFK assassination investigation); Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. at 855-56 (no public interest in disclosure of information DEA obtained about individuals and their activities, where such material would not shed light on DEA's conduct with respect to its investigation); see also KTVY-TV v. United States, 919 F.2d at 1470 (disclosure of identities of witnesses and  
(continued...)

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In Reporters Committee, the Supreme Court emphasized the desirability of establishing "categorical balancing" under Exemption 7(C) as a means of achieving "workable rules" for processing FOIA requests.<sup>51</sup> In so doing, it recognized that entire categories of cases can properly receive uniform disposition "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."<sup>52</sup> This approach, in conjunction with other elements of Reporters Committee and traditional Exemption 7(C) principles, subsequently led the D.C. Circuit to largely eliminate the need for case-by-case balancing in favor of "categorical" withholding of individuals' identities in law enforcement records.<sup>53</sup>

In SafeCard Services, Inc. v. SEC, the plaintiff sought information pertaining to an SEC investigation of manipulation of SafeCard stock, including "names and addresses of third parties mentioned in witness interviews, of customers listed in stock transaction records obtained from investment companies, and of persons in correspondence with the SEC."<sup>54</sup> Reiterating the fundamentally inherent privacy interest of individuals mentioned in any way in law enforcement files,<sup>55</sup> the D.C. Circuit found that the plaintiff's asserted public interest--providing the public "with insight into the SEC's conduct with respect to SafeCard"--was "not just less substantial [but] insubstantial."<sup>56</sup> Based upon the Supreme Court's endorsement of categorical rules in Reporters Committee, it then further determined that the identities of individuals who appear in law enforcement files would virtually never be "very probative of an agency's behavior or performance."<sup>57</sup> It observed that such information would serve a "significant" public interest only if "there is compelling evidence that the agency . . . is engaged in illegal activity."<sup>58</sup> Consequently, the D.C. Circuit held

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<sup>50</sup>(...continued)

third parties would not further plaintiff's unsupported theory that post office shootings could have been prevented by postal authorities); Halloran v. VA, 874 F.2d 315, 323 (5th Cir. 1989) ("[M]erely stating that the interest exists in the abstract is not enough; rather, the court should have analyzed how that interest would be served by compelling disclosure."); FOIA Update, Spring 1989, at 6.

<sup>51</sup> Reporters Committee, 489 U.S. at 776-80.

<sup>52</sup> Id. at 780.

<sup>53</sup> See SafeCard Servs., Inc. v. SEC, 926 F.2d at 1206.

<sup>54</sup> Id. at 1205.

<sup>55</sup> See id. (recognizing privacy of suspects, witnesses and investigators).

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Id. at 1206; cf. Dunkelberger v. Department of Justice, 906 F.2d at 782 (finding some cognizable public interest in "FBI agent's alleged participation in (continued...)

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that "unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is [categorically] exempt from disclosure."<sup>59</sup>

Protecting the privacy interests of individuals who are the targets of FOIA requests and are named in investigatory records requires special procedures. Many agencies with criminal law enforcement responsibilities follow the approach of the FBI, which is to respond to FOIA requests for records concerning other individuals by refusing to confirm or deny whether such records exist. Such a response is necessary because, as previously discussed, members of the public may draw adverse inferences from the mere fact that an individual is mentioned in the files of a criminal law enforcement agency.<sup>60</sup>

Therefore, except where the third-party subject is deceased or provides a written waiver of his privacy rights, law enforcement agencies should categorically "Glomarize" all such third-party requests--refusing either to confirm or deny the existence of responsive records--in order to protect the privacy of those who are in fact the subject of or mentioned in investigatory files.<sup>61</sup> (Prior to Reporters Committee, before an agency could give such a response, it was required to check the requested records, if any existed, for any official acknowledgment of the investigation (e.g., as a result of prosecution) or for any

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<sup>58</sup>(...continued)

a scheme to entrap a public official and in the manner in which the agent was disciplined"). But see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 567-69 (exceptional finding of public interest in disclosure of unsubstantiated allegations); McCutchen v. HHS, slip op. at 10 (finding significant public interest in disclosing identities of scientists investigated on (and ultimately cleared of) charges of scientific misconduct, based upon belief that such disclosure would foster greater public oversight).

<sup>59</sup> SafeCard Servs., Inc. v. SEC, 926 F.2d at 1206; see, e.g., Coleman v. FBI, No. 89-2773, slip op. at 16 (D.D.C. Dec. 10, 1991) (citing SafeCard Servs., Inc. v. SEC, 926 F.2d at 1205-06)), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992).

<sup>60</sup> See Ray v. United States Dep't of Justice, 778 F. Supp. at 1215; FOIA Update, Summer 1989, at 5; FOIA Update, Winter 1986, at 3-4 ("OIP Guidance: Privacy 'Glomarization'"); FOIA Update, Sept. 1982, at 2; see also Massey v. FBI, slip op. at 5675 ("individuals have substantial privacy interests in information that either confirms or suggests that they have been subject to criminal investigations or proceedings"); Antonelli v. FBI, 721 F.2d at 617 ("even acknowledging that certain records are kept would jeopardize the privacy interests that the FOIA exemptions are intended to protect").

<sup>61</sup> See Antonelli v. FBI, 721 F.2d at 617 ("Glomar" response appropriate for third-party requests where requester has identified no public interest in disclosure); Durham v. United States Postal Serv., slip op. at 4-5 ("Glomar" response concerning possible subject of murder investigation warranted); FOIA Update, Summer 1989, at 5; FOIA Update, Winter 1986, at 3-4.

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overriding public interest in disclosure that would render "Glomarization" inapplicable. However, in Reporters Committee, the Supreme Court eliminated the need to consider whether there has been a prior acknowledgment when it expressly "recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public."<sup>62</sup> Further, as the very fact of an arrest and conviction of a person, as reflected in his FBI "rap sheet," creates a cognizable privacy interest, any underlying investigative file, containing a far more detailed account of the subject's activities, gives rise to an even greater privacy interest.<sup>63</sup>)

At the litigation stage, the agency must demonstrate to the court, either through a Vaughn affidavit or an in camera submission, that its refusal to confirm or deny the existence of responsive records is appropriate.<sup>64</sup> Although this "refusal to confirm or deny" approach is now widely accepted in the case law,<sup>65</sup> several cases have illustrated the procedural difficulties involved in de-

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<sup>62</sup> 489 U.S. at 767.

<sup>63</sup> See FOIA Update, Summer 1989, at 5 (under Reporters Committee, Exemption 7(C) "Glomarization" can be undertaken without review of any responsive records, in response to third-party requests for routine law enforcement records pertaining to living private citizens who have not given consent to disclosure); see also FOIA Update, Spring 1991, at 6 (warning agencies not to notify requesters of identities of other agencies to which record referrals are made, in any exceptional case in which so doing would reveal sensitive abstract fact about existence of records).

<sup>64</sup> See Ely v. FBI, 781 F.2d 1487, 1492 n.4 (11th Cir. 1986) ("the government must first offer evidence, either publicly or in camera to show that there is a legitimate claim"); Grove v. CIA, 752 F. Supp. at 30 (agency required to conduct search to properly justify use of "Glomar" response in litigation).

<sup>65</sup> See, e.g., Reporters Committee, 489 U.S. at 757 (request for any "rap sheet" on defense contractor); Beck v. Department of Justice, 997 F.2d at 1493-94 (request for records concerning alleged wrongdoing by two named DEA agents); Dunkelberger v. Department of Justice, 906 F.2d at 780, 782 (request for information that could verify alleged misconduct by an undercover FBI agent); Freeman v. United States Dep't of Justice, No. 86-1073, slip op. at 2 (4th Cir. Dec. 29, 1986) (request for alleged FBI informant file of Teamsters president); Strassman v. United States Dep't of Justice, 792 F.2d 1267, 1268 (4th Cir. 1986) (request for records allegedly indicating whether governor of West Virginia threatened to invoke Fifth Amendment); Antonelli v. FBI, 721 F.2d at 616-19 (prisoner seeking files on eight third parties); Durham v. United States Postal Serv., slip op. at 4-5 (prisoner seeking file on possible suspect in murder investigation); Ray v. United States Dep't of Justice, 778 F. Supp. at 1215 (request for any records reflecting results of INS investigation of alleged employee misconduct); Knight Publishing Co. v. United States Dep't of Justice, No. 84-510, slip op. at 1-2 (W.D.N.C. Mar. 28, 1985) (newspaper seeking any DEA investigatory file on governor, lieutenant governor or attorney general of North Carolina); Ray v. Department of Justice, No. 3-84-1234, slip op. at 2-3 (continued...)

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fending a "Glomar" response when the requester's "speculation" as to the contents of the records (if any exist) raises a qualifying public interest.<sup>66</sup> And when a third-party request is made for both administrative and investigatory records, an agency may need to bifurcate the request: The agency can provide a substantive response to the administrative records aspect and a "Glomar" response to the investigatory records aspect of the request.<sup>67</sup>

The significantly lessened certainty of harm now required under Exemption 7(C) and the approval of "categorical" withholding of privacy-related law enforcement information in most instances should permit agencies to afford full protection to personal privacy interests in law enforcement files wherever it can reasonably be foreseen that those interests are threatened by a contemplated FOIA disclosure.<sup>68</sup>

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<sup>65</sup>(...continued)

(M.D. Tenn. Nov. 28, 1984) (convicted killer of Dr. Martin Luther King, Jr., seeking file on former Tennessee state senator who introduced legislation which would bar convicts from receiving payment for literary works); Ely v. Secret Serv., No. 83-2080, slip op. at 1-2 (D.D.C. Dec. 14, 1983) (inmate seeking file on third party "well known to plaintiff"); Ray v. United States Dep't of Justice, 558 F. Supp. 226, 228-29 (D.D.C. 1982) (convicted killer of Dr. Martin Luther King, Jr., seeking any file on his former attorney, Percy Foreman, or Congressman Louis Stokes), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (table cite); Blakey v. Department of Justice, 549 F. Supp. 362, 365-66 (D.D.C. 1982) (professor seeking any records relating to a minor figure in investigation of assassination of President Kennedy who was indexed under topics other than Kennedy assassination), aff'd in part & vacated in part, 720 F.2d 215 (D.C. Cir. 1983) (table cite); Rushford v. Civiletti, 485 F. Supp. at 479-81 (reporter seeking criminal files on federal judges).

<sup>66</sup> See Shaw v. FBI, 604 F. Supp. 342, 344-45 (D.D.C. 1985) (requester seeking any investigatory files on individuals whom he believed participated in assassination of President Kennedy); Flynn v. United States Dep't of Justice, No. 83-2282, slip op. at 1-3 (D.D.C. Feb. 18, 1984) (allegation of documents reflecting judicial bias), summary judgment for agency granted (D.D.C. Apr. 6, 1984); see also Knight Publishing Co. v. United States Dep't of Justice, slip op. at 2 (on motion to compel unsealing of in camera affidavit).

<sup>67</sup> See, e.g., Grove v. Department of Justice, 802 F. Supp. at 510-11 (agency conducted search for administrative records sought but "Glomarized" part of request concerning investigatory records); accord Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1981) (early "Glomarization" case bifurcating between classified and unclassified activities) (Exemptions 1 and 3).

<sup>68</sup> See Attorney General's Memorandum at 9-12; see also Stone v. FBI, 727 F. Supp. at 665 (discussing breadth of Exemption 7(C) protection after 1986 FOIA amendments).



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It has long been recognized that Exemption 7(D) of the FOIA, which protects against disclosure of information pertaining to confidential sources, affords the most comprehensive protection of all of the FOIA's law enforcement exemptions. Moreover, the Freedom of Information Reform Act of 1986 significantly strengthened the protections of Exemption 7(D) in a number of respects.<sup>1</sup>

As amended, Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] 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 a 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."<sup>2</sup>

Although in some respects the 1986 FOIA amendments essentially codified what had been the prevailing judicial interpretation of the prior language of the exemption, in other areas the amendments represent a significant expansion of the exemption's shield for confidential sources. Both Congress and the courts have clearly manifested their appreciation that a "robust" Exemption 7(D) is crucial<sup>3</sup> to ensuring that "confidential sources are not lost through retaliation against the sources for past disclosure<sup>4</sup> or because of the sources' fear of

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<sup>1</sup> See Irons v. FBI, 880 F.2d 1446, 1452 (1st Cir. 1989) (en banc) ("In 1986 Congress acted again to . . . broaden the reach of this exemption and to ease considerably a Federal law enforcement agency's burden in invoking it.") (quoting Irons v. FBI, 811 F.2d 681, 687 (1st Cir. 1987)); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 11 (D.D.C. 1991) (same); Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 13-15 (Dec. 1987) [hereinafter Attorney General's Memorandum].

<sup>2</sup> 5 U.S.C. § 552(b)(7)(D) (1988).

<sup>3</sup> Brant Constr. Co. v. EPA, 778 F.2d 1258, 1262 (7th Cir. 1985); Johnson v. United States Dep't of Justice, 739 F.2d 1514, 1518 (10th Cir. 1984).

<sup>4</sup> See, e.g., KTVY-TV v. United States, 919 F.2d 1465, 1470-71 (10th Cir. 1990) (per curiam) ("indications of fear of harassment and embarrassment support an implied request for confidentiality"); Keys v. United States Dep't of Justice, 830 F.2d 337, 345-46 (D.C. Cir. 1987) (fear of "harassment, ridicule or retaliation" by interviewees justifies nondisclosure); Williams v. FBI, 822 F. Supp. 808, 814 (D.D.C. 1993) (same); Engelking v. DEA, No. 91-165, slip op. at 9 (D.D.C. Nov. 30, 1992) ("assistance . . . would be inhibited as a result of fear of exposure and possible retaliation"); Helmsley v. United States Dep't of Justice, No. 90-2413, slip op. at 13 (D.D.C. Sept. 24, 1992) ("information . . . must be afforded protection to ensure that cooperating private citizens will not be subjected to harassment and will continue to cooperate");

(continued...)

future disclosure."<sup>5</sup>

As previously noted, the shift from the "would constitute" to the "could reasonably be expected to constitute" standard in the threshold of the exemption should "ease considerably" a federal law enforcement agency's burdens in justifying withholding.<sup>6</sup> Moreover, by specifically identifying particular categories of individuals and institutions to be included in the term "source," the FOIA Reform Act enacted into positive law the position reflected in the legislative history of the 1974 amendments to the FOIA: that the term "confidential source" was chosen by design to encompass a broader group than would have been included had the term "informer" been used.<sup>7</sup>

<sup>4</sup>(...continued)

Gula v. Meese, 699 F. Supp. 956, 960 (D.D.C. 1988) ("[S]uccess of law enforcement investigations rests upon information provided by individuals who may be exposed to relentless harassment and possible harm if their identities were revealed."); see also Struth v. FBI, 673 F. Supp. 949, 965 (E.D. Wis. 1987) ("[T]his exemption need not be construed narrowly because, in enacting it, Congress displayed an intent to preserve, not destroy, confidentiality in certain necessary situations.").

<sup>5</sup> See, e.g., McDonnell v. United States, No. 91-5916, slip op. at 53 (3d Cir. Sept. 21, 1993) ("goal of Exemption 7(D) [is] to protect the ability of law enforcement agencies to obtain the cooperation of persons having relevant information and who expect a degree of confidentiality in return for their cooperation") (to be published); Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 563 (1st Cir. 1992) (Exemption 7(D) intended to avert "drying-up" of sources); Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1486 (11th Cir. 1992) ("[F]ear of exposure would chill the public's willingness to cooperate with the FBI . . . [and] would deter future cooperation."); Shaw v. FBI, 749 F.2d 58, 61 (D.C. Cir. 1984) (purpose of Exemption 7(D) is "to prevent the FOIA from causing the 'drying up' of sources of information in criminal investigations"); Johnson v. United States Dep't of Justice, 739 F.2d at 1514 (same); Helmsley v. United States Dep't of Justice, slip op. at 13 ("release of the confidential source information would chill cooperation with the government"); Wagoner v. United States Postal Serv., No. 91-1529, slip op. at 9 (D.D.C. Feb. 5, 1992) (Information "must be afforded protection to ensure that cooperating private citizens will not be subjected to harassment and will continue to cooperate."), summary affirmance granted, No. 92-5101 (D.C. Cir. Dec. 10, 1992); Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 60 (D.D.C. 1990) (noting "law enforcement's interest in assuring future sources that their identities will remain confidential").

<sup>6</sup> United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989); see also Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 564 n.14 ("1986 amendment eased the government's burden of proof substantially"); Attorney General's Memorandum at 9-13.

<sup>7</sup> See S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6291.

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By its own terms, however, this statutory enumeration is not exhaustive. The term "source" historically has been interpreted to include a broad variety of individuals and institutions not legislatively specified, such as crime victims,<sup>8</sup> citizens providing unsolicited allegations of misconduct,<sup>9</sup> citizens responding to inquiries from law enforcement agencies,<sup>10</sup> private employees responding to an OSHA investigation of an industrial accident,<sup>11</sup> prisoners,<sup>12</sup> mental healthcare facilities,<sup>13</sup> and commercial or financial institutions.<sup>14</sup> Both the statute and the case law have recognized that sources include state and local law enforcement agencies<sup>15</sup> and that they include foreign law enforcement agencies as

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<sup>8</sup> See, e.g., Coleman v. FBI, No. 89-2773, slip op. at 21 (D.D.C. Dec. 10, 1991), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992); Gula v. Meese, 699 F. Supp. at 960.

<sup>9</sup> See, e.g., Brant Constr. Co. v. EPA, 778 F.2d at 1263; Pope v. United States, 599 F.2d 1383, 1386-87 (5th Cir. 1979); Mobil Oil Corp. v. FTC, No. 74-Civ-311, slip op. at 3 (S.D.N.Y. Dec. 7, 1978).

<sup>10</sup> See, e.g., Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 565; Miller v. Bell, 661 F.2d 623, 627-28 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

<sup>11</sup> See, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 924-25 (11th Cir. 1984).

<sup>12</sup> Johnson v. Federal Bureau of Prisons, No. CV-90-H-645-E, slip op. at 6-7 (N.D. Ala. Nov. 1, 1990).

<sup>13</sup> See, e.g., Sanders v. United States Dep't of Justice, No. 91-2263, slip op. at 9 (D. Kan. Apr. 21, 1992).

<sup>14</sup> See, e.g., Jones v. FBI, No. C77-1001, slip op. at 16 (N.D. Ohio June 2, 1991) (magistrate's recommendation), adopted (N.D. Ohio Aug. 12, 1992) (appeal pending); Coleman v. FBI, slip op. at 22; McCoy v. Moschella, No. 89-2155, slip op. at 2 (D.D.C. Sept. 30, 1991); Founding Church of Scientology v. Levi, 579 F. Supp. 1060, 1063 (D.D.C. 1982), aff'd, 721 F.2d 828 (D.C. Cir. 1983); Biberman v. FBI, 528 F. Supp. 1140, 1143 (S.D.N.Y. 1982); Dunaway v. Webster, 519 F. Supp. 1059, 1082 (N.D. Cal. 1981).

<sup>15</sup> See, e.g., Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 & n.27 (10th Cir. 1989) (Exemption 7(D) "encourages cooperation and information sharing between local law enforcement agencies and the FBI."), cert. denied, 497 U.S. 1010 (1990); Parton v. United States Dep't of Justice, 727 F.2d 774, 775-77 (8th Cir. 1984) (state prison officials interviewed in connection with civil rights investigation); Lesar v. United States Dep't of Justice, 636 F.2d 472, 489-91 (D.C. Cir. 1980); Shafmaster Fishing Co. v. United States, 814 F. Supp. 182, 184 (D.N.H. 1993); Watson v. United States Dep't of Justice, 799 F. Supp. 193, 196 (D.D.C. 1993) (state bureau of investigation); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 400 (W.D.N.Y. 1992).

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well.<sup>16</sup> Other federal law enforcement agencies, however, should not receive protection as confidential sources.<sup>17</sup>

The same underlying considerations which mandate that a broad spectrum of individuals and institutions be encompassed by the term "source" also require that the adjective "confidential" be entitled to a similarly broad construction: It merely signifies that the information was provided in confidence or in trust, with the assurance that it would not be disclosed to others.<sup>18</sup> Thus, "the question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential."<sup>19</sup> And because

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<sup>16</sup> See, e.g., Shaw v. FBI, 749 F.2d at 62; Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1491-92 (D.C. Cir. 1984); Founding Church of Scientology v. Regan, 670 F.2d 1158, 1161-62 (D.C. Cir. 1981) (including foreign Interpol national bureaus), cert. denied, 456 U.S. 976 (1982); Shafmaster Fishing Co. v. United States, 814 F. Supp. at 184; Church of Scientology Int'l v. United States Nat'l Cent. Bureau-Interpol, No. 89-707, slip op. at 10 (C.D. Cal. Sept. 10, 1991) (foreign Interpol national bureaus). But see also United States Dep't of Justice v. Landano, 113 S. Ct. 2014, 2022 (1993) (establishing more specific evidentiary standard for demonstrating that any such source provided information based upon an implied understanding of confidentiality).

<sup>17</sup> See Retail Credit Co. v. FTC, 1976-1 Trade Cas. (CCH) ¶ 60,727, at 68,127 n.3 (D.D.C. May 10, 1976); see also FOIA Update, Spring 1984, at 7.

<sup>18</sup> See, e.g., Nadler v. United States Dep't of Justice, 955 F.2d at 1484; Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 575-76 (D.C. Cir. 1990); Irons v. FBI, 880 F.2d at 1448; Shaw v. FBI, 749 F.2d at 61; Radowich v. United States Attorney, Dist. of Md., 658 F.2d 957, 959 (4th Cir. 1981); Coleman v. FBI, slip op. at 22; Borton, Inc. v. OSHA, 566 F. Supp. 1420, 1425 (E.D. La. 1983) (magistrate's recommendation published as "appendix").

<sup>19</sup> United States Dep't of Justice v. Landano, 113 S. Ct. at 2019; see McDonnell v. United States, slip op. at 54 ("content based test [is] not appropriate in evaluating a document for Exemption 7(D) status, rather the proper focus of the inquiry is on the source of the information"); Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 563 ("confidentiality depends not on [document's] contents but on the terms and circumstances under which" agency acquired information); Ferguson v. FBI, 957 F.2d at 1069 (key to withholding under Exemption 7(D) is document content and not circumstances under which information obtained); Weisberg v. United States Dep't of Justice, 745 F.2d at 1492 ("[T]he availability of Exemption 7(D) depends not upon the factual contents of the document sought, but upon whether the source was confidential."); Shaw v. FBI, 749 F.2d at 61 (same); Lesar v. United States Dep't of Justice, 636 F.2d at 492; Gordon v. Thornberg, 790 F. Supp. 374, 377 (D.R.I. 1992) (term "'confidential' means provided in confidence or trust; neither the information nor the source need be 'secret'"); Gale v. FBI, 141 F.R.D. (continued...)

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the applicability of this exemption hinges on the circumstances under which the information is provided, and not exclusively on the harm resulting from disclosure (in contrast to Exemptions 6 and 7(C)), no balancing test is applied under Exemption 7(D).<sup>20</sup>

The first clause of Exemption 7(D), with respect to any civil or criminal law enforcement records, focuses upon the identity of a confidential source, rather than the information furnished by the source. The 1974 legislative history of Exemption 7(D), though, plainly evidences Congress's intention to absolutely and comprehensively protect the identity of anyone who provided information to a government agency in confidence.<sup>21</sup> Thus, this exemption's first clause protects "both the identity of the informer and information which might reasonably be found to lead to disclosure of such identity."<sup>22</sup> Consequently, the courts have readily recognized that the first clause of Exemption 7(D) safeguards not only such obviously identifying information as an informant's name and address,<sup>23</sup> but also all information which would "tend to reveal" the source's identity.<sup>24</sup>

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<sup>19</sup>(...continued)

94, 98 (N.D. Ill. 1992) ("focus[] on the source of the information, not the information itself"); accord Dow Jones & Co. v. Department of Justice, 917 F.2d at 575; Schmerler v. FBI, 900 F.2d 333, 338 (D.C. Cir. 1990); Lesar v. United States Dep't of Justice, 636 F.2d at 492.

<sup>20</sup> See, e.g., McDonnell v. United States, slip op. at 52 (Exemption "7(D) does not entail a balancing of public and private interests"); Ferguson v. FBI, 957 F.2d at 1068 ("If we are to hold that the unique circumstances here justify a deviation from the blanket rule, we would be opening the door for a time-consuming consideration of factors in every situation."); Nadler v. United States Dep't of Justice, 955 F.2d at 1487 n.8 ("Once a source has been found to be confidential, Exemption 7(D) does not require the Government to justify its decision to withhold information against the competing claim that the public interest weighs in favor of disclosure."); Parker v. Department of Justice, 934 F.2d 375, 380 (D.C. Cir. 1991) ("judiciary is not to balance interests under Exemption 7(D)"); Schmerler v. FBI, 900 F.2d at 336 ("statute admits no such balancing"); Katz v. FBI, No. 87-3712, slip op. at 9 (5th Cir. Mar. 30, 1988); Irons v. FBI, 811 F.2d at 685; Brant Constr. Co. v. EPA, 778 F.2d at 1262-63 ("Congress has struck the balance in favor of nondisclosure."); Cuccaro v. Secretary of Labor, 770 F.2d 355, 360 (3d Cir. 1985); Sands v. Murphy, 633 F.2d 968, 971 (1st Cir. 1980).

<sup>21</sup> See S. Conf. Rep. No. 1200 at 13.

<sup>22</sup> 120 Cong. Rec. 17033 (1974) (statement of Sen. Hart).

<sup>23</sup> See Cuccaro v. Secretary of Labor, 770 F.2d at 359-60; Cleveland & Vicinity Dist. Council v. United States Dep't of Labor, No. 1:87-2384, slip op. at 12 (N.D. Ohio Apr. 22, 1992) (magistrate's recommendation), adopted (N.D. Ohio May 11, 1992).

<sup>24</sup> Pollard v. FBI, 705 F.2d 1151, 1155 (9th Cir. 1983); see, e.g., Williams (continued...)

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Accordingly, protection for source-identifying information extends well beyond material which is merely a substitute for the source's name. To prevent indirect identification of a source, even the name of a third party who is not a confidential source--but who acted as an intermediary for the source in his dealings with the agency--can be withheld.<sup>25</sup> And when circumstances warrant, a law enforcement agency may employ a "Glomar" response--refusing to confirm or deny the very existence of records about a particular individual--if a more specific response to a narrowly targeted request would reflect that he acted as a confidential source.<sup>26</sup> Even greater source-identification protection is now provided by the "(c)(2) exclusion,"<sup>27</sup> which permits a criminal law enforcement agency to entirely exclude records from the FOIA under specified circumstances when necessary to avoid divulging the existence of a source relationship. (See discussion of Exclusions, below.) Additionally, information provided by a source may be withheld under the first clause of Exemption 7(D) where disclosure of that information would permit the "linking" of a source to specific source-provided material.<sup>28</sup>

<sup>24</sup>(...continued)

v. FBI, 822 F. Supp. at 812 n.1 & 813-14 (source symbol numbers and source file numbers); Church of Scientology v. IRS, 816 F. Supp. 1138, 1161 (W.D. Tex. 1993) ("agency may withhold any portion of the document that would reveal the identity of the confidential source") (appeal pending); Doe v. United States Dep't of Justice, 790 F. Supp. 17, 21 (D.D.C. 1992) (where source well known to investigated applicant, agency must protect "even the most oblique indications of identity"); Soto v. DEA, No. 90-1816, slip op. at 6 (D.D.C. Apr. 13, 1992) ("coded" informants" and "dates, locations, and circumstances by which someone familiar with the criminal enterprise could deduce the informant's identity" protected); Church of Scientology Int'l v. United States Nat'l Cent. Bureau-Interpol, slip op. at 10 ("information with a realistic likelihood of disclosing the source's identity may be redacted"); McDonnell v. United States, No. 88-3682, slip op. at 45 n.20 (D.N.J. June 10, 1991) (magistrate's recommendation), adopted (D.N.J. Sept. 6, 1991) (permanent symbol numbers), aff'd in pertinent part & rev'd & remanded, No. 91-5916 (3d Cir. Sept. 21, 1993); Katz v. Webster, No. 82-Civ-1092, slip op. at 26 (S.D.N.Y. May 20, 1985) (source and symbol file numbers); Martinez v. FBI, No. 82-1547, slip op. at 13 (D.D.C. Oct. 11, 1983) (same).

<sup>25</sup> See Birch v. Postal Serv., 803 F.2d 1206, 1212 (D.C. Cir. 1986); United Technologies Corp. v. NLRB, 777 F.2d 90, 95 (2d Cir. 1985).

<sup>26</sup> See Benavides v. DEA, 769 F. Supp. 380, 381-82 (D.D.C. 1990), rev'd & remanded on procedural grounds, 968 F.2d 1243, modified, 976 F.2d 751 (D.C. Cir. 1992).

<sup>27</sup> 5 U.S.C. § 552(c)(2) (1988).

<sup>28</sup> L&C Marine Transp., Ltd. v. United States, 740 F.2d at 923-25; see, e.g., Stone v. Defense Investigative Serv., 816 F. Supp. 782, 788 (D.D.C. 1993) (withholding proper where "information so singular that to release it would likely identify the individual") (appeal pending); Barrett v. OSHA, No. C2-90-147, slip op. at 13 (S.D. Ohio Oct. 18, 1990) (protecting statements  
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Informants' identities are protected wherever they have provided information either under an express promise of confidentiality,<sup>29</sup> or "under circumstances from which such an assurance could be reasonably inferred."<sup>30</sup> Courts have uniformly recognized that express promises of confidentiality are deserving of protection under Exemption 7(D).<sup>31</sup> Several courts have held that the identities of persons providing statements in response to routinely given "unsolicited assurances of confidentiality" are protectable under Exemption 7(D) as well.<sup>32</sup>

Historically, there had existed a conflict in the case law as to the availability of Exemption 7(D) protection for sources who were advised that they

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<sup>28</sup>(...continued)

obtained from witnesses regarding single incident involving only three or four persons).

<sup>29</sup> See KTVY-TV v. United States, 919 F.2d at 1470; King v. United States Dep't of Justice, 830 F.2d 210, 235 (D.C. Cir. 1987); Cleveland & Vicinity Dist. Council v. United States Dep't of Labor, slip op. at 14 (telling interviewees "that their identities, as well as any information they relayed, would be held in confidence" equals an express promise of confidentiality); Savada v. DOD, 755 F. Supp. 6, 8 (D.D.C. 1991); Simon v. United States Dep't of Justice, 752 F. Supp. 14, 21 (D.D.C. 1990), aff'd, 980 F.2d 782 (D.C. Cir. 1992).

<sup>30</sup> S. Conf. Rep. No. 1200 at 13; United States Dep't of Justice v. Landano, 113 S. Ct. at 2019 (same).

<sup>31</sup> See McDonnell v. United States, slip op. at 53 ("identity of and information provided by [persons given an express assurance of confidentiality] are exempt from disclosure under the express language of Exemption 7(D)"); Wiener v. FBI, 943 F.2d 972, 986 (9th Cir. 1991) ("An express grant of confidentiality is virtually unassailable . . . [agency] need only establish the informant was told his name would be held in confidence."), cert. denied, 112 S. Ct. 3013 (1992); Birch v. United States Postal Serv., 803 F.2d 1206, 1212 (D.C. Cir. 1986) ("Since the informant requested and received express assurances of confidentiality prior to assisting the investigation, he or she was a 'confidential source.'"); Buhovecky v. Department of Justice, 700 F. Supp. 566, 571 (D.D.C. 1988) ("there is clear authority to withhold the names of those sources to whom confidentiality was expressly granted"); Simon v. United States Dep't of Justice, 752 F. Supp. at 21 (withholding proper where "source/implicitly requested that his identity be kept confidential"); Nishnic v. United States Dep't of Justice, 671 F. Supp. 776, 799 (D.D.C. 1987) (source identity properly withheld where agency "made an express assurance of confidentiality" to source).

<sup>32</sup> See, e.g., Brant Constr. Co. v. EPA, 778 F.2d at 1263; L&C Marine Transp., Ltd. v. United States, 740 F.2d at 924 n.5; Pope v. United States, 599 F.2d at 1386-87; Bortoni, Inc. v. OSHA, 566 F. Supp. at 1422; see also Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 555, 565 (24 individuals held to have been provided express promises of confidentiality based upon IG regulation).

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might be called to testify if a trial eventually were to take place.<sup>33</sup> However, in United States Department of Justice v. Landano,<sup>34</sup> the Supreme Court resolved this conflict by holding that "[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 . . . thought necessary for law enforcement purposes."<sup>35</sup> (It should be noted that the effect of a source's actual testimony upon Exemption 7(D) protection presents a distinctly different issue,<sup>36</sup> which is addressed below together with other issues regarding waiver of this exemption.)

In contrast to the situation involving express confidentiality, a particularly difficult issue under Exemption 7(D) recently arose regarding the circumstances under which an expectation of confidentiality can be shown to have been implied. An implicit promise of confidentiality may be discerned from the inherent sensitivity of both criminal and civil investigations.<sup>37</sup> Over the years, a number of courts of appeals employed a "presumption" of confidentiality in criminal cases, particularly those involving the FBI.<sup>38</sup> Historically, these

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<sup>33</sup> Compare Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 986 (9th Cir. 1985) (no confidentiality recognized) and Poss v. NLRB, 565 F.2d 654, 658 (10th Cir. 1977) (same) with Irons v. FBI, 811 F.2d at 687 (confidentiality recognized); Schmerler v. FBI, 900 F.2d at 339 (same) and United Technologies Corp. v. NLRB, 777 F.2d at 95 (same).

<sup>34</sup> 113 S. Ct. at 2020.

<sup>35</sup> Id. ("[T]he word 'confidential,' as used in Exemption 7(D), refers to a degree of confidentiality less than total secrecy.").

<sup>36</sup> See Parker v. Department of Justice, 934 F.2d at 381.

<sup>37</sup> See, e.g., United Technologies Corp. v. NLRB, 777 F.2d at 94 ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."); see also Voelker v. FBI, 638 F. Supp. 571, 573 (E.D. Mo. 1986) (identifying individuals who supplied information in an FBI background investigation could subject them to "possible loss of business or social standing, ridicule, harassment, and even bodily harm") (Privacy Act case).

<sup>38</sup> D.C. Circuit: Parker v. Department of Justice, 934 F.2d at 378; Dow Jones & Co. v. Department of Justice, 917 F.2d at 576; Schmerler v. FBI, 900 F.2d at 337; Second Circuit: Donovan v. FBI, 806 F.2d 55, 61 (2d Cir. 1986); Diamond v. FBI, 707 F.2d 75, 78 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984); Sixth Circuit: Ingle v. Department of Justice, 698 F.2d 259, 269 (6th Cir. 1983); Seventh Circuit: Kimberlin v. Department of the Treasury, 774 F.2d 204, 208 (7th Cir. 1985); Miller v. Bell, 661 F.2d at 627; Eighth Circuit: Parton v. United States Dep't of Justice, 727 F.2d at 776; Tenth Circuit: KTVY-TV v. United States, 919 F.2d at 1470; Hopkinson v. Shillinger, 866 F.2d at 1222-23; Johnson v. United States Dep't of Justice, 739 F.2d at 1517-18; Eleventh Circuit: Nadler v. United States Dep't of Justice, 955 F.2d at 1486 & n.7. Contra Wiener v. FBI, 943 F.2d at 986 ("A claim

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courts applied a "categorical" approach to this aspect of Exemption 7(D), of the type generally approved by the Supreme Court in United States Department of Justice v. Reporters Committee for Freedom of the Press,<sup>39</sup> thereby eliminating the burdensome task for criminal law enforcement agencies of proving implied confidentiality on a case-by-case basis. However, this past year the Supreme Court effectively reversed all of these cases on this point of evidentiary presumption in Landano.<sup>40</sup>

At issue in Landano was "whether the Government is entitled to a presumption that all sources supplying information to the Federal Bureau of Investigation . . . in the course of a criminal investigation are confidential sources."<sup>41</sup> In deciding Landano, the Supreme Court made clear that its decision affects only implied assurances of confidentiality<sup>42</sup> and that a source need not have an expectation of "total secrecy" to be deemed a confidential source.<sup>43</sup> However, the Court found that it was not Congress' intent to provide for a "universal" presumption or broad categorical withholding under Exemption 7(D)<sup>44</sup>; rather, it said, a "more particularized approach" is required.<sup>45</sup> Under this new approach, agencies seeking to invoke Exemption 7(D) must prove expectations of confidentiality based upon the "circumstances" of each case.<sup>46</sup>

Such specific showings of confidentiality, the Court indicated, can be made on a "generic" basis,<sup>47</sup> where "certain circumstances characteristically

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<sup>38</sup>(...continued)

that confidentiality was impliedly granted . . . requires the court to engage in a highly contextual, fact-based inquiry."); Lame v. United States Dep't of Justice, 654 F.2d 917, 928 (3d Cir. 1981) ("detailed explanations relating to each alleged confidential source" required so that court can determine whether Exemption 7(D) withholding appropriate as to "each source").

<sup>39</sup> 489 U.S. 749 (1989).

<sup>40</sup> See 113 S. Ct. at 2023-24.

<sup>41</sup> Id. at 2017.

<sup>42</sup> Id. at 2020 ("The precise question before us . . . is how the Government can meet its burden of showing that a source provided information on an implied assurance of confidentiality.").

<sup>43</sup> Id. ("[A]n exemption so limited that it covered only sources who reasonably could expect total anonymity would be, as a practical matter, no exemption at all.").

<sup>44</sup> Id. at 2021-23.

<sup>45</sup> Id. at 2023.

<sup>46</sup> Id.

<sup>47</sup> Id.

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support an inference of confidentiality."<sup>48</sup> Throughout its opinion the Court stressed two "factors" to be applied in deciding whether implicit confidentiality exists: "the nature of the crime . . . and the source's relation to it."<sup>49</sup> It also pointed to five lower court rulings in which the respective courts highlighted the potential for harm to the witness as examples of decisions in which courts have correctly applied these two factors.<sup>50</sup> Henceforth, law enforcement agencies seeking to invoke Exemption 7(D) for "implied confidentiality" sources will have to specifically address such factors in order to meet Landano's new evidentiary standard on a case-by-case basis.<sup>51</sup>

Few courts have yet to address the issue of implied confidentiality in the wake of the Supreme Court's decision in Landano, although several courts have remanded the issue for further review or allowed the government the opportunity to submit supplemental filings in accordance with Landano's new evidentiary requirements.<sup>52</sup> The courts that have addressed the issue under Landano thus far have recognized the nature of the crime and the source's relation to it as the

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<sup>48</sup> Id. at 2022.

<sup>49</sup> Id. at 2023-24.

<sup>50</sup> Id. at 2023 (citing Keys v. United States Dep't of Justice, 830 F.2d at 345-46 (individuals providing information regarding possible Communist sympathies, criminal activity, and murder by foreign operatives would have worried about retaliation); Donovan v. FBI, 806 F.2d at 60-61 (individuals providing information about four American churchwomen murdered in El Salvador may likely face fear of disclosure); Parton v. United States Dep't of Justice, 727 F.2d at 776-77 (prison officials providing information regarding alleged attack on inmate faced "high probability of reprisal"); Nix v. United States, 572 F.2d 998, 1003-04 (4th Cir. 1978) (guards and prison inmates providing information about guards who allegedly beat another inmate face risk of reprisal); Miller v. Bell, 661 F.2d at 628 (individuals providing information about self-proclaimed litigious subject seeking to enlist them in "anti-government crusades" faced "strong potential for harassment"))).

<sup>51</sup> Id. at 2024.

<sup>52</sup> See McDonnell v. United States, slip op. at 3, 58; Massey v. FBI, No. 92-6068, slip op. 5667, 5673 (2d Cir. Aug. 27, 1993); Hale v. United States Dep't of Justice, No. 91-6135, slip op. at 4 (10th Cir. Aug. 19, 1993); Selby v. United States Dep't of Justice, No. 92-56348, slip op. at 1 (9th Cir. July 26, 1993); Ferguson v. FBI, No. 92-6272, slip op. at 2 (2d Cir. July 19, 1993); Oliva v. United States Dep't of Justice, 996 F.2d 1475, 1477 (2d Cir. 1993); Steinberg v. United States Dep't of Justice, No. 91-2740, slip op. at 8-9 (D.D.C. Sept. 13, 1993); Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 2 (D.D.C. June 28, 1993); Manchester v. DEA, 823 F. Supp. 1259, 1262 (E.D. Pa. 1993). But see Senate of P.R. v. United States Dep't of Justice, No. 84-1829, slip op. at 26 (D.D.C. Aug. 24, 1993) (government "has not carried its burden [in light of Landano] of justifying its nondisclosure of the documents, and the documents must be released") (motion for reconsideration pending).

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primary factors in determining whether implied confidentiality exists.<sup>53</sup> In two of these cases, courts have already applied these factors to find the existence of implied confidentiality under Landano.<sup>54</sup>

The second clause of Exemption 7(D) protects all information furnished to law enforcement authorities by confidential sources in the course of criminal or lawful national security intelligence investigations.<sup>55</sup> Thus, the statutory requirement of an "investigation," while no longer a component of Exemption 7's threshold language, remains "a predicate of exemption under the second clause of paragraph (D)."<sup>56</sup> For the purposes of this clause, criminal law enforcement authorities include federal agency inspectors general.<sup>57</sup> In an interesting elaboration on the definition of a "criminal investigation," courts have recognized that information originally compiled by local law enforcement authorities in conjunction with a nonfederal criminal investigation fully retains its criminal investigatory character when subsequently obtained by federal authorities,<sup>58</sup> even if received solely for use in a federal civil enforcement

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<sup>53</sup> See McDonnell v. United States, slip op. at 57; Massey v. FBI, slip op. at 5673-74; Hale v. United States Dep't of Justice, slip op. at 3; Steinberg v. United States Dep't of Justice, slip op. at 8; Manna v. United States Dep't of Justice, No. 92-2772, slip op. at 21-22 (D.N.J. Sept. 13, 1993); Government Accountability Project v. NRC, No. 86-3201, slip op. at 9-10 (D.D.C. June 30, 1993); Manchester v. DEA, 823 F. Supp. at 1262.

<sup>54</sup> Manna v. United States Dep't of Justice, slip op. at 22 ("[The] government has provided a particularized showing of circumstances from which confidentiality can reasonably be inferred . . . where there has been disclosure of intelligence information regarding organized crime activity from local or state personnel to federal agents."); Government Accountability Project v. NRC, slip op. at 9-10 (persons providing information "about potentially criminal matters involving co-workers" face "risk of reprisal").

<sup>55</sup> See Shaw v. FBI, 749 F.2d at 63-65 (articulating standard for determining if law enforcement undertaking satisfies "criminal investigation" threshold); Meeropol v. Smith, No. 75-1121, slip op. at 76-78 (D.D.C. Feb. 29, 1984) (intelligence investigations), aff'd in part & remanded in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986); see, e.g., Ferguson v. FBI, 957 F.2d at 1069 (FBI properly withheld publicly circulated material provided to it by confidential source).

<sup>56</sup> See, e.g., Keys v. United States Dep't of Justice, 830 F.2d at 343.

<sup>57</sup> See Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 563 n.13 (Inspectors General "deemed" same as criminal law enforcement authorities); Brant Constr. Co. v. EPA, 778 F.2d at 1265 (recognizing "substantial similarities between the activities of the FBI and the OIGs").

<sup>58</sup> See Harvey v. United States Dep't of Justice, 747 F. Supp. 29, 38 (D.D.C. 1990).

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proceeding.<sup>59</sup> In addition, protection for source-provided information has been extended to information supplied to federal officials by state or local enforcement authorities seeking assistance in pursuing a nonfederal investigation.<sup>60</sup>

Obviously, confidential source information that may be withheld under the second clause of Exemption 7(D) need not be source-identifying.<sup>61</sup> Thus, under the second clause of Exemption 7(D), courts have permitted the withholding of confidential information even after the source's identity has been officially divulged or acknowledged,<sup>62</sup> or where the requester knows the source's

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<sup>59</sup> See Cleveland & Vicinity Dist. Council v. United States Dep't of Labor, slip op. at 12 n.3 (Exemption 7(D) "clearly applies to information obtained from confidential sources in all investigations, both civil and criminal."); Dayo v. INS, No. C-2-83-1422, slip op. at 5-6 (S.D. Ohio Dec. 31, 1985).

<sup>60</sup> See Hopkinson v. Shillinger, 866 F.2d at 1222 (state law enforcement agency's request for FBI laboratory evaluation of evidence submitted by state agency and results of FBI's analysis protected); Gordon v. Thornberg, 790 F. Supp. at 377-78 ("When a state law enforcement agency sends material to an FBI lab for testing, confidentiality is 'inherently implicit.' . . . [A]ll information from another agency must be protected to provide the confidence necessary to law enforcement cooperation."); Rojem v. United States Dep't of Justice, 775 F. Supp. 6, 12 (D.D.C. 1991) (to release file "would unduly discourage States from enlisting the FBI's assistance on criminal cases"), appeal dismissed, No. 92-5088 (D.C. Cir. Nov. 4, 1992); Payne v. United States Dep't of Justice, 772 F. Supp. 229, 231 (E.D. Pa. 1989) (The "requirement is met . . . [when] the documents sought are FBI laboratory and fingerprint examinations of evidence collected by local law enforcement agencies."), aff'd, 904 F.2d 695 (3d Cir. 1990) (table cite).

<sup>61</sup> See, e.g., Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 564 ("agency may not be ordered to disclose information from a confidential source even if nonconfidential sources have provided the agency with the identical information"); see also Parker v. Department of Justice, 934 F.2d at 375; Shaw v. FBI, 749 F.2d at 61-62; Radowich v. United States Attorney, Dist. of Md., 658 F.2d at 964; Duffin v. Carlson, 636 F.2d 709, 712 (D.C. Cir. 1980); Simon v. United States Dep't of Justice, 752 F. Supp. at 22.

<sup>62</sup> See Ferguson v. FBI, 957 F.2d at 1068 (subsequent disclosure of source's identity or some of information provided by source does not require "full disclosure of information provided by such a source"); Shafmaster Fishing Co. v. United States, 814 F. Supp. at 185 (source's identity or information provided need not be "secret" to justify withholding); Church of Scientology v. IRS, 816 F. Supp. at 1161 ("irrelevant that the identity of the confidential source is known"); see, e.g., Cleary v. FBI, 811 F.2d 421, 423 (8th Cir. 1987); Shaw v. FBI, 749 F.2d at 62; Radowich v. United States Attorney, Dist. of Md., 658 F.2d at 964; Lesar v. United States Dep't of Justice, 636 F.2d at 491.

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identity.<sup>63</sup> Similarly, information provided by an anonymous source remains protected.<sup>64</sup> Moreover, even where source-provided information has been revealed and the identities of some of the sources independently divulged, Exemption 7(D) can protect against the matching of witnesses' names with the specific information that they supplied.<sup>65</sup>

Because the phrase "confidential information furnished only by the confidential source" sometimes caused confusion in the past, the 1986 FOIA amendments unequivocally clarified the congressional intent by deleting the word "confidential" as a modifier of "information" and omitting the word "only" from this formulation. Even prior to the legislative change, courts regularly employed this portion of Exemption 7(D) to protect all information provided by a confidential source, both because such withholdings were anticipated by the language and legislative history of the statute,<sup>66</sup> and in recognition of the fact that disclosure of any of this material would jeopardize the system of confidentiality that ensures a free flow of information from sources to investigatory agencies.<sup>67</sup> Now, however, courts need look no further than the Act's literal

<sup>63</sup> See Radowich v. United States Attorney, Dist. of Md., 658 F.2d at 960 (Exemption 7(D) applies even where "identities of confidential sources were known."); see, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d at 923, 925 (fact that employee-witnesses could be matched to their statements does not diminish Exemption 7(D) protection); Keeney v. FBI, 630 F.2d 114, 119 n.2 (2d Cir. 1980) (Exemption 7(D) applies to "local law enforcement agencies [that] have now been identified."); Shafmaster Fishing Co. v. United States, 814 F. Supp. at 185 (source's identity "need not be secret to justify withholding information under [E]xemption 7(D)"); Sanders v. United States Dep't of Justice, slip op. at 9 (fact that requester knows identity of source does not eviscerate Exemption 7(D) protection).

<sup>64</sup> See Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 565-67; Mitchell v. Ralston, No. 81-4478, slip op. at 2 (S.D. Ill. Oct. 14, 1982).

<sup>65</sup> See Kirk v. United States Dep't of Justice, 704 F. Supp. 288, 293 (D.D.C. 1989); accord L&C Marine Transp., Ltd. v. United States, 740 F.2d at 925.

<sup>66</sup> See Irons v. FBI, 880 F.2d at 1450-51.

<sup>67</sup> Id. at 1449; Church of Scientology v. IRS, 816 F. Supp. at 1161 (Exemption 7(D) enacted "to ensure that the FOIA did not impair federal law enforcement agencies' ability to gather information"); Dayton Newspapers, Inc. v. FBI, No. C-3-85-815, slip op. at 13 (S.D. Ohio Feb. 9, 1993) ("purpose of Exemption 7(D) is to ensure that the FOIA did not impair the ability of federal law enforcement agencies to gather information, thus to ensure that information continued to flow to those agencies"); Shafmaster Fishing Co. v. FBI, 814 F. Supp. at 185 (object of Exemption 7(D) "'not simply to protect the source, but also to protect the flow of information to the law enforcement agency'" (citing Irons v. FBI, 880 F.2d at 1449, 1453); see, e.g., Shaw v. FBI, 749 F.2d at 62 ("Whatever the phrase 'furnished only by the confidential source' may mean, it (continued...)"))

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language to see that all source-provided information is protected in criminal and national security investigations.<sup>68</sup>

Once courts determine the existence of confidentiality under Exemption 7(D), they are reluctant to find a subsequent waiver of the exemption's protections. This restraint stems both from the potentially adverse repercussions that may result from additional disclosures, and from a recognition that any "judicial effort[] to create a 'waiver' exception" to exemption 7(D)'s language runs afoul of the statute's intent to provide "workable rules."<sup>69</sup> It therefore has been observed that a waiver of Exemption 7(D)'s protections should be recognized only upon "absolutely solid evidence showing that the source of an FBI interview in a law enforcement investigation has manifested complete disregard for confidentiality."<sup>70</sup>

Thus, even authorized or official disclosure of some information provided by a confidential source in no way opens the door to disclosure of any of the other information the source has provided.<sup>71</sup> In this vein, it is now well established that source-provided information remains protected even where some of it has been the subject of testimony in open court.<sup>72</sup> Moreover, in order to

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<sup>67</sup>(...continued)

assuredly cannot mean 'obtainable only from the confidential source.');" Weisberg v. United States Dep't of Justice, 745 F.2d at 1492; Duffin v. Carlson, 636 F.2d at 712-13.

<sup>68</sup> See, e.g., Irons v. FBI, 880 F.2d at 1448.

<sup>69</sup> Parker v. Department of Justice, 934 F.2d at 380; Irons v. FBI, 880 F.2d at 1455-56 (citing Reporters Committee, 489 U.S. at 779).

<sup>70</sup> Parker v. Department of Justice, 934 F.2d at 378 (quoting Dow Jones & Co. v. Department of Justice, 908 F.2d 1006, 1011 (D.C. Cir.), superseded, 917 F.2d 571 (D.C. Cir. 1990)).

<sup>71</sup> Shaw v. FBI, 749 F.2d at 62 ("Disclosure of one piece of information received from a particular party--and even the disclosure of that party as its source--does not prevent that party from being a 'confidential source' for other purposes."); Brant Constr. Co. v. EPA, 778 F.2d at 1265 n.8 ("[S]ubsequent disclosure of the information, either partially or completely, does not affect its exempt status under 7(D)."); Johnson v. Department of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991) ("The mere fact that someone makes a public statement concerning an incident does not constitute a waiver of the Bureau's confidential file. A press account may be erroneous or false or, more likely, incomplete.").

<sup>72</sup> See, e.g., Davis v. United States Dep't of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992); Ferguson v. FBI, 957 F.2d at 1068 (local law enforcement officer does not lose status as confidential source by testifying in court); Parker v. Department of Justice, 934 F.2d at 379-81 ("[A] government agency is not required to disclose the identity of a confidential source or information conveyed to the agency in confidence in a criminal investigation notwithstanding the possibility that the informant may have testified at a public trial."); Irons v.  
(continued...)

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demonstrate a waiver by disclosure through authorized channels, the requester must demonstrate both that "the exact information given to the [law enforcement authority] has already become public, and the fact that the informant gave the same information to the [law enforcement authority] is also public."<sup>73</sup> Consequently, one court has found that the government is not required even to "confirm or deny that persons who testify at trial are also confidential informants."<sup>74</sup>

The lengths to which it is proper to go in order to safeguard informant-provided information are illustrated by one decision holding that letters shown to a suspect for the purpose of prompting a confession were properly denied the suspect under the FOIA--even though the suspect was the very author of the letters which, in turn, had been provided to authorities by a third party.<sup>75</sup> Similarly, the release of informant-related material to a party aligned with an

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<sup>72</sup>(...continued)

FBI, 880 F.2d at 1454 ("There is no reason grounded in fairness for requiring a source who disclosed information during testimony to reveal, against his will (or to have the FBI reveal for him), information that he did not disclose in public."); Kimberlin v. Department of the Treasury, 774 F.2d at 209 ("The disclosure [prior to or at trial] of information given in confidence does not render non-confidential any of the information originally provided."); Scherer v. Kelley, 584 F.2d 170, 176 n.7 (7th Cir. 1978), cert. denied, 440 U.S. 964 (1979); Johnson v. Federal Bureau of Prisons, slip op. at 6-7 (no waiver notwithstanding fact that individuals were called as plaintiff's witnesses at prison disciplinary hearing and testified in plaintiff's presence); Williams v. FBI, 822 F. Supp. at 183 n.4 ("public testimony by confidential sources does not waive the FBI's right to withhold the identity of or information supplied by a confidential source, when the identity or information is not actually revealed in public"); Kirk v. United States Dep't of Justice, 704 F. Supp. at 293 ("[T]he limited mention of sources in documentation and the fact that certain sources may have testified at trial does not destroy these or other persons' rights of confidentiality."); see also FOIA Update, Spring 1984, at 6; cf. Helmsley v. United States Dep't of Justice, slip op. at 13 (agency may protect information provided by confidential sources who did not testify at trial).

<sup>73</sup> Parker v. Department of Justice, 934 F.2d at 378; Dow Jones & Co. v. Department of Justice, 917 F.2d at 577; see, e.g., Rojem v. United States Dep't of Justice, 775 F. Supp. at 12 (where fact of law enforcement agency's communication with FBI known, substance still should be protected); see also Davis v. United States Dep't of Justice, 968 F.2d at 1280 (government entitled to withhold tapes obtained through informant's assistance "unless it is specifically shown that those tapes, or portions of them, were played during the informant's testimony").

<sup>74</sup> Schmerler v. FBI, 900 F.2d at 339 (testimony by source does not automatically waive confidentiality because he may be able "to camouflage his true role notwithstanding his court appearance") (quoting Irons v. FBI, 811 F.2d at 687); see also Parker v. Department of Justice, 934 F.2d at 381.

<sup>75</sup> See Gula v. Meese, 699 F. Supp. at 960.

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agency in an administrative proceeding in no way diminishes the government's ability to invoke Exemption 7(D) in response to a subsequent request by a non-allied party.<sup>76</sup> Logically, this principle should be extended to encompass parties aligned with the government in actual litigation as well. Nor is the protection of Exemption 7(D) forfeited by "court-ordered and court-supervised" disclosure to an opponent in civil discovery.<sup>77</sup> Although it had previously been held that where the government fails to object in any way to such discovery and consciously and deliberately puts confidential source material into the public record, a waiver of the exemption will be found to have occurred,<sup>78</sup> more recent decisions have undermined this position.<sup>79</sup> However, "if the exact information given to the [law enforcement agency] has already become public, and the fact that the informant gave the same information to the [agency] is also public, there would be no grounds to withhold."<sup>80</sup>

Obviously, if no waiver of Exemption 7(D) results from authorized release of relevant information, "[t]he per se limitation on disclosure under 7(D) does not disappear if the identity of the confidential source becomes known through other means."<sup>81</sup> It should be observed that in the unusual situation in which an agency elects to publicly disclose source-identifying or source-provided information as necessary in furtherance of an important agency function, it "has no duty to seek the witness's permission to waive his confidential status under the Act."<sup>82</sup> Conversely, because Exemption 7(D) "mainly seeks to pro-

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<sup>76</sup> United Technologies Corp. v. NLRB, 777 F.2d at 95-96; accord FOIA Update, Spring 1983, at 6.

<sup>77</sup> Donohue v. United States Dep't of Justice, No. 84-3451, slip op. at 11 (D.D.C. Dec. 23, 1987).

<sup>78</sup> Nishnic v. United States Dep't of Justice, 671 F. Supp. at 812.

<sup>79</sup> See Glick v. Department of Justice, No. 89-3279, slip op. at 8-9 (D.D.C. June 20, 1991); see also Parker v. Department of Justice, 934 F.2d at 380 ("[J]udicial efforts to create a 'waiver' exception to the Exemption are contrary to the statute's intent to provide workable rules.").

<sup>80</sup> Dow Jones & Co. v. Department of Justice, 917 F.2d at 577.

<sup>81</sup> L&C Marine Transp., Ltd. v. United States, 740 F.2d at 925 (first clause of Exemption 7(D)); see, e.g., Weisberg v. United States Dep't of Justice, 745 F.2d at 1491 (joint withholding under Exemptions 7(C) and 7(D)); Lesar v. Department of Justice, 636 F.2d at 491 (information provided by local law enforcement agencies whose participation had become known); Keeney v. FBI, 630 F.2d at 119 n.2 (confidentiality for information supplied by local law enforcement agency unaffected by identification of agency as source).

<sup>82</sup> Borton, Inc. v. OSHA, 566 F. Supp. at 1422; see, e.g., Doe v. United States Dep't of Justice, 790 F. Supp. at 21-22 ("[T]he FBI is not required to try to persuade people to change their minds; to] require the FBI on a regular basis to urge its sources to waive confidentiality would undermine the Bureau's effectiveness.").



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protect law enforcement agencies in their efforts to find future sources,"<sup>83</sup> "waiver" by 'sources' will not automatically prove sufficient to release the [source-provided] information."<sup>84</sup>

Of course, Exemption 7(D)'s protection for sources and the information they have provided is in no way diminished by the fact that an investigation has been closed.<sup>85</sup> Indeed, because of the vital role that Exemption 7(D) plays in promoting effective law enforcement, courts have regularly recognized that its protections cannot be lost through the mere passage of time.<sup>86</sup> Additionally, unlike with Exemption 7(C), the safeguards of Exemption 7(D) remain wholly undiminished by the death of the source.<sup>87</sup>

<sup>83</sup> Irons v. FBI, 880 F.2d at 1453; see, e.g., Koch v. United States Postal Serv., No. 92-233, slip op. at 12 (W.D. Mo. Dec. 17, 1992) ("If the informant's identity is disclosed . . . , individuals would be less likely to come forward with information in future investigations.").

<sup>84</sup> Id. at 1452. But see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 567 n.16 (express waiver of confidentiality by source vitiates Exemption 7(D) protection).

<sup>85</sup> See KTVY-TV v. United States, 919 F.2d at 1470-71; Akron Standard Div. of Eagle-Picher Indus. v. Donovan, 780 F.2d 568, 573 (6th Cir. 1986); Church of Scientology v. IRS, 816 F. Supp. at 1161 (source identity and information provided "remains confidential . . . after the investigation is concluded"); Soto v. DEA, slip op. at 7 ("It is of no consequence that these sources provided information relating to a criminal investigation which has since been completed."); Gale v. FBI, 141 F.R.D. at 98 (Exemption 7(D) protects statements made even "while no investigation is pending.").

<sup>86</sup> See, e.g., Schmerler v. FBI, 900 F.2d at 336 ("The statute contains no sunset provision . . ."); Keys v. Department of Justice, 830 F.2d at 346 ("Congress has not established a time limitation for exemption (7)(D) and it would be both impractical and inappropriate for the Court to do so." (quoting Keys v. Department of Justice, slip op. at 7)); King v. United States Dep't of Justice, 830 F.2d at 212-13, 236 (interviews conducted in 1941 and 1952 protected); Irons v. FBI, 811 F.2d at 689 (information regarding 1948-56 Smith Act trials protected); Brant Constr. Co. v. EPA, 778 F.2d at 1265 n.8 (in view of "policy of 7(D) to protect future sources of information," passage of time "does not alter status" of source-provided information); Diamond v. FBI, 707 F.2d at 76-77 (protecting McCarthy-era documents); Fitzgibbon v. United States Secret Serv., 747 F. Supp. at 60 (information regarding alleged 1961 plot against President Kennedy by Trujillo regime in Cuba); Abrams v. FBI, 511 F. Supp. 758, 762-63 (N.D. Ill. 1981) (protecting 27-year-old documents).

<sup>87</sup> See, e.g., McDonnell v. United States, slip op. at 54 (consideration of whether source "deceased does not extend to the information withheld pursuant to Exemption 7(D)"); Schmerler v. FBI, 900 F.2d at 336 ("[T]hat the sources may have died is of no moment to the analysis."); Kiraly v. FBI, 728 F.2d at 279 (information provided by deceased source who also testified at trial); Cohen v. Smith, No. 81-5365, slip op. at 4 (9th Cir. Mar. 25, 1983), cert. denied,

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## EXEMPTION 7(E)

Perhaps because Exemption 7(D) had been traditionally afforded such a broad construction by the courts, few opinions since the passage of the FOIA Reform Act have hinged on its specific revisions. It is evident, however, that the Act's relaxation of Exemption 7(D)'s harm standard, in conjunction with the other legislative amendments to it, strives to ensure that the utmost protections possible will continue to be afforded to confidential sources.<sup>88</sup> All federal agencies maintaining law enforcement information should be applying the strengthened Exemption 7(D) to provide adequate source protection. They should employ, in the words of one of the first courts to consider the matter under the Reform Act, "[a] 'robust' reading of exemption 7(D)."<sup>89</sup>

## EXEMPTION 7(E)

As with other parts of Exemption 7, Exemption 7(E) was significantly strengthened by the Freedom of Information Reform Act of 1986.<sup>1</sup> Previously, Exemption 7(E) encompassed only investigatory records compiled for law enforcement purposes the production of which "would . . . disclose investigative techniques and procedures."<sup>2</sup> It now affords protection to all law enforcement information which "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."<sup>3</sup> Thus, all of the applications of Exemption 7(E) recognized under its former version are in no way diminished by the provision's amendment and remain fully effective.

As reconstituted, the first clause of Exemption 7(E) permits the withholding of "records or information compiled for law enforcement purposes . . . [which] would disclose techniques and procedures for law enforcement investi-

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<sup>87</sup>(...continued)

464 U.S. 939 (1983); Jones v. FBI, slip op. at 14 (identity protected "even if the informant is dead"); see also FOIA Update, Summer 1983, at 5; cf. Allen v. DOD, 658 F. Supp. 15, 20 (D.D.C. 1986) (protection of deceased intelligence sources under Exemption 1).

<sup>88</sup> See Attorney General's Memorandum at 13.

<sup>89</sup> Sluby v. United States Dep't of Justice, No. 86-1503, slip op. at 5 (D.D.C. Apr. 30, 1987); accord Irons v. FBI, 811 F.2d at 687-89 (post-amendment decision extending Exemption 7(D) protection to sources who received only conditional assurances of confidentiality).

<sup>1</sup> Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to 3207-49.

<sup>2</sup> See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 15 (Dec. 1987) [hereinafter Attorney General's Memorandum].

<sup>3</sup> 5 U.S.C. § 552(b)(7)(E) (1988).

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gations or prosecutions."<sup>4</sup> It should not be overlooked that this first clause is phrased in such a way as to not require any particular determination of harm--or risk of circumvention of law--that would be caused by disclosure of the records or information within its coverage. Rather, it is designed to provide a more "categorical" protection of the information so described.<sup>5</sup>

Notwithstanding this broadening of the scope of Exemption 7(E)'s protection, the general requirement that the technique or procedure not be already well known to the public remains.<sup>6</sup> Examples of investigatory techniques previously held not protectible under Exemption 7(E) because courts have found them to be publicly known are "documentation appropriate for seeking search warrants before launching raiding parties" when this information has been revealed in court records,<sup>7</sup> "mail covers" and the "use of post office boxes,"<sup>8</sup> "security flashes," and the "tagging of fingerprints."<sup>9</sup>

Post-amendment cases have dealt similarly with this requirement, holding that details of a pretext contact which constituted "no more than a garden variety ruse or misrepresentation" were ineligible for Exemption 7(E) protection,<sup>10</sup> and disallowing the use of Exemption 7(E) where there was no indication "that disclosure of these documents would reveal secret investigative techniques."<sup>11</sup>

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<sup>4</sup> Id.

<sup>5</sup> See Attorney General's Memorandum at 16 n.27.

<sup>6</sup> See Attorney General's Memorandum at 16 n.27 (citing S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983) (citing, in turn, H.R. Rep. No. 180, 93d Cong., 2d Sess. 12 (1974))).

<sup>7</sup> National Org. for the Reform of Marihuana Laws v. DEA, No. 80-1339, slip op. at 8 (D.D.C. June 24, 1981).

<sup>8</sup> Dunaway v. Webster, 519 F. Supp. 1059, 1082-83 (N.D. Cal. 1981).

<sup>9</sup> Ferguson v. Kelley, 448 F. Supp. 919, 926 (N.D. Ill. 1977).

<sup>10</sup> Struth v. FBI, 673 F. Supp. 949, 970 (E.D. Wis. 1987); see also Rosenfeld v. United States Dep't of Justice, 761 F. Supp. 1440, 1450 (N.D. Cal. 1991) (information pertaining to specific pretext phone call held ineligible for exemption protection) (appeal pending). But see also Nolan v. United States Dep't of Justice, No. 89-A-2035, slip op. at 13 (D. Colo. Mar. 13, 1991) (information surrounding pretext phone call properly withheld because disclosure may harm ongoing investigations), aff'd on other grounds, 973 F.2d 843 (10th Cir. 1992).

<sup>11</sup> Smith v. United States Dep't of Justice, No. 86-6162, slip op. at 2 (E.D. Pa. Sept. 1, 1987); see also Don Ray Drive-A-Way Co. v. Skinner, 785 F. Supp. 198, 200 (D.D.C. 1992) (computer algorithm used by Department of Transportation to determine safety rating of motor carriers "does not simply involve investigative techniques or procedures" because it has same status as regulations or agency law); Albuquerque Publishing Co. v. United States Dep't (continued...)

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However, even commonly known procedures have been protected from release where "[t]he techniques themselves may be known to the public, but the circumstances of their usefulness . . . may not be widely known,"<sup>12</sup> or where "their use in concert with other elements of an investigation and in their totality directed toward a specific investigative goal constitute a 'technique' which merits protection to insure its future effectiveness."<sup>13</sup>

<sup>11</sup>(...continued)

of Justice, 726 F. Supp. 851, 858 (D. Ariz. 1989) (agencies "should avoid burdening the Court with techniques commonly described in movies, popular novels, stories or magazines or television"); Astley v. Lawson, No. 89-2806, slip op. at 13 (D.D.C. Jan. 11, 1991) (mere assertion that technique falls within scope of exemption is insufficient).

<sup>12</sup> Parker v. United States Dep't of Justice, No. 88-760, slip op. at 8 (D.D.C. Feb. 28, 1990), aff'd in pertinent part, No. 90-5070 (D.C. Cir. June 28, 1990); see also Hale v. United States Dep't of Justice, 973 F.2d 894, 902-03 (10th Cir. 1992) (information concerning security devices, modus operandi and polygraph matters), cert. granted, vacated & remanded on other grounds, 113 S. Ct. 3029 (1993); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 392 n.5, 393 n.6 (W.D.N.Y. 1992) (fact of whether alien's name is listed in INS Lookout Book and methods of apprehension); McCoy v. Moschella, No. 89-2155, slip op. at 9-10 (D.D.C. Sept. 30, 1991) (categorization of similar bank robberies for purposes of subject identification); Ellis v. United States Dep't of Justice, No. 90-132, slip op. at 4 (D.D.C. Sept. 25, 1990) (FBI polygraph material).

<sup>13</sup> Martinez v. FBI, No. 82-1547, slip op. at 16 (D.D.C. Oct. 11, 1983); see, e.g., Neill v. United States Dep't of Justice, No. 91-3319, slip op. at 7-8 (D.D.C. July 20, 1993) ("known techniques used in conjunction with unknown techniques"); Hassan v. FBI, No. 91-2189, slip op. at 8-10 (D.D.C. July 13, 1992) (common techniques used with uncommon technique to achieve unique investigative goal), summary affirmance granted, No. 92-5318 (D.C. Cir. Mar. 17, 1993); Coleman v. FBI, No. 89-2773, slip op. at 26 (D.D.C. Dec. 10, 1991) (while techniques themselves may be known, disclosure of specific use or patterns of use reduces future effectiveness), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 12 (D.D.C. 1991) (disclosure of information within context of documents at issue could alert subjects of investigation about techniques used to aid FBI); Varelli v. FBI, No. 88-1865, slip op. at 17 (D.D.C. Oct. 4, 1991) (routine techniques protected when used with uncommon technique to accomplish unique investigative goal); Wagner v. FBI, No. 90-1314, slip op. at 5 (D.D.C. June 4, 1991) (exemption protects detailed surveillance and undercover investigative methods and techniques), summary affirmance granted, No. 91-5220 (D.C. Cir. Aug. 3, 1992); D'Alessandro v. United States Dep't of Justice, No. 90-2088, slip op. at 8 (D.D.C. Feb. 28, 1991) (certain known investigative techniques, when used in conjunction with other techniques, could reasonably be expected to risk circumvention of law); PHE, Inc. v. United States Dep't of Justice, No. 90-1461, slip op. at 7 (D.D.C. Jan. 31, 1991) (descriptions of even commonly known obscenity investigation techniques pro-

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In some cases, it is not possible to describe secret law enforcement techniques, even in general terms, without disclosing the very information to be withheld.<sup>14</sup> Several recent decisions, though, have described the general nature of the technique while withholding the details.<sup>15</sup> Numerous cases decided

<sup>13</sup>(...continued)

tected when they are used "in concert with other elements of an investigation and in their totality [are] directed toward a specific investigative goal"), aff'd in pertinent part, rev'd in other part & remanded, 983 F.2d 248 (D.C. Cir. 1993); Beck v. United States Dep't of the Treasury, No. 88-493, slip op. at 26 (D.D.C. Nov. 8, 1989) (certain documents, including map, withheld because disclosure would reveal surveillance technique used by Customs Service, as well as why certain individuals were contacted with regard to investigations), aff'd, 946 F.2d 1563 (D.C. Cir. 1992) (table cite); Gonzalez v. United States Dep't of Justice, No. 88-913, slip op. at 8 (D.D.C. Oct. 25, 1988) (protecting investigative techniques used in particular investigations, and their effectiveness ratings, which could assist criminals in employing countermeasures to circumvent these techniques); accord Dettman v. United States Dep't of Justice, No. 82-1108, slip op. at 14 (D.D.C. Mar. 21, 1985), aff'd, 802 F.2d 1472, 1475 n.4 (D.C. Cir. 1986); see also FOIA Update, Spring 1984, at 5; cf. United States v. Van Horn, 789 F.2d 1492, 1508 (11th Cir. 1986) ("Disclosing the precise locations where surveillance devices are hidden or their precise specifications will educate criminals regarding how to protect themselves against police surveillance.") (recognizing qualified privilege in criminal case).

<sup>14</sup> See, e.g., Engelking v. DEA, No. 91-165, slip op. at 10 (D.D.C. Nov. 30, 1992) (release of two specific DEA techniques "would make them ineffective by allowing drug violators to evade detection and apprehension"); Soto v. DEA, No. 90-1816, slip op. at 7 (D.D.C. Apr. 13, 1992) (detailed description of technique pertaining to detection of drug traffickers would effectively disclose it); Fitzgibbon v. United States Secret Serv., No. 86-1886, slip op. at 3 (D.D.C. Mar. 17, 1992) (descriptions of how certain law enforcement investigations are conducted and "Administrative Profile" forms); Rojem v. United States Dep't of Justice, No. 90-3021, slip op. at 2 (D.D.C. Oct. 31, 1991) (critical descriptions and chronologies of law enforcement tactics not known to public); Martorano v. FBI, No. 89-377, slip op. at 20-21 (D.D.C. Sept. 30, 1991) (narcotics investigation techniques not commonly known to public); Spirovski v. DEA, No. 90-1633, slip op. at 6 (D.D.C. July 24, 1991) (details regarding three specific DEA investigative techniques); Fernandez v. United States Dep't of Justice, No. 88-1539, slip op. at 8 (D.D.C. Feb. 5, 1990) (accepting DEA claim that "at least three proven techniques and procedures not commonly known to the public" could not be explained without revealing their substance or risking integrity of their effectiveness); Lam Lek Chong v. DEA, No. 85-3726, slip op. at 19-20 (D.D.C. Mar. 14, 1988), aff'd on other grounds, 929 F.2d 729 (D.C. Cir. 1991).

<sup>15</sup> See, e.g., Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); Becker v. IRS, No. 91-C-1203, slip op. at 14-15 (N.D. Ill. Mar. 27, 1992) (protects investigatory techniques used by IRS  
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before the 1986 amendments are consistent with current case law in allowing agencies to describe the general nature of the technique while withholding full detail.<sup>16</sup>

While the former version of Exemption 7(E) protected law enforcement techniques and procedures only where they could be regarded as "investigatory" or "investigative" in character, the first clause of the amended Exemption 7(E) no longer contains that limitation. Rather, it now simply covers "techniques and procedures for law enforcement investigations and prosecutions."<sup>17</sup> As

<sup>15</sup>(...continued)

to identify and investigate tax protestors) (appeal pending); Destileria Serralles, Inc. v. Department of the Treasury, No. 85-837, slip op. at 15 (D.P.R. Sept. 22, 1988) (technique for examining records of alcoholic beverage retailers "to determine whether discounts offered by a wholesale liquor dealer were used as a subterfuge for the giving of a thing of value to the retailer"); O'Connor v. IRS, 698 F. Supp. 204, 206-07 (D. Nev. 1988) ("tolerance and criteria used internally by the IRS in investigations"); Laroque v. United States Dep't of Justice, No. 86-2677, slip op. at 7-8 (D.D.C. July 12, 1988) ("reason codes" and "source codes" in State Department "lookout notices"); Luther v. IRS, No. 5-86-130, slip op. at 3-4 (D. Minn. June 8, 1987) (magistrate's recommendation) (alternative holding) ("IRS's Discriminant Function Scores" used to select returns for audit), adopted (D. Minn. Aug. 13, 1987).

<sup>16</sup> See, e.g., Cohen v. Smith, No. 81-5365, slip op. at 8 (9th Cir. Mar. 25, 1983) (details of telephone interviews), cert. denied, 464 U.S. 939 (1983); Ray v. United States Customs Serv., No. 83-1476, slip op. at 16-17 (D.D.C. Jan. 28, 1985) (same); Fund for a Conservative Majority v. Federal Election Comm'n, No. 84-1342, slip op. at 6-8 (D.D.C. Feb. 26, 1985) (alternative holding) (audit criteria); Oliva v. FBI, No. 83-3724, slip op. at 4 (D.D.C. Mar. 30, 1984) (model, serial number and type of equipment used in connection with surveillance); LeClair v. United States Secret Serv., No. 82-2162, slip op. at 5 (D. Mass. Feb. 23, 1983) ("Administrative Profile" used to evaluate individuals in connection with protective services); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405, 413-14 (D.D.C. 1983) (alternative holding) (computer program used to detect anti-dumping law violations); Minnesota v. Department of Energy, No. 4-81-434, slip op. at 10 (D. Minn. Dec. 14, 1982) (details of techniques utilized in oil refinery audit); Hayward v. United States Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 81,231, at 81,646 (D.D.C. July 14, 1981) (methods and techniques used by U.S. Marshals Service to relocate protected witnesses); Malloy v. United States Dep't of Justice, 457 F. Supp. at 545 (details concerning "bait money" and "bank security devices"); Boyce v. Deputy Director, No. 78-084, slip op. at 4-5 (D.D.C. Oct. 25, 1978) (procedures unique to counterfeiting investigations); Ott v. Levi, 419 F. Supp. 750, 752 (E.D. Mo. 1976) (laboratory techniques used in arson investigation); see also U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 7 (D.D.C. Mar. 26, 1986) (extending former version of Exemption 7(E) to protect even Secret Service's contract specifications for President's armored limousine).

<sup>17</sup> 5 U.S.C. § 552(b)(7)(E) (1988).

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such, it authorizes the withholding of information consisting of, or reflecting, a law enforcement "technique" or a law enforcement "procedure," wherever it is "for law enforcement investigations or prosecutions" generally.<sup>18</sup>

The protection now available under this first clause of the exemption is thus broader than that which formerly was available under Exemption 7(E) as a whole.<sup>19</sup> One of the Exemption 7 weaknesses specifically addressed by Congress in achieving FOIA reform was its inadequacy to protect such records as law enforcement manuals which, though certainly containing law enforcement "techniques" and "procedures," ran afoul of the former "investigatory" requirement of the exemption.<sup>20</sup> Such documents, including those which pertain to the "prosecutions" stage of the law enforcement process, now meet the requirements for withholding under Exemption 7(E) to the extent that they consist of, or reflect, law enforcement techniques and procedures best kept confidential.<sup>21</sup>

Exemption 7(E)'s entirely new second clause separately protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law."<sup>22</sup> This distinct new protection was added by Congress to ensure proper protection for the type of law enforcement guideline information found ineligible to be withheld in the en banc decision of the Court of Appeals for the District of Columbia Circuit in Jordan v. Department of Justice,<sup>23</sup> a case involving guidelines for prosecutions. It reflects a dual concern with the need to remove any lingering effect of that decision, while at the same time ensuring that agencies do not unnecessarily maintain "secret law" on the standards used to regulate behavior.<sup>24</sup>

Accordingly, this clause of Exemption 7(E) is available to protect any "law enforcement guideline" information of the type involved in Jordan, whether it pertains to the prosecution or basic investigation stage of a law enforcement matter, whenever it is determined that its disclosure "could reasonably be

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<sup>18</sup> Id.; see Attorney General's Memorandum at 15. But see also Cowsen-El v. United States Dep't of Justice, 826 F. Supp. 532, 533-34 (D.D.C. 1992) (Bureau of Prisons Program Statement held internal policy wholly unrelated to investigations or prosecutions).

<sup>19</sup> See Attorney General's Memorandum at 16.

<sup>20</sup> See S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983) (citing, e.g., Sladek v. Bensinger, 605 F.2d 899 (5th Cir. 1979)).

<sup>21</sup> Attorney General's Memorandum at 16.

<sup>22</sup> 5 U.S.C. § 552(b)(7)(E) (1988).

<sup>23</sup> 591 F.2d 753, 771 (D.C. Cir. 1978).

<sup>24</sup> S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983). See Attorney General's Memorandum at 16-17; see also Don Ray Drive-A-Way Co. v. Skinner, 785 F. Supp. at 200 & n.1 (shrouding safety rating process in secrecy "is not an acceptable solution to the agency's proper concern over severe budgetary restrictions").

## EXEMPTION 7(E)

expected to risk circumvention of the law."<sup>25</sup> In choosing this particular harm formulation, Congress employed the more relaxed harm standard now used widely throughout Exemption 7, and obviously "was guided by the 'circumvention of the law' standard that the D.C. Circuit established in its en banc decision"<sup>26</sup> in Crooker v. Bureau of Alcohol, Tobacco & Firearms.<sup>27</sup> However, in applying this clause of Exemption 7(E) to law enforcement manuals, agencies should be careful to withhold only the portions of those guidelines that correlate to a specific harm to law enforcement efforts.<sup>28</sup>

<sup>25</sup> See, e.g., PHE, Inc. v. United States Dep't of Justice, 983 at 251 (D.C. Cir. 1993) ("release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts"); Silber v. United States Dep't of Justice, No. 91-876, transcript at 25 (D.D.C. Aug. 13, 1992) (bench order) (disclosure of agency's monograph on fraud litigation "would present the specter of circumvention of the law"); Small v. IRS, 820 F. Supp. 163, 165-66 (D.N.J. 1992) (disclosure of "IRS's Discriminant Function Scores" would result in circumvention of tax laws; IRS tolerance and audit guidelines withheld because disclosure would allow taxpayers to devise circumvention strategies); Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 14 (D.D.C. Dec. 19, 1990) (exemption protects final contingency plan in event of attack on United States, guidelines for response to terrorist attacks, and contingency plans for immigration emergencies); Powell v. United States Dep't of Justice, No. 86-2020, slip op. at 18 (D.D.C. Aug. 18, 1988) (magistrate's recommendation) (although agency released documents describing various enforcement techniques, disclosure of specific technique used in particular case would reveal agency's strategy in similar cases), adopted (D.D.C. Oct. 31, 1989); Williston Basin Interstate Pipeline Co. v. Federal Energy Regulatory Comm'n, No. 88-592, slip op. at 4-5 (D.D.C. Apr. 17, 1989) (finding portions of FERC regulatory audit describing (1) significance of each page in audit report, (2) investigatory technique utilized and (3) auditor's conclusions, to constitute "the functional equivalent of a manual of investigative techniques"). But see Church of Scientology v. IRS, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) (IRS did not establish how release of notes and memoranda "regarding harassment of Service employees" written during course of investigation "could reasonably be expected to circumvent the law") (appeal pending).

<sup>26</sup> S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983); see Attorney General's Memorandum at 17.

<sup>27</sup> 670 F.2d 1051 (D.C. Cir. 1981).

<sup>28</sup> See PHE, Inc. v. United States Dep't of Justice, 983 F.2d at 252 (National Obscenity Enforcement Unit failed to submit affidavit containing "precise descriptions of the nature of the redacted material and providing reasons why releasing each withheld section would create a risk of circumvention of the law, or . . . clearly indicat[ing] why disclosable material could not be segregated from exempted material"); cf. Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 982-83 (1st Cir. 1985) (remanding for determination of segregability) (Exemption 2); Schreibman v. United States Dep't of Com-

(continued...)



## EXEMPTION 7(F)

Law enforcement agencies therefore may avail themselves of the distinct protections now provided in Exemption 7(E)'s two clauses. Their "noninvestigatory" law enforcement records, to the extent that they can be fairly regarded as reflecting techniques or procedures, are now entitled to categorical protection under Exemption 7(E)'s expanded first clause. As well, law enforcement guidelines that satisfy the broad "could reasonably be expected to risk circumvention of law" standard can be protected under Exemption 7(E)'s newer second clause.<sup>29</sup> (See also discussion of overlapping "circumvention" protection available under Exemption 2, above.)

## EXEMPTION 7(F)

As a result of the Freedom of Information Reform Act of 1986,<sup>1</sup> Exemption 7(F) now permits the withholding of information necessary to protect the physical safety of a wide range of individuals. Whereas Exemption 7(F) previously protected records that "would . . . endanger the life or physical safety of law enforcement personnel,"<sup>2</sup> the amended exemption provides protection to "any individual" where disclosure of information about him "could reasonably be expected to endanger [his] life or physical safety."<sup>3</sup>

Prior to the 1986 FOIA amendments, this exemption had been invoked to protect both federal and local law enforcement officers.<sup>4</sup> Cases decided after the 1986 FOIA amendments continue this strong protection for law enforcement agents.<sup>5</sup> Under the amended language of Exemption 7(F), courts have applied

<sup>28</sup>(...continued)

merce, 785 F. Supp. 164, 166 (D.D.C. 1991) (remanding for segregability finding involving vulnerability assessment) (Exemption 2).

<sup>29</sup> See Attorney General's Memorandum at 17 & n.31.

<sup>1</sup> Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to 3207-49.

<sup>2</sup> 5 U.S.C. § 552(b)(7)(F) (1982) (amended 1986).

<sup>3</sup> 5 U.S.C. § 552(b)(7)(F) (1988).

<sup>4</sup> See, e.g., Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977) (FBI special agents and "other law enforcement personnel"); Barham v. Secret Serv., No. 82-2130, slip op. at 5 (W.D. Tenn. Sept. 13, 1982) (Secret Service agents); Docal v. Benninger, 543 F. Supp. 38, 48 (M.D. Pa. 1981) (DEA special agents, supervisory special agents, and local law enforcement officers); Mahler v. United States Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,032, at 82,263 (D.D.C. Sept. 29, 1981) (Deputy U.S. Marshal); Nunez v. DEA, 497 F. Supp. 209, 212 (S.D.N.Y. 1980) (DEA special agents); Ray v. Turner, 468 F. Supp. 730, 735 (D.D.C. 1979) (U.S. Customs Service agent).

<sup>5</sup> See, e.g., Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 6 (D.D.C. June 28, 1993) (names, identifying data, and aliases of local undercover law enforcement officers); Manchester v. DEA, 823 F. Supp. 1259, (continued...)

the broader protection now offered by this exemption. They have held that this exemption is appropriate to withhold the "names and identifying information of federal employees, and third persons who may be unknown" to the requester.<sup>6</sup> Withholding of such information can be necessary to protect such persons from

<sup>5</sup>(...continued)

1273 (E.D. Pa. 1993) (names and identities of DEA special agents, supervisory special agents, and other law enforcement officers); Engelking v. DEA, No. 91-165, slip op. at 10 (D.D.C. Nov. 30, 1992) (same); Watson v. United States Dep't of Justice, 799 F. Supp. 193, 197 (D.D.C. 1992) (same); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 795 (D.D.C. 1992) (same), summary affirmance granted in pertinent part, No. 92-5360 (D.C. Cir. Apr. 29, 1993); Soto v. DEA, No. 90-1816, slip op. at 8 (D.D.C. Apr. 13, 1992) (same); Martorano v. DEA, No. 89-813, slip op. at 21-22 (D.D.C. Sept. 30, 1991) (identities of DEA agents and other law enforcement personnel who associate with violators in undercover capacities); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 11 (D.D.C. 1991) (identities of DEA law enforcement personnel); Beck v. United States Dep't of Justice, No. 88-3433, slip op. at 2-3 (D.D.C. July 24, 1991) (names mentioned in criminal investigative files), summary affirmance granted in pertinent part, No. 91-5292 (D.C. Cir. Nov. 19, 1992); Spirovski v. DEA, No. 90-1633, slip op. at 4 (D.D.C. July 24, 1991) (names, telephone numbers and addresses of DEA personnel); Wagner v. FBI, No. 90-1314, slip op. at 6 (D.D.C. June 4, 1991) (identities of DEA agents who routinely operate in undercover narcotics investigations), summary affirmance granted, No. 91-5220 (D.C. Cir. Aug. 3, 1992); Clarkson v. IRS, No. 88-3036-3K, slip op. at 7-8 (D.S.C. May 10, 1990) (identities of IRS agents who participated in undercover operations involving violent tax-protester groups); Atkins v. Department of Justice, No. 88-842, slip op. at 10 (D.D.C. Feb. 26, 1990) (names and identities of DEA agents and other law enforcement personnel who associate with violators in undercover capacities), aff'd, 946 F.2d 1563 (D.C. Cir. 1991) (table cite).

<sup>6</sup> Luther v. IRS, No. 5-86-130, slip op. at 6 (D. Minn. Aug. 13, 1987); see also Durham v. United States Dep't of Justice, No. 91-2636, slip op. at 11 (D.D.C. Aug. 17, 1993) (given requester's past violent behavior, agency can protect identities of individuals who assisted FBI in its case against requester); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 810 (D.N.J. 1993) (release of FBI reports would endanger life or physical safety of victims, informants, and potential and actual witnesses); Kele v. United States Parole Comm'n, No. 92-1302, slip op. at 3 (D.D.C. Aug. 18, 1992) (agency can withhold adverse witness's address and also statements concerning his involvement with requester and willingness to testify at requester's probation hearing); Sanders v. United States Dep't of Justice, No. 91-2263, slip op. at 10 (D. Kan. Apr. 21, 1992) (in view of requester's mental difficulties, disclosing identities of medical personnel who prepared requester's mental health records would endanger their safety); Author Servs., Inc. v. IRS, No. 90-2187, slip op. at 7 (C.D. Cal. Nov. 14, 1991) (identities of third parties and handwriting and identities of IRS employees withholdable in view of previous conflict and hostility between parties); Varelli v. FBI, No. 88-1865, slip op. at 17 (D.D.C. Oct. 4, 1991) (identities of individuals in El Salvador who knew of requester's relationship with FBI protected).

## EXEMPTION 7(F)

possible harm by a requester who has threatened them in the past.<sup>7</sup> More recently, courts have held that the expansive language of "any individual" encompasses protection of the identities of informants who have been threatened with harm.<sup>8</sup>

Significantly, Exemption 7(F) protection has been held to remain applicable even after a law enforcement officer subsequently retired.<sup>9</sup> On the other hand, in one instance it was held that Exemption 7(F) could not be employed to protect the identities of law enforcement personnel who testified at the requester's criminal trial.<sup>10</sup>

Several years ago, one court approved a rather novel, but certainly appropriate, application of this exemption to a description in an FBI laboratory report of a homemade machine gun because its disclosure would create the real possibility that law enforcement officers would have to face "individuals armed with homemade devices constructed from the expertise of other law enforcement people."<sup>11</sup>

Although Exemption 7(F)'s coverage may in large part be duplicative of that afforded by Exemption 7(C), it is potentially broader in that no balancing is required for withholding under Exemption 7(F).<sup>12</sup> It is difficult to imagine any circumstance, though, in which the public's interest in disclosure could outweigh the safety of any individual. Moreover, Exemption 7(F), as amended, should be of greater utility to law enforcement agencies, given the lessened

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<sup>7</sup> See, e.g., Luther v. IRS, slip op. at 6; Durham v. United States Dep't of Justice, slip op. at 11 (protection for third parties who have knowledge about crime in which requester was involved); Manna v. United States Dep't of Justice, 815 F. Supp. at 810 (victims, informants, and potential and actual witnesses in La Cosa Nostra case protected).

<sup>8</sup> See, e.g., Housley v. FBI, No. 87-3231, slip op. at 7 (D.D.C. Mar. 18, 1988) (identities of informants); see also Spirovski v. DEA, slip op. at 4 (names, telephone numbers and addresses of informants).

<sup>9</sup> See Moody v. DEA, 592 F. Supp. 556, 559 (D.D.C. 1984).

<sup>10</sup> Myers v. United States Dep't of Justice, No. 85-1746, slip op. at 6 (D.D.C. Sept. 22, 1986). Contra Beck v. United States Dep't of Justice, slip op. at 2-3 (exemption not necessarily waived when information revealed at public trial); Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 6 (D.D.C. Apr. 13, 1989) (similar to protection under Exemption 7(C), DEA agents' identities protected even though they testified at trial), aff'd, No. 89-5185 (D.C. Cir. Feb. 26, 1990).

<sup>11</sup> LaRouche v. Webster, No. 75-6010, slip op. at 24 (S.D.N.Y. Oct. 23, 1984); see also Pfeffer v. Director, Bureau of Prisons, No. 89-899, slip op. at 4 (D.D.C. Apr. 18, 1990) (information about smuggling weapons into prisons could reasonably be expected to endanger physical safety of "some individual" and therefore was properly withheld under Exemption 7(F)).

<sup>12</sup> See FOIA Update, Spring 1984, at 5.

## EXEMPTION 8

"could reasonably be expected" harm standard now in effect.<sup>13</sup> Agencies can reasonably infer from this modification Congress' approval to withhold information wherever there is a reasonable likelihood of its disclosure causing harm to someone.<sup>14</sup>

## EXEMPTION 8

Exemption 8 of the FOIA covers 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."<sup>1</sup>

This exemption received little judicial attention during the first dozen years of the FOIA's operation. The only significant decision during that period was one which held that national securities exchanges and broker-dealers are not "financial institutions" within the meaning of the exemption.<sup>2</sup> With respect to stock exchanges, which have been held to constitute "financial institutions" under Exemption 8, that decision has not been followed.<sup>3</sup>

Subsequent courts interpreting Exemption 8 have declined to restrict the "particularly broad, all-inclusive" scope of the exemption.<sup>4</sup> They have reasoned that "if Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not our function, even in the FOIA

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<sup>13</sup> See, e.g., Simpson v. United States Dep't of Justice, No. 87-2832, slip op. at 11 (D.D.C. Sept. 30, 1988) (need to protect identities of DEA agents held so "clear" that in camera review unnecessary); cf. Hoch v. CIA, No. 82-754, slip op. at 3 (D.D.C. Sept. 30, 1988) ("disclosures by the congressional committees did not purport to be official acknowledgements as to any of the information" sought), aff'd, 907 F.2d 1227 (D.C. Cir. 1990) (table cite).

<sup>14</sup> See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act at 18 & n.34 (Dec. 1987); see also, e.g., Dickie v. Department of the Treasury, No. 86-649, slip op. at 13 (D.D.C. Mar. 31, 1987) (upholding application of Exemption 7(F) as amended based upon agency judgment of "very strong likelihood" of harm).

<sup>1</sup> 5 U.S.C. § 552(b)(8) (1988).

<sup>2</sup> M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 470 (D.D.C. 1972).

<sup>3</sup> See Mermelstein v. SEC, 629 F. Supp. 672, 673-75 (D.D.C. 1986) (opinion based in part upon legislative history of Sunshine Act).

<sup>4</sup> Consumers Union of United States, Inc. v. Office of the Comptroller of the Currency, No. 86-1841, slip op. at 2 (D.D.C. Mar. 11, 1988); McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,194, at 80,494 (D.D.C. July 28, 1980).

## EXEMPTION 8

context, to subvert that effort."<sup>5</sup> The Court of Appeals for the District of Columbia Circuit has gone so far as to state that in Exemption 8 Congress has provided "absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports."<sup>6</sup> More recently, in a major Exemption 8 decision, the D.C. Circuit broadly construed the term "financial institutions" and held that it is not limited to "depository" institutions.<sup>7</sup>

In examining the sparse legislative history of Exemption 8, courts have discerned two major purposes underlying it: (1) "to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability," and (2) "to promote cooperation and communication between employees and examiners."<sup>8</sup> Accordingly, different types of documents have been held to fall within the broad confines of Exemption 8. First and foremost, the authority of federal agencies to withhold bank examination reports prepared by federal bank examiners has not been questioned.<sup>9</sup> Further, matters that are "related to" such reports--that is, documents that "represent the foundation of the examination process, the findings of such an examination, or its follow-up"--have also been held exempt from disclosure.<sup>10</sup> Likewise, Exemption 8 has been employed to withhold portions of documents--such as internal memoranda and policy statements--that contain specific information

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<sup>5</sup> Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531, 533 (D.C. Cir. 1978); see also Sharp v. FDIC, 2 Gov't Disclosure Serv. (P-H) ¶ 81,107, at 81,270 (D.D.C. Jan. 28, 1981); McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,494.

<sup>6</sup> Gregory v. FDIC, 631 F.2d 896, 898 (D.C. Cir. 1980); see also Public Citizen v. Farm Credit Admin., 938 F.2d 290, 293-94 (D.C. Cir. 1991) (holding that National Consumer Cooperative Bank is "financial institution" for purposes of Exemption 8; exemption protects audit reports prepared by Farm Credit Administration for submission to Congress regarding NCCB, although FCA does not regulate or supervise NCCB).

<sup>7</sup> Public Citizen v. Farm Credit Admin., 938 F.2d at 292-94.

<sup>8</sup> Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,034, at 80,102 (D.D.C. Feb. 13, 1980); see also Consumers Union of United States, Inc. v. Heimann, 589 F.2d at 534; Feinberg v. Hibernia Corp., No. 90-4245, slip op. at 8 (E.D. La. Jan. 7, 1993); Fagot v. FDIC, 584 F. Supp. 1168, 1173 (D.P.R. 1984), aff'd in pertinent part & rev'd in part, 760 F.2d 252 (1st Cir. 1985) (table cite).

<sup>9</sup> See Sharp v. FDIC, 2 Gov't Disclosure Serv. (P-H) at 81,270; Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,102.

<sup>10</sup> Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,102; see also Teichgraeber v. Board of Governors, Fed. Reserve Sys., No. 87-2505, slip op. at 2-3 (D. Kan. Mar. 20, 1989); Consumers Union of United States, Inc. v. Office of the Comptroller of the Currency, slip op. at 2-3; Folger v. Conover, No. 82-4, slip op. at 6-8 (E.D. Ky. Oct. 25, 1983); Sharp v. FDIC, 2 Gov't Disclosure Serv. (P-H) at 81,271.

about named financial institutions.<sup>11</sup>

Bank examination reports and related documents prepared by state regulatory agencies have been found protectible under Exemption 8 on more than one ground. The purposes of the exemption are plainly served by withholding such material because of the "interconnected" purposes and operations of federal and state banking authorities.<sup>12</sup> A state agency report transferred to a federal agency strictly for its confidential use, however, and thus still within the control of the state agency, was held as a threshold matter not even to be an "agency record" under the FOIA subject to disclosure.<sup>13</sup> In general, "all records, regardless of the source, of a bank's financial condition and operations and in the possession of a federal agency 'responsible for the regulation or supervision of financial institutions,' are exempt."<sup>14</sup>

Indeed, even records pertaining to banks that are no longer in operation can be withheld under Exemption 8 in order to serve the policy of promoting "frank cooperation" between bank and agency officials.<sup>15</sup> The exemption protects even bank examination reports and related memoranda relating to insolvency proceedings.<sup>16</sup> Documents relating to cease-and-desist orders that issue after a bank examination as the result of a closed administrative hearing are also properly exempt.<sup>17</sup> Additionally, reports examining bank compliance with consumer laws and regulations have been held to "fall squarely within the exemption."<sup>18</sup>

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<sup>11</sup> See Wachtel v. Office of Thrift Supervision, No. 3-90-833, slip op. at 19-20, 23, 26-28, 30, 33 (M.D. Tenn. Nov. 20, 1990) (protecting portions of documents that contain specific information about two named financial institutions--names of institutions, names of officers and agents, any references to their geographic locations, and specific information about their financial conditions).

<sup>12</sup> See Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,102.

<sup>13</sup> McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,495.

<sup>14</sup> Id. (quoting legislative history).

<sup>15</sup> Gregory v. FDIC, 631 F.2d at 899.

<sup>16</sup> See, e.g., Tripodi v. United States Dep't of Justice, No. 87-3301, slip op. at 2-3 (D.D.C. May 23, 1990). But cf. In re Sunrise Sec. Litig., 109 B.R. 658, 664-67 (E.D. Pa. 1990) (holding that Federal Home Loan Bank of Atlanta could not rely upon regulation implementing Exemption 8 as independent evidentiary "bank examination privilege," and even under more general "official information privilege" there exists no absolute protection for internal working papers and other documents generated in government's examination of failed bank) (non-FOIA case).

<sup>17</sup> See, e.g., Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,103.

<sup>18</sup> Id.; cf. Consumers Union of United States, Inc. v. Heimann, 589 F.2d at (continued...)

## EXEMPTION 9

Moreover, in keeping with the expansive construction of Exemption 8, courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial state of the institution: "[A]n entire examination report, not just that related to the 'condition of the bank' may be properly withheld."<sup>19</sup>

## EXEMPTION 9

Exemption 9 of the FOIA covers "geological and geophysical information and data, including maps, concerning wells."<sup>1</sup> While this exemption is very rarely invoked or interpreted,<sup>2</sup> one court has held that it applies only to "well information of a technical or scientific nature."<sup>3</sup> Only two other decisions have addressed Exemption 9; however, both merely mentioned the exemption without discussing its scope or application.<sup>4</sup>

## EXCLUSIONS

The Freedom of Information Reform Act of 1986 created an entirely new mechanism for protecting certain especially sensitive law enforcement matters

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<sup>18</sup>(...continued)

534-35 (Truth in Lending Act does not narrow Exemption 8's broad language); Consumers Union of United States, Inc. v. Office of the Comptroller of the Currency, slip op. at 2-3 (reports fall within Exemption 8 "because they analyze and summarize information concerning consumer complaints").

<sup>19</sup> Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,103. But see Fagot v. FDIC, No. 84-1523, slip op. at 5-6 (1st Cir. Mar. 27, 1985) (portion of document which does not relate to bank report or examination cannot be withheld); see generally PHE, Inc. v. Department of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993) (emphasizing general agency segregation obligation under FOIA).

<sup>1</sup> 5 U.S.C. § 552(b)(9) (1988).

<sup>2</sup> See National Broadcasting Co. v. SBA, No. 92 Civ. 6483, slip op. at 5 n.2 (S.D.N.Y. Jan. 28, 1993) (merely noting that document withheld under Exemption 4 "also contains geographic or geological information which is exempted from disclosure pursuant to FOIA Exemption 9").

<sup>3</sup> Black Hills Alliance v. United States Forest Serv., 603 F. Supp. 117, 122 (D.S.D. 1984) (excluding number, locations, and depths of proposed uranium exploration drill-holes).

<sup>4</sup> See Superior Oil Co. v. Federal Energy Regulatory Comm'n, 563 F.2d 191, 203-04 & n.20 (5th Cir. 1977) (non-FOIA case); Pennzoil Co. v. Federal Power Comm'n, 534 F.2d 627, 629-30 & n.2 (5th Cir. 1976) (non-FOIA case); cf. Eccc, Inc. v. Federal Energy Regulatory Comm'n, 645 F.2d 339, 348-49 (5th Cir. 1981) (requirement that producers of natural gas submit confidential geological information held valid) (non-FOIA case).

## EXCLUSIONS

under new subsection (c) of the FOIA.<sup>1</sup> These three special protection provisions, referred to as record "exclusions," now expressly authorize federal law enforcement agencies, for especially sensitive records under certain specified circumstances, to "treat the records as not subject to the requirements of [the FOIA]."<sup>2</sup> It should be appreciated at the outset, however, that the unfamiliar procedures required to properly employ these special record exclusions are by no means straightforward and must be implemented with the utmost care.<sup>3</sup> Any agency considering employing an exclusion or having a question as to their implementation should first consult with the Office of Information and Privacy, at (202) 514-3642.<sup>4</sup>

Initially, it is crucial to recognize the somewhat subtle, but very significant, distinction between the result of employing a record exclusion and the concept that is colloquially known as "Glomarization."<sup>5</sup> That latter term refers to the situation in which an agency expressly refuses to confirm or deny the existence of records responsive to a request.<sup>6</sup> (A more detailed discussion of "Glomarization" is set forth under Exemption 1, above.) The application of one of the three record exclusions, on the other hand, results in a response to the FOIA requester stating that there exist no records responsive to his FOIA request. While "Glomarization" remains adequate to provide necessary protection in certain situations, these special record exclusions should prove invaluable in addressing the exceptionally sensitive situations in which even "Glomarization" is inadequate to the task.

### The (c)(1) Exclusion

The first of these novel provisions, known as the "(c)(1) exclusion," provides as follows:

Whenever a request is made which involves access to records described in subsection (b)(7)(A) and -- (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere

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<sup>1</sup> See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18-30 (Dec. 1987) [hereinafter Attorney General's Memorandum].

<sup>2</sup> 5 U.S.C. § 552(c)(1), (c)(2), (c)(3) (1988).

<sup>3</sup> See Attorney General's Memorandum at 27 n.48.

<sup>4</sup> See id.

<sup>5</sup> See id. at 26 & n.47; see also Benavides v. DEA, 968 F.2d 1243, 1246-48 (D.C. Cir.) (initially confusing exclusion mechanism with "Glomarization"), modified, 976 F.2d 751, 753 (D.C. Cir. 1992).

<sup>6</sup> See, e.g., Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982); Philippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).



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with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.<sup>7</sup>

In most cases, the protection of Exemption 7(A) is sufficient to guard against any impairment of law enforcement investigations or proceedings through the FOIA. To avail itself of Exemption 7(A), however, an agency must routinely specify that it is doing so--first administratively and then, if sued, in court--even when it is invoking the exemption to withhold all responsive records in their entirety. Thus, in specific situations in which the very fact of an investigation's existence is yet unknown to the investigation's subject, invoking Exemption 7(A) in response to a FOIA request for pertinent records permits an investigation's subject to be "tipped off" to its existence. By the same token, any person (or entity) engaged in criminal activities could use a carefully worded FOIA request to try to determine whether he (or it) is under federal investigation. An agency response that does not invoke Exemption 7(A) to withhold law enforcement files tells such a requester that his activities have thus far escaped detection.

The (c)(1) exclusion now authorizes federal law enforcement agencies, under specified circumstances, to shield the very existence of records of ongoing investigations or proceedings by excluding them entirely from the FOIA's reach.<sup>8</sup> To qualify for such exclusion from the FOIA, the records in question must be those which would otherwise be withheld in their entirety under Exemption 7(A). Further, they must relate to an "investigation or proceeding [that] involves a possible violation of criminal law."<sup>9</sup> Hence, any records pertaining to a purely civil law enforcement matter cannot be excluded from the FOIA under this provision, although they may qualify for ordinary Exemption 7(A) withholding. However, the statutory requirement that there be only a "possible violation of criminal law," by its very terms, admits a wide range of investigatory files maintained by more than just criminal law enforcement agencies.<sup>10</sup>

Next, the statute imposes two closely related requirements which go to the very heart of the particular harm addressed through this record exclusion. An agency determining whether it can employ (c)(1) protection must consider whether it has "reason to believe" that the investigation's subject is not aware of its pendency and that, most fundamentally, the agency's disclosure of the very existence of the records in question "could reasonably be expected to

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<sup>7</sup> 5 U.S.C. § 552(c)(1).

<sup>8</sup> See Attorney General's Memorandum at 18-22.

<sup>9</sup> 5 U.S.C. § 552(c)(1)(A).

<sup>10</sup> See Attorney General's Memorandum at 20 & n.37 (files of agencies which are not primarily engaged in criminal law enforcement activities may be eligible for protection if they contain information about potential criminal violations which are pursued toward the possibility of referral to the Department of Justice for further prosecution).

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interfere with enforcement proceedings."<sup>11</sup>

Obviously, where all investigatory subjects are already aware of an investigation's pendency, the "tip off" harm sought to be prevented through this record exclusion is not of concern. Accordingly, the language of this exclusion expressly obliges agencies contemplating its use to consider the level of awareness already possessed by the investigative subjects involved. It is appropriate that agencies do so, as the statutory language provides, according to a good-faith, "reason to believe" standard, which very much comports with the "could reasonably be expected to" standard utilized both elsewhere in this exclusion and in the amended language of Exemption 7(A).<sup>12</sup>

This "reason to believe" standard for considering a subject's present awareness should afford agencies all necessary latitude in making such determinations. As the exclusion is phrased, this requirement is satisfied so long as an agency determines that it affirmatively possesses "reason to believe" that such awareness does not in fact exist. While it is always possible that an agency might possess somewhat conflicting or even contradictory indications on such a point, unless an agency can resolve that a subject is aware of an investigation, it should not risk impairing the investigation through a telling FOIA disclosure.<sup>13</sup> Moreover, agencies are not obligated to accept any bald assertions by investigative subjects that they "know" of ongoing investigations against them; such assertions might well constitute no more than sheer speculation. Because such a ploy, if accepted, could defeat the exclusion's clear statutory purpose, agencies should rely upon their own objective indicia of subject awareness and consequent harm.<sup>14</sup>

In the great majority of cases, invoking Exemption 7(A) will protect the interests of law enforcement agencies in responding to FOIA requests for active law enforcement files. The (c)(1) exclusion should be employed only in the exceptional case in which an agency reaches the judgment that, given its belief of subject unawareness, the mere invocation of Exemption 7(A) could reasonably be expected to cause harm--a judgment that should be made distinctly and thoughtfully.<sup>15</sup>

Finally, the clear language of this exclusion specifically restricts its applicability to "during only such time" as the above required circumstances continue to exist. This limitation comports with the extraordinary nature of the protection afforded by the exclusion, as well as with the basic temporal nature of Exemption 7(A) underlying it. It means, of course, that an agency that has employed the exclusion in a particular case is obligated to cease doing so once the circumstances warranting it cease to exist. Once a law enforcement matter

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<sup>11</sup> 5 U.S.C. § 552(c)(1)(B).

<sup>12</sup> See Attorney General's Memorandum at 21.

<sup>13</sup> See id.

<sup>14</sup> See id. at n.38.

<sup>15</sup> See id. at 21.

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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. If the FOIA request which triggered the agency's use of the exclusion remains pending either administratively or in court at such time, the excluded records should be identified as responsive to that request and processed in the ordinary manner.<sup>16</sup> However, an agency is under no legal obligation to spontaneously reopen a closed FOIA request, even though records were excluded during its entire pendency: By operation of law, the records simply were not subject to the FOIA during the pendency of the request.<sup>17</sup>

Where all of these requirements are met, and an agency reaches the judgment that it is necessary and appropriate that the (c)(1) exclusion be employed in connection with a request, this means that the records in question will be treated, as far as the FOIA requester is concerned, as if they did not exist.<sup>18</sup> Where it is the case that the excluded records are just part of the totality of records responsive to a FOIA request, the request will be handled as a seemingly routine one, with the other responsive records processed as if they were the only responsive records in existence. Where the only records responsive to a request fall within the exclusion, the requester will lawfully be advised that no records responsive to his FOIA request exist.<sup>19</sup>

In order to maintain the integrity of an exclusion, each agency that employs it must ensure that its FOIA responses are consistent throughout. Therefore, all agencies that could possibly employ at least one of the three record exclusions should ensure that their FOIA communications are consistently phrased so that a requester cannot ever discern the existence of any excluded records, or of any matter underlying them, through the agency's response to his FOIA request.

### The (c)(2) Exclusion

The second exclusion created by the FOIA Reform Act applies to a narrower situation, involving the threatened identification of confidential informants in criminal proceedings.<sup>20</sup> The "(c)(2) exclusion" provides as follows:

Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject

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<sup>16</sup> See id. at 22.

<sup>17</sup> See id. at 22 n.39.

<sup>18</sup> See id. at 22.

<sup>19</sup> Id.

<sup>20</sup> See id. at 22-24.

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to the requirements of [the FOIA] unless the informant's status as an informant has been officially confirmed.<sup>21</sup>

This exclusion contemplates the situation in which a sophisticated requester could try to identify an informant by forcing a law enforcement agency into a position in which it otherwise would have no lawful choice but to tellingly invoke Exemption 7(D) in response to a request which encompasses informant records maintained on a named person.<sup>22</sup> In the ordinary situation, Exemption 7(D), as now amended, should adequately allow a law enforcement agency to withhold all items of information necessary to prevent the identification of any of its confidential sources.<sup>23</sup>

But as with Exemption 7(A), invoking Exemption 7(D) in response to a FOIA request tells the requester that somewhere within the records encompassed by his particular request there is reference to at least one confidential source. Again, under ordinary circumstances the disclosure of this fact poses no direct threat. But under certain extraordinary circumstances, this disclosure could result in devastating harms to the source and to the system of confidentiality existing between sources and criminal law enforcement agencies.

The scenario in which the exclusion is most likely to be employed is one in which the ringleaders of a criminal enterprise suspect that they have been infiltrated by a source and therefore force all participants in the criminal venture either to directly request that any law enforcement files on them be disclosed to the organization or to execute privacy waivers authorizing disclosure of their files in response to a request from the organization. Absent the (c)(2) exclusion, a law enforcement agency could effectively be forced to disclose information to the subject organization (i.e., through the very invocation of Exemption 7(D)) indicating that the named individual is a confidential source.<sup>24</sup>

The (c)(2) exclusion is principally intended to address this unusual, but dangerous situation by permitting an agency to escape the necessity of giving a response that would be tantamount to identifying a named party as a law enforcement source.<sup>25</sup> Any criminal law enforcement agency is now authorized to treat such requested records, within the extraordinary context of such a FOIA

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<sup>21</sup> 5 U.S.C. § 552(c)(2).

<sup>22</sup> See Attorney General's Memorandum at 23.

<sup>23</sup> See, e.g., Keys v. United States Dep't of Justice, 830 F.2d 337, 345-46 (D.C. Cir. 1987); see also United States Dep't of Justice v. Landano, 113 S. Ct. 2014, 2023-24 (1993) (although "the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI in the course of a criminal investigation," it should "often" be able to identify circumstances supporting an inference of confidentiality).

<sup>24</sup> See Attorney General's Memorandum at 23.

<sup>25</sup> See id. at 23-24.

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request, as beyond the FOIA's reach. As with the (c)(1) exclusion, the agency would have "no obligation to acknowledge the existence of such records in response to such request."<sup>26</sup>

A criminal law enforcement agency forced to employ this exclusion should do so in the same fashion as it would employ the (c)(1) exclusion already discussed.<sup>27</sup> It is imperative that all information which ordinarily would be disclosed to a first-party requester, other than information which would reflect that an individual is a confidential source, be disclosed. If, for example, the Federal Bureau of Investigation were to respond to a request for records pertaining to an individual having a known record of federal prosecutions by replying that "there exist no records responsive to your FOIA request," the interested criminal organization would surely recognize that its request had been afforded extraordinary treatment and would draw its conclusions accordingly. Therefore, the (c)(2) exclusion must be employed in a manner entirely consistent with its source-protection objective.

### The (c)(3) Exclusion

The third of these special record exclusions pertains only to certain law enforcement records that are maintained by the FBI.<sup>28</sup> The "(c)(3) exclusion" provides as follows:

Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in [Exemption 1], the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of [the FOIA].<sup>29</sup>

This exclusion recognizes the exceptional sensitivity of the FBI's activities in the areas of foreign intelligence, counterintelligence and the battle against international terrorism, as well as the fact that the classified files of these activities can be particularly vulnerable to targeted FOIA requests. Sometimes, within the context of a particular FOIA request, the very fact that the FBI does or does not hold any records on a specified person or subject can itself be a sensitive fact, properly classified in accordance with Executive Order No. 12,356 and protectible under FOIA Exemption 1.<sup>30</sup> Once again, however, the mere invocation of Exemption 1 to withhold such information can provide information to the requester which would have an extremely adverse effect on the government's interests. In some possible contexts, the furnishing of an

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<sup>26</sup> S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983).

<sup>27</sup> See Attorney General's Memorandum at 24.

<sup>28</sup> See id. at 24-27.

<sup>29</sup> 5 U.S.C. § 552(c)(3).

<sup>30</sup> 5 U.S.C. § 552(b)(1); see Attorney General's Memorandum at 25.

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actual "no records" response, even to a seemingly innocuous "first-party" request, can compromise sensitive activities.<sup>31</sup>

The FOIA Reform Act took cognizance of this through the (c)(3) exclusion, in which it authorizes the FBI to protect itself against such harm in connection with any of its records pertaining to these three, especially sensitive, areas. To do so, the FBI must of course reach the judgment, in the context of a particular request, that the very existence or nonexistence of responsive records is itself a classified fact and that it need employ this record exclusion to prevent its disclosure.<sup>32</sup> By the terms of this provision, the excluded records may be treated as such so long as their existence, within the context of the request, "remains classified information."<sup>33</sup>

Additionally, it should be noted that while the statute refers to records maintained by the FBI, exceptional circumstances could possibly arise in which it would be appropriate for another component of the Department of Justice or another federal agency to invoke this exclusion.<sup>34</sup> Such a situation could occur where information in records of another component or agency is derived from FBI records which fully qualify for (c)(3) exclusion protection. In such extraordinary circumstances, the agency processing the derivative information should consult with the FBI regarding the possible joint invocation of the exclusion in order to avoid a potentially damaging inconsistent response.<sup>35</sup>

### Procedural Considerations

Several procedural considerations regarding the implementation and operation of these special record exclusions should be noted. First, it should be self-evident that the decision to employ an exclusion in response to a particular request must not be reflected on anything made available to the requester. Where an agency reaches the judgment that it is necessary to employ an exclusion, it should do so as a specific official determination that is reviewed carefully by appropriate supervisory agency officials.<sup>36</sup> The particular records covered by an exclusion action should be concretely and carefully identified and segregated from any responsive records that are to be processed according to ordinary procedures.<sup>37</sup>

It must be remembered that providing a "no records" response as part of an exclusion strategy does not insulate the agency from either administrative or

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<sup>31</sup> See Attorney General's Memorandum at 25.

<sup>32</sup> See id.

<sup>33</sup> 5 U.S.C. § 552(c)(3).

<sup>34</sup> See Attorney General's Memorandum at 25 n.45.

<sup>35</sup> See id.

<sup>36</sup> See id. at 27.

<sup>37</sup> See id.

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judicial review of the agency's action. The recipient of a "no records" response may challenge it because he believes that the agency has failed to conduct a sufficiently detailed search to uncover the requested records.<sup>38</sup> Alternately, any requester, mindful of the exclusion mechanism and seeking information of a nature which could possibly trigger an exclusion action, could seek review in an effort to pursue his suspicions and to have a court determine whether an exclusion, if in fact used, was appropriately employed.

Moreover, because the very objective of the exclusions is to preclude the requester from learning that there exist such responsive records, all administrative appeals and court cases involving a "no records" response must now receive extremely careful attention. If one procedure is employed in adjudicating appeals or litigating cases in which there are genuinely no responsive records, and any different course is followed where an exclusion is in fact being used, sophisticated requesters could quickly learn to distinguish between the two and defeat an exclusion's very purpose.<sup>39</sup>

Consequently, agencies should prepare in advance a uniform procedure to handle administrative appeals and court challenges which seek review of the possibility that an exclusion was employed in a given case. In responding to administrative appeals from "no record" responses,<sup>40</sup> agencies should accept any clear request for review of the possible use of an exclusion and specifically address it in evaluating and responding to the appeal.<sup>41</sup>

In the exceptional case in which an exclusion was in fact invoked, the appellate review authority should examine the correctness of that action and come to a judgment as to the exclusion's continued applicability as of that time.<sup>42</sup> In the event that an exclusion is found to have been improperly employed or to be no longer applicable, the appeal should be remanded for prompt processing of all formerly excluded records, with the requester advised accordingly.<sup>43</sup> Where it is determined either that an exclusion was properly employed or that, as in the overwhelming bulk of cases, no exclusion was used, the result of the administrative appeal should be, by all appearances, the same: The requester should be specifically advised that this aspect of his appeal was

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<sup>38</sup> See id. at 29; see generally Oglesby v. United States Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990).

<sup>39</sup> See Attorney General's Memorandum at 29.

<sup>40</sup> See FOIA Update, Spring 1991, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (agencies now obligated to advise any requester who receives "no record" response of its procedures for filing administrative appeal) (superseding FOIA Update, Summer 1984, at 2).

<sup>41</sup> See Attorney General's Memorandum at 29 (superseded in part by FOIA Update, Spring 1991, at 5).

<sup>42</sup> See Attorney General's Memorandum at 28.

<sup>43</sup> See id.

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reviewed and found to be without merit.<sup>44</sup>

Such administrative appeal responses, of course, necessarily must be stated in such a way that does not indicate whether an exclusion was in fact invoked.<sup>45</sup> Moreover, in order to preserve the effectiveness of the exclusion mechanism, requesters who inquire in any way whether an exclusion has been used should routinely be advised that it is the agency's standard policy to refuse to confirm or deny that an exclusion was employed in any particular case.<sup>46</sup>

Exclusion issues in court actions must be handled with similarly careful and thoughtful preparation. First, it need be recognized that any judicial review of a suspected exclusion determination must of course be conducted *ex parte*, based upon an *in camera* court filing submitted directly to the judge.<sup>47</sup> Second, it is essential to the integrity of the exclusion mechanism that requesters not be able to determine whether an exclusion was employed at all in a given case based upon how any case is handled in court. Thus, it is critical that the *in camera* defenses of exclusion issues raised in FOIA cases occur not merely in those cases in which an exclusion actually was employed and is in fact being defended.<sup>48</sup>

Accordingly, the Attorney General has stated that it is the government's standard litigation policy in the defense of FOIA lawsuits that, whenever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government will routinely submit an *in camera* declaration addressing that claim, one way or the other.<sup>49</sup> Where an exclusion was in fact employed, the correctness of that action will be justified to the court. Where an exclusion was not in fact employed, the *in camera* declaration will state simply that it is being submitted to the court so as to mask whether or not an exclusion is being employed, thus preserving the integrity of the exclusion process overall.<sup>50</sup> In either case, the government will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion case. Such a public decision, like an administrative appeal determination of an exclusion-related request for review, should specify only that a full review of the claim was had and that, if an exclusion was in fact employed, it was, and remains, amply justified.<sup>51</sup>

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<sup>44</sup> See *id.* at 28-29.

<sup>45</sup> See *id.* at 29.

<sup>46</sup> See *id.* at 29 & n.52.

<sup>47</sup> See *id.* at 29.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 30.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*; see *Beauman v. FBI*, No. Cv-92-7603, slip op. at 2 (C.D. Cal. (continued...))



## DISCRETIONARY DISCLOSURE AND WAIVER

### DISCRETIONARY DISCLOSURE AND WAIVER

The Freedom of Information Act is an information disclosure statute which, through its exemption structure, strikes an overall balance between information disclosure and nondisclosure,<sup>1</sup> with an emphasis on the "fullest responsible disclosure."<sup>2</sup> Inasmuch as the FOIA's exemptions are discretionary, not mandatory,<sup>3</sup> agencies are free to make "discretionary disclosures" of exempt information, as a matter of good public policy and government accountability, wherever they are not otherwise prohibited from doing so.<sup>4</sup> Where they do so, agencies should not be held to have "waived" their ability to invoke applicable FOIA exemptions for similar or related information in the future. In other situations, however, various types of agency conduct and circumstances can reasonably be held to result in exemption waiver.

#### Discretionary Disclosure

Because the Freedom of Information Act does not itself prohibit the disclosure of any information,<sup>5</sup> an agency's ability to make a discretionary disclosure of information covered by a FOIA exemption necessarily hinges on whether any separate legal barrier to disclosure applies to the information in question. Some of the FOIA's exemptions--such as Exemption 2<sup>6</sup> and Exemp-

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<sup>51</sup>(...continued)

Apr. 12, 1993) ("In response to the plaintiff's claim of the (c)(1) exclusion being utilized in this action, . . . [w]ithout confirming or denying that any such exclusion was actually invoked by the defendant, the Court finds and concludes [after review of an in camera declaration] that if an exclusion was in fact employed, it was, and remains, amply justified." (adopting agency's proposed conclusion of law)).

<sup>1</sup> See John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989).

<sup>2</sup> S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 30 (Dec. 1987); FOIA Update, Summer 1988, at 14.

<sup>3</sup> See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979).

<sup>4</sup> See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1334 n.1 (D.C. Cir. 1987) (An agency's FOIA disclosure decision can "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions."), cert. denied, 485 U.S. 977 (1988); see also FOIA Update, Summer 1985, at 3 ("It is well known that agencies generally have discretion under the Freedom of Information Act to decide whether to invoke applicable FOIA exemptions.").

<sup>5</sup> See 5 U.S.C. § 552(d) (1988).

<sup>6</sup> 5 U.S.C. § 552(b)(2).

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tion 5,<sup>7</sup> for example--protect a type of information that is not subject to any such disclosure prohibition. Other FOIA exemptions--most notably Exemption 3<sup>8</sup>--directly correspond to, and serve to accommodate, distinct prohibitions on information disclosure that operate entirely independently of the FOIA. An agency is constrained from making a discretionary FOIA disclosure of the types of information covered by the following FOIA exemptions:

Exemption 1 of the FOIA protects from disclosure national security information concerning the national defense or foreign policy, provided that it has been properly classified in accordance with both the substantive and procedural requirements of an executive order.<sup>9</sup> As a general rule, an agency official holding classification authority determines whether any particular information requires classification and then that determination is implemented under the FOIA through the invocation of Exemption 1.<sup>10</sup> Thus, if information is in fact properly classified, and therefore is exempt from disclosure under Exemption 1, it is not appropriate for discretionary FOIA disclosure. (See discussion of Exemption 1, above.)

Exemption 3 of the FOIA explicitly accommodates the nondisclosure provisions that are contained in a variety of other federal statutes. Some of these statutory nondisclosure provisions, such as those pertaining to grand jury information<sup>11</sup> and census data,<sup>12</sup> categorically prevent disclosure harm and establish absolute prohibitions on agency disclosure; others leave agencies with some discretion as to whether to disclose certain information, but such administrative discretion generally is exercised independently of the FOIA.<sup>13</sup> (See discussion of Exemption 3, above.) Therefore, agencies ordinarily do not make discretionary disclosure under the FOIA of information that falls within the scope of Exemption 3.<sup>14</sup>

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<sup>7</sup> 5 U.S.C. § 552(b)(5).

<sup>8</sup> 5 U.S.C. § 552(b)(3).

<sup>9</sup> See 5 U.S.C. § 552(b)(1) (implementing current Executive Order 12,356, 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 note (1988)).

<sup>10</sup> See generally FOIA Update, Winter 1985, at 1-2.

<sup>11</sup> See Fed. R. Crim. P. 6(e) (enacted as statute in 1977)

<sup>12</sup> See 13 U.S.C. §§ 8(b), 9(a) (1988).

<sup>13</sup> See, e.g., Aronson v. IRS, 973 F.2d 962, 966 (1st Cir. 1992).

<sup>14</sup> See, e.g., Association of Retired R.R. Workers v. Railroad Retirement Bd., 830 F.2d 331, 335 (D.C. Cir. 1987) (FOIA jurisdiction does not extend to exercise of agency disclosure discretion within Exemption 3 statute). But see Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992) (exceptional FOIA case in which court ordered Veterans Administration to disclose existence of certain medical records pursuant to discretionary terms of 38 U.S.C. § 7332(b)).

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Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."<sup>15</sup> For the most part, Exemption 4 protects information implicating private commercial interests that would not ordinarily be the subject of discretionary FOIA disclosure. (See discussions of Exemption 4, above, and "Reverse" FOIA, below.) Even more significantly, a specific criminal statute, the Trade Secrets Act,<sup>16</sup> prohibits the unauthorized disclosure of most (if not all) of the information falling within Exemption 4; its practical effect is to constrain an agency's ability to make a discretionary disclosure of Exemption 4 information,<sup>17</sup> absent an agency regulation (based upon a federal statute) that expressly authorizes disclosure.<sup>18</sup>

Exemptions 6 and 7(C) of the FOIA protect personal privacy interests, in non-law enforcement records<sup>19</sup> and law enforcement records,<sup>20</sup> respectively. As with private commercial information covered by Exemption 4, the personal information protected by Exemptions 6 and 7(C) is not the type of information ordinarily considered appropriate for discretionary FOIA disclosure; with these exemptions, a balancing of public interest considerations is built into the determination of whether the information is exempt in the first place. (See discussions of Exemption 6 and Exemption 7(C), above.) Moreover, the personal information covered by Exemptions 6 and 7(C) in many cases falls within the protective coverage of the Privacy Act of 1974,<sup>21</sup> which mandates that any such information concerning U.S. citizens and permanent-resident aliens that is maintained in a "system of records"<sup>22</sup> not be disclosed unless that disclosure is permitted under one of the specific exceptions to the Privacy Act's general disclosure prohibition.<sup>23</sup> Inasmuch as the FOIA-disclosure exception in the Privacy Act permits only those disclosures that are "required" under the FOIA,<sup>24</sup> the making of discretionary FOIA disclosures of personal information is fundamentally incompatible with the Privacy Act and, in many instances, is pro-

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<sup>15</sup> 5 U.S.C. § 552(b)(4).

<sup>16</sup> 18 U.S.C. § 1905 (1988).

<sup>17</sup> See CNA Fin. Corp. v. Donovan, 830 F.2d at 1144; see also FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

<sup>18</sup> See Chrysler v. Brown, 441 U.S. at 295-96; see, e.g., St. Mary's Hosp. Inc. v. Harris, 604 F.2d 407, 409-10 (5th Cir. 1979). (See discussion of this point under "Reverse" FOIA, below.)

<sup>19</sup> 5 U.S.C. § 552(b)(6).

<sup>20</sup> 5 U.S.C. § 552(b)(7)(C).

<sup>21</sup> 5 U.S.C. § 552a (1988 & Supp. IV 1992).

<sup>22</sup> 5 U.S.C. § 552a(a)(5).

<sup>23</sup> 5 U.S.C. § 552a(b).

<sup>24</sup> 5 U.S.C. § 552a(b)(2).

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hibited by it.<sup>25</sup>

With the exception of information that is subject to the disclosure prohibitions accommodated by the above FOIA exemptions, agencies may make discretionary disclosures of any exempt information under the FOIA and agency FOIA officers should be encouraged to do so. Such disclosures are most appropriate where the interest protected by the exemption in question is primarily an institutional interest of the agency (rather than a private interest of an individual or commercial entity), one that the agency might choose to forego in a particular case--or in particular types of cases--as a matter of sound administrative discretion and overall public interest.<sup>26</sup>

One example is the type of administrative information that can fall within the "low 2" aspect of Exemption 2, which uniquely shields agencies from sheer administrative burden rather than from any reasonably foreseeable disclosure harm. (See discussion of Exemption 2, above.) In many instances, especially where the information in question is a portion of a document page not otherwise exempt in its entirety, such information would more efficiently be released than withheld.<sup>27</sup> As a practical matter, information should not be withheld unless it need be.

More common examples of the types of information appropriate for discretionary FOIA disclosure can be found under Exemption 5, which incorporates discovery privileges that nearly always protect only the institutional interests of the agency possessing the information. (See discussion of Exemption 5, above.) Information that might otherwise be withheld under the deliberative process privilege for the purpose of protecting the deliberative process in general can be disclosed where to do so would cause no foreseeable harm to any particular process of agency deliberation.<sup>28</sup> Similarly, many litigation-related

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<sup>25</sup> See DOD v. FLRA, 964 F.2d 26, 30-31 n.6 (D.C. Cir. 1992) (discussing Privacy Act's limitations on discretionary FOIA disclosure); see also FOIA Update, Summer 1984, at 2 (discussing interplay between FOIA and Privacy Act).

<sup>26</sup> See, e.g., Gregory v. FDIC, 631 F.2d 896, 899 & n.4 (D.C. Cir. 1980) (discretionary disclosure of information falling within Exemption 8); Superior Oil Co. v. Federal Energy Regulatory Comm'n, 563 F.2d 191, 203-05 (5th Cir. 1977) (discretionary disclosure of information falling within Exemption 9); Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 707 n.11, 712 n.34 (D.C. Cir. 1977) (discretionary disclosure of "deliberative process" information falling within Exemption 5).

<sup>27</sup> See FOIA Update, Winter 1984, at 11-12 ("FOIA Counselor: The Unique Protection of Exemption 2") (advising agencies to invoke exemption only where doing so truly avoids burden).

<sup>28</sup> See, e.g., Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d at 707 n.11, 712 n.34; accord Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1072 (D.C. Cir. 1993) (suggesting harm standard (continued...))

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records that otherwise might routinely be withheld under the attorney work-product privilege long after the conclusion of litigation can be considered for disclosure on the same basis.<sup>29</sup> Any such information, though technically or arguably falling within a FOIA exemption, need not be withheld if its disclosure would not foreseeably harm any governmental or other interest intended to be protected by that exemption.<sup>30</sup>

In this regard, it should be remembered that the FOIA requires agencies to disclose all "reasonably segregable" nonexempt portions of requested records.<sup>31</sup> The satisfaction of this important statutory requirement can involve an onerous delineation process, one that readily lends itself to the making of discretionary disclosures, particularly at the margins of FOIA exemption applicability.<sup>32</sup>

Furthermore, as a general rule, making a discretionary disclosure under the FOIA can significantly lessen an agency's burden at all levels of the administrative process, and it also eliminates the possibility that the information in question will become the subject of protracted litigation--thus serving an additional public interest in the conservation of increasingly scarce agency resources.

Where an agency considers making a discretionary disclosure of exempt information under the FOIA, it should be able to do so free of any concern that in exercising its administrative discretion with respect to particular information it is impairing its ability to invoke applicable FOIA exemptions for any arguably similar information. In the leading judicial precedent on this point, Mobil

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<sup>28</sup>(...continued)

for factual information under deliberative process privilege); Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1436 n.8 (D.C. Cir. 1992) (same for relatively "mundane," nonpolicy-oriented information).

<sup>29</sup> See, e.g., FOIA Update, Summer 1985, at 5 (encouraging consideration of discretionary disclosure of attorney work-product information where possible to do so without causing harm to litigation process).

<sup>30</sup> Accord, e.g., Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d at 712 n.34 (observing that agencies should be willing to "disclos[e] information which while arguably exempt need not be withheld").

<sup>31</sup> 5 U.S.C. § 552(b) (final sentence); see also, e.g., PHE, Inc. v. Department of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993) (both agency and court must determine whether any withheld information can be segregated from exempt information and released).

<sup>32</sup> See, e.g., Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (emphasizing significance of segregation requirement in connection with deliberative process privilege under Exemption 5); Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 983 (1st Cir. 1985) ("detailed process of segregation" held not unreasonable for request involving 36 document pages).

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Oil Corp. v. EPA,<sup>33</sup> a FOIA requester argued that by making a discretionary release of certain records that could have been withheld under Exemption 5, the agency had waived its right to invoke that exemption for a group of "related" records.<sup>34</sup> In rejecting such a waiver argument, the Court of Appeals for the Ninth Circuit surveyed the law of waiver under the FOIA and found "no case . . . in which the release of certain documents waived the exemption as to other documents. On the contrary, [courts] generally have found that the release of certain documents waives FOIA exemptions only for those documents released."<sup>35</sup>

Such a general rule of nonwaiver through discretionary disclosure is supported by sound policy considerations, as the Ninth Circuit in Mobil Oil discussed at some length:

Implying such a waiver could tend to inhibit agencies from making any disclosures other than those explicitly required by law because voluntary release of documents exempt from disclosure requirements would expose other documents [of a related nature] to risk of disclosure. An agency would have an incentive to refuse to release all exempt documents if it wished to retain an exemption for any documents. . . . [R]eadily finding waiver of confidentiality for exempt documents would tend to thwart the [FOIA's] underlying statutory purpose, which is to implement a policy of broad disclosure of government records.<sup>36</sup>

This rule was presaged by the Court of Appeals for the D.C. Circuit many

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<sup>33</sup> 879 F.2d 698 (9th Cir. 1989).

<sup>34</sup> Id. at 700.

<sup>35</sup> Id. at 701; see Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) ("[D]isclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case."); Stein v. Department of Justice, 662 F.2d 1245, 1259 (7th Cir. 1981) (exercise of discretion should waive no right to withhold records of "similar nature"); Schiller v. NLRB, No. 87-1176, slip op. at 7 (D.D.C. July 10, 1990) ("Discretionary release of a document pertains to that document alone, regardless of whether similar documents exist."), rev'd on other grounds, 964 F.2d 1205 (D.C. Cir. 1992); see also, e.g., United States Student Ass'n v. CIA, 620 F. Supp. 565, 571 (D.D.C. 1985) (no waiver through prior disclosure except as to "duplicate" information); Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba, 624 F. Supp. 572, 578 (D.D.C. 1984) (same); cf. Silber v. United States Dep't of Justice, No. 91-876, transcript at 18 (D.D.C. Aug. 13, 1992) (bench order) (no waiver would be found even if it were to be established that other comparable documents had been disclosed).

<sup>36</sup> 879 F.2d at 701; see also Army Times Publishing Co. v. Department of the Air Force, 998 F.2d at 1068 (articulating general principle of no waiver of exemption simply because agency released "information similar to that requested" in past).

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years ago, when it observed:

Surely this is an important consideration. The FOIA should not be construed so as to put the federal bureaucracy in a defensive or hostile position with respect to the Act's spirit of open government and liberal disclosure of information.<sup>37</sup>

As another court more recently phrased it: "A contrary rule would create an incentive against voluntary disclosure of information."<sup>38</sup> Agencies should be mindful, though, that this nonwaiver rule applies to true discretionary disclosures made under the FOIA--which should be made available to anyone--as distinguished from any "selective" disclosure made more narrowly outside the context of the FOIA.<sup>39</sup> Such non-FOIA disclosures can lead to more difficult waiver questions.

### Waiver

Sometimes, when a FOIA exemption is being invoked, a further inquiry must be undertaken: a determination of whether, through some prior disclosure or an express authorization, the applicability of the exemption has been waived. Resolution of this inquiry requires a careful analysis of the specific nature of and circumstances surrounding the prior disclosure involved.<sup>40</sup> First and foremost, if the prior disclosure does not "match" the exempt information in question, the difference between the two might itself be a significant basis for reach-

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<sup>37</sup> Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d at 712 n.34.

<sup>38</sup> Mehl v. EPA, 797 F. Supp. 43, 47 (D.D.C. 1992); see also Public Law Educ. Inst. v. United States Dep't of Justice, 744 F.2d 181, 183-84 (D.C. Cir. 1984) (no FOIA attorneys fees liability where agency disclosed requested record as matter of administrative discretion); Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981) (agency should not be penalized for declassifying and releasing documents during litigation; otherwise, there would be "a disincentive for an agency to reappraise its position and, when appropriate, release documents previously withheld").

<sup>39</sup> See, e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) (finding waiver where agency made "selective" disclosure to one interested party only); Committee to Bridge the Gap v. Department of Energy, No. 90-3568, transcript at 5 (C.D. Cal. Oct. 11, 1991) (bench order) (waiver found where agency gave preferential treatment to interested party; such action is "offensive" to FOIA and "fosters precisely the distrust of government the FOIA was intended to obviate").

<sup>40</sup> See FOIA Update, Spring 1983, at 6; see also Mobil Oil Corp. v. EPA, 879 F.2d 698, 700 (9th Cir. 1989) ("The inquiry into whether a specific disclosure constitutes a waiver is fact specific."); Carson v. United States Dep't of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980) ("[T]he extent to which prior agency disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed.").

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ing the conclusion that no waiver has occurred.<sup>41</sup>

Although courts are generally sympathetic to the necessities of effective agency functioning when confronted with an issue of waiver,<sup>42</sup> courts do look harshly upon prior disclosures that result in unfairness.<sup>43</sup> In one case, Hop-

<sup>41</sup> See, e.g., Afshar v. Department of State, 702 F.2d 1125, 1132 (D.C. Cir. 1983) (finding that "withheld information is in some material respect different" from that to which requester claimed had been released previously); Public Citizen v. Department of State, 787 F. Supp. 12, 13 (D.D.C. 1992) (appeal pending); see also, e.g., Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (no waiver where withheld information "pertain[s] to a time period later than the date of the publicly documented information"); Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 9 (D.D.C. June 28, 1993) (no waiver where requester failed to show that information available to public duplicates that being withheld); Hunt v. FBI, No. C-92-1390, slip op. at 15-16 (N.D. Cal. Sept. 16, 1992) (agency not required to disclose documents where "similar" ones were previously released; none of released documents were "as specific as" or "match" requested documents); Silber v. United States Dep't of Justice, transcript at 18 (release of other manuals in other subject-matter areas does not compel release of fraud monograph). But see also Committee to Bridge the Gap v. Department of Energy, transcript at 2-5 (distinguishing Mobil Oil and finding deliberative process privilege waived for draft order by prior voluntary disclosure of earlier draft order to interested party; agency ordered to release earlier draft order and all subsequent revisions).

<sup>42</sup> See, e.g., Massey v. FBI, No. 92-6086, slip op. 5667, 5676 (2d Cir. Aug. 27, 1993) (individuals held not to waive "strong privacy interests in government documents containing information about them even where the information may have been public at one time"); Irons v. FBI, 880 F.2d 1446, 1452 (1st Cir. 1989) (en banc) (public testimony by confidential source does not waive FBI's right to withhold information pursuant to Exemption 7(D)); Cooper v. Department of the Navy, 558 F.2d 274, 278 (5th Cir. 1977) (prior disclosure of aircraft accident investigation report to aircraft manufacturer held not to constitute waiver); Van Atta v. Defense Intelligence Agency, No. 87-1508, slip op. at 5-6 (D.D.C. July 6, 1988) (disclosure to foreign government does not constitute waiver); Medera Community Hosp. v. United States, No. 86-542, slip op. at 6-9 (E.D. Cal. June 28, 1988) (no waiver where memoranda interpreting agency's regulations sent to state auditor involved in enforcement proceeding); Erb v. United States Dep't of Justice, 572 F. Supp. 954, 956 (W.D. Mich. 1983) (nondisclosure under Exemption 7(A) upheld after "limited disclosure" of FBI criminal investigative report to defense attorney and state prosecutor).

<sup>43</sup> See, e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) ("selective disclosure" of record to one party in litigation deemed "offensive" to FOIA and held to prevent agency's subsequent invocation of Exemption 5 against other party to litigation); Committee to Bridge the Gap v. Department of Energy, transcript at 3-5 (deliberative process privilege waived for draft order by prior voluntary disclosure of earlier draft order to interested party).

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kins v. Department of the Navy,<sup>44</sup> a commercial life insurance company sought access to records reflecting the name, rank, and duty location of servicemen stationed at Quantico Marine Corps Base. The district court, although not technically applying the doctrine of waiver, rejected the agency's privacy arguments on the grounds that officers' reassignment stations were routinely published in the Navy Times and that the Department of Defense had disclosed the names and addresses of 1.4 million service members to a political campaign committee.<sup>45</sup>

An agency's failure to heed even its own regulations regarding circulation of internal agency documents was found determinative and led to a finding of waiver in Shermco Industries v. Secretary of the Air Force.<sup>46</sup> Similarly, an agency's personnel regulation requiring disclosure of (or a promise by an agency official to disclose) the information,<sup>47</sup> an agency's carelessness in permitting access to certain information,<sup>48</sup> and an entirely mistaken disclosure of the contents of a document<sup>49</sup> have all resulted in waiver.<sup>50</sup>

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<sup>43</sup>(...continued)

party; selective disclosure is "offensive" to FOIA); Northwest Envtl. Defense Ctr. v. United States Forest Serv., No. 91-125, slip op. at 12 (D. Or. Aug. 23, 1991) (magistrate's recommendation) (deliberative process privilege waived as to portion of agency report discussed with "interested" third party), adopted (D. Or. Feb. 12, 1992).

<sup>44</sup> No. 84-1868, slip op. at 5-6 (D.D.C. Feb. 5, 1985).

<sup>45</sup> See id. at 6; see also In re Subpoena Duces Tecum, 738 F.2d 1367, 1371-74 (D.C. Cir. 1984) (voluntary disclosure by private party of information to one agency waived attorney work-product and attorney-client privileges when same information sought by second agency) (non-FOIA case).

<sup>46</sup> 613 F.2d 1314, 1320 (5th Cir. 1980).

<sup>47</sup> See Johnson v. HHS, No. 88-243-5, slip op. at 10-11 (E.D.N.C. Feb. 7, 1989).

<sup>48</sup> See, e.g., Cooper v. Department of the Navy, 594 F.2d 484, 488 (5th Cir. 1978), cert. denied, 444 U.S. 926 (1979); cf. Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (no waiver where information disclosed under "strict confidentiality") (appeal pending).

<sup>49</sup> See, e.g., Dresser Indus. Valve Operations, Inc. v. EEOC, 2 Gov't Disclosure Serv. (P-H) ¶ 82,197, at 82,575 (W.D. La. Jan. 19, 1982). But see also Nation Magazine v. Department of State, 805 F. Supp. 68, 73 (D.D.C. 1992) ("[N]o rule of administrative law requires an agency to extend erroneous treatment of one party to other parties, 'thereby turning an isolated error into a uniform misapplication of the law.'" (quoting Sacred Heart Medical Ctr. v. Sullivan, 958 F.2d 537, 548 n.24 (3d Cir. 1992) (dicta))); Astley v. Lawson, No. 89-2806, slip op. at 20 (D.D.C. Jan. 11, 1991) (inadvertent placement of documents into public record held not to waive exemption where it was remedied immediately upon agency's awareness of mistake); cf. Myers v. Williams,  
(continued...)

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On the other hand, the Court of Appeals for the First Circuit has firmly held that the mere fact that a confidential source testifies at a trial does not waive Exemption 7(D) protection for any source-provided information not actually revealed in public.<sup>51</sup> Nor does public congressional testimony waive Exemption 1 protection where the context of the information publicized is different and only some of the information is revealed.<sup>52</sup>

In one case it was held that the oral disclosure of only the conclusion reached in a predecisional document "does not, without more, waive the [delib-

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<sup>49</sup>(...continued)

No. 92-1609 (D. Or. Apr. 21, 1993) (preliminary injunction granted prohibiting FOIA requester from disclosing original and all copies of erroneously disclosed document containing trade secrets) (non-FOIA case).

<sup>50</sup> See also Gannett River States Publishing Corp. v. Bureau of the Nat'l Guard, No. J91-0455-L, slip op. at 14 (S.D. Miss. Mar. 2, 1992) (privacy interests in withholding identities of soldiers disciplined for causing accident is de minimis because agency previously released much identifying information); Powell v. United States, 584 F. Supp. 1508, 1520-21 (N.D. Cal. 1984) (suggesting that attorney work-product privilege may be waived where agency made earlier release of such information which "reflect[ed] positively" on agency, and later may have withheld work-product information on same matter which did not reflect so "positively" on agency).

<sup>51</sup> See Irons v. FBI, 880 F.2d at 1454; see also LaRouche v. United States Dep't of Justice, No. 90-2753, slip op. at 14 (D.D.C. June 24, 1993) (agency must review requested file and disclose those portions which were revealed at trial); Church of Scientology Int'l v. FBI, No. 91-10850-Y, slip op. at 4-5 (D. Mass. Nov. 23, 1992) (privacy protection waived for information about individuals who publicly testified at trial and who have been identified). But see Jones v. FBI, No. C77-1001, slip op. at 13-14 (N.D. Ohio Aug. 12, 1992) (identities of confidential informants and third parties are not waived even if they have testified in court and are publicly known) (appeal pending); but see also Williams v. FBI, 822 F. Supp. 808, 814 n.3 (D.D.C. 1993) (public testimony by confidential sources does not waive exemption); cf. Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 25-26 (D. Mass. Nov. 12, 1992) (neither testimony at trial nor actual trial itself waives protection for documents prepared in anticipation of litigation); Wechsler v. United States Consumer Prod. Safety Comm'n, No. 92-402, slip op. at 4 (S.D. Fla. Oct. 19, 1992) (magistrate's recommendation) (fact that confidential source and/or confidential information may subsequently be disclosed does not affect exemption), adopted sub nom. United States v. United States Consumer Prod. Safety Comm'n (S.D. Fla. Dec. 1, 1992).

<sup>52</sup> See Fitzgibbon v. CIA, 911 F.2d at 765 (prior disclosure does not waive "information pertaining to a time period later than the date of the publicly documented information"); see also Afshar v. Department of State, 702 F.2d at 1131-32 (finding no waiver where withheld information is in some respect materially different); Public Citizen v. Department of State, 787 F. Supp. at 15.

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erative process] privilege."<sup>53</sup> In another, an agency disclosure to a small group of nongovernmental personnel, with no copies permitted, was held not to inhibit agency decisionmaking so that the deliberative process privilege was not waived.<sup>54</sup>

As is suggested above, if the agency is able to establish that it acted responsibly and in furtherance of a legitimate governmental purpose, its later claim of exemption will likely prevail.<sup>55</sup> Of course, circulation of a document within the agency does not waive an exemption,<sup>56</sup> nor does disclosure among agencies,<sup>57</sup> or to advisory committees (even those including members of the

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<sup>53</sup> Morrison v. United States Dep't of Justice, No. 87-3394, slip op. at 3 (D.D.C. Apr. 29, 1988). But see Myles-Pirzada v. Department of the Army, No. 91-1080, slip op. at 6 (D.D.C. Nov. 20, 1992) (privilege waived when agency official read report to requester over telephone); Washington Post Co. v. United States Dep't of the Air Force, 617 F. Supp. 602, 605 (D.D.C. 1985) (disclosure of document's conclusions waived privilege for body of document).

<sup>54</sup> See Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba, 624 F. Supp. 572, 577-78 (D.D.C. 1984); see also Brinderson Constructors, Inc. v. Army Corps of Eng'rs, No. 85-0905, slip op. at 12 (D.D.C. June 11, 1986) (requester's participation in agency enterprise did not entitle requester to all related documents). But see Myles-Pirzada v. Department of the Army, slip op. at 6 (privilege waived when agency official read report to requester over telephone); Shell Oil Co. v. IRS, 772 F. Supp. 202, 211 (D. Del. 1991) (finding waiver when agency employee read aloud entire draft document at public meeting: "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.").

<sup>55</sup> See FOIA Update, Spring 1983, at 6; see, e.g., Badhwar v. United States Dep't of the Air Force, 629 F. Supp. 478, 481 (D.D.C. 1986) (disclosure to outside person held necessary to assemble report in first place), aff'd in part & remanded in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); FOIA Update, Winter 1984, at 4.

<sup>56</sup> See, e.g., Chemcentral/Grand Rapids Corp. v. EPA, No. 91-C-4380, slip op. at 12-14 (N.D. Ill. Oct. 5, 1992) (no waiver of attorney-client privilege where documents in question were circulated to only those employees who needed to review legal advice contained in it); Lasker-Goldman Corp. v. GSA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,125, at 81,322 (D.D.C. Feb. 27, 1981) (no waiver where document was circulated to management officials within agency).

<sup>57</sup> See, e.g., Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982) (agency does not automatically waive exemption by releasing documents to other agencies); Silber v. United States Dep't of Justice, transcript at 10-18 (distribution of manual to other agencies does not constitute waiver). But cf. Lacefield v. United States, No. 92-N-1680, slip op. at 11 (D. Colo. Mar. 10, 1993) (attorney-client privilege waived with respect to letter from City of Denver attorney to Colorado Department of Safety because letter was circulated to IRS).

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public).<sup>58</sup> Similarly, deference to the common agency practice of disclosing specifically requested information to a congressional committee,<sup>59</sup> or to the General Accounting Office (an arm of Congress),<sup>60</sup> or to state attorneys general,<sup>61</sup> does not waive FOIA exemption protection for that information.

Indeed, when an agency has been compelled to disclose a document under limited and controlled conditions, such as under a protective order in an administrative proceeding, its authority to withhold the document thereafter is not diminished.<sup>62</sup> This applies as well to other disclosures in the criminal discovery context.<sup>63</sup>

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<sup>58</sup> See, e.g., Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107-08 (D.C. Cir. 1976).

<sup>59</sup> See, e.g., Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941, 946 (11th Cir. 1992) (holding no waiver of exemption due to court-ordered disclosure, involuntary disclosure to Congress, or disclosure of related information); Aspin v. DOD, 491 F.2d 24, 26 (D.C. Cir. 1973); see also Eagle-Picher Indus. v. United States, 11 Ct. Cl. 452, 460-61 (1987) (work-product privilege not waived in nonspecific congressional testimony "if potentially thousands of documents need be reviewed to determine if the gist or a significant part of documents were revealed") (non-FOIA case); FOIA Update, Winter 1984, at 3-4 ("OIP Guidance: Congressional Access Under FOIA") (analyzing and cabining Murphy v. Department of the Army, 613 F.2d 1151 (D.C. Cir. 1979)).

<sup>60</sup> See, e.g., Shermco Indus. v. Secretary of the Air Force, 613 F.2d at 1320-21.

<sup>61</sup> Interco, Inc. v. FTC, 490 F. Supp. 39, 44 (D.D.C. 1979).

<sup>62</sup> See, e.g., Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 79 n.13 (2d Cir. 1979); see also Silverberg v. HHS, No. 89-2743, slip op. at 7 (D.D.C. June 14, 1991) (fact that individual who is subject of drug test by particular laboratory has right of access to its performance and testing information does not render such information publicly available), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993).

<sup>63</sup> See, e.g., Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992) (fact that local police department released records pursuant to New York Freedom of Information Law and one of its officers testified at length in court held not to waive police department's status as confidential source under Exemption 7(D)); Parker v. Department of Justice, 934 F.2d 375, 379 (D.C. Cir. 1991) (nondisclosure under Exemption 7(D) upheld even though confidential informant may have testified at requester's trial); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 12 (D.D.C. 1991) (even if some of withheld information has appeared in print, nondisclosure is proper because disclosure from official source would confirm unofficial information and thereby cause harm to third parties); Beck v. United States Dep't of Justice, No. 88-3433, slip op. at 2-3 (D.D.C. June 24, 1991) (nondisclosure under Exemptions 7(A), 7(C), 7(D) and 7(F) upheld even though agency disclosed information in criminal proceeding), sum-  
(continued...)

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The one circumstance in which an agency's failure to treat information in a responsible, appropriate fashion should not result in waiver is where the failure is not fairly attributable to the agency--i.e., where an agency employee has made an unauthorized disclosure, a "leak" of information. Recognizing that a finding of waiver in such circumstances would only lead to "exacerbation of the harm created by the leaks,"<sup>64</sup> the courts have consistently refused to penalize agencies by holding that because of such conduct a waiver has occurred.<sup>65</sup>

<sup>63</sup>(...continued)

mary affirmance granted in pertinent part, No. 91-5292 (D.C. Cir. Nov. 19, 1992); Glick v. Department of Justice, No. 89-3279, slip op. at 8 (D.D.C. June 20, 1991) (fact that agency discloses information in one context does not waive confidentiality of information or of those who provide it); Crooker v. Bureau of Alcohol, Tobacco & Firearms, No. 85-615, slip op. at 4-5 (D.D.C. Aug. 2, 1985) (nondisclosure under Exemption 7(A) upheld even though requester reviewed document in prior parole hearing), rev'd on other grounds, 789 F.2d 64 (D.C. Cir. 1986); Erb v. United States Dep't of Justice, 572 F. Supp. at 956 (nondisclosure to third party upheld under Exemption 7(A) even though document provided to defendant through criminal discovery); Krohn v. Department of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,120, at 83,724 (D.D.C. Sept. 7, 1979) (nondisclosure under Exemption 7(D) upheld even though requester previously reviewed documents as defendant in criminal discovery); see also Murphy v. FBI, 490 F. Supp. 1138, 1141 & n.6 (D.D.C. 1980) (citing Krohn with approval), summary judgment vacated as moot, No. 80-1612 (D.C. Cir. Jan. 8, 1981).

<sup>64</sup> Murphy v. FBI, 490 F. Supp. at 1142.

<sup>65</sup> See, e.g., Simmons v. United States Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (unauthorized disclosure does not constitute waiver); Medina-Hincapie v. Department of State, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983) (official's ultra vires release does not constitute waiver); LaRouche v. United States Dep't of Justice, slip op. at 14 (fact that some aspects of grand jury proceeding were leaked to press has "no bearing" on FOIA litigation); Resolution Trust Corp. v. Dean, 813 F. Supp. 1426, 1429-30 (D. Ariz. 1993) (no waiver of attorney-client privilege where agency took precautions to secure confidentiality of document but inexplicable leak nonetheless occurred) (non-FOIA case); Silber v. United States Dep't of Justice, transcript at 18 (unauthorized publication of parts of document does not constitute waiver); Washington Post Co. v. DOD, No. 84-2949, slip op. at 16-18 (D.D.C. Feb. 25, 1987) (congressional leaks); Lone Star Indus. v. FTC, No. 82-3150, slip op. at 17 n.8 (D.D.C. June 8, 1983); Laborers' Int'l Union v. United States Dep't of Justice, 578 F. Supp. 52, 58 n.3 (D.D.C. 1983), aff'd, 772 F.2d 919 (D.C. Cir. 1984); Lasker-Goldman Corp. v. GSA, 2 Gov't Disclosure Serv. (P-H) at 81,322; Safeway Stores, Inc. v. FTC, 428 F. Supp. 346, 347 (D.D.C. 1977); see also In re Engram, No. 91-1722, slip op. at 3, 6-7 (4th Cir. June 2, 1992) (per curiam) (permitting discovery as to circumstances of suspected leak); cf. Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (agency not required to confirm or deny accuracy of information released by other government agencies regarding its interest in certain individuals); Rush v. Department of State, 748 F.

(continued...)

## DISCRETIONARY DISCLOSURE AND WAIVER

On the other hand, "official" disclosures--i.e., direct acknowledgments by authoritative government officials--may well waive an otherwise applicable FOIA exemption.<sup>66</sup> In this context, one decision held that information that was the subject of an "off-the-record" disclosure to the press cannot be protected under Exemption 1.<sup>67</sup> Similarly, an individual's express disclosure authorization with respect to his own interests implicated in requested records can also result in a waiver.<sup>68</sup>

Finally, it should be noted that an agency should not be required to demonstrate in a FOIA case that it has positively determined that not a single disclosure of any withheld information has occurred.<sup>69</sup> Indeed, the burden is on

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<sup>65</sup>(...continued)

Supp. 1548, 1556 (S.D. Fla. 1990) (finding that author of agency documents, who had since left government service, did not have authority to waive Exemption 5 protection).

<sup>66</sup> See Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985); see, e.g., Myles-Pirzada v. Department of the Army, slip op. at 6 (privilege waived when agency official read report to requester over telephone); Schlesinger v. CIA, 591 F. Supp. 60, 61 (D.D.C. 1984); see also Krikorian v. Department of State, 984 F.2d 461, 467-68 (D.C. Cir. 1993) (court on remand must determine whether redacted portions of document had been "officially acknowledged"); Afshar v. Department of State, 702 F.2d at 1133 (books by former agency officials do not constitute "an official and documented disclosure"); Hunt v. FBI, slip op. at 16-18 (alleged nongovernmental disclosure of contents of requested documents does not constitute "official" acknowledgement); Holland v. CIA, No. 91-1233, slip op. at 13-14 (D.D.C. Aug. 31, 1992) (applying Afshar and finding that requester has not demonstrated that specific information in public domain has been "officially acknowledged"); United States Student Ass'n v. CIA, 620 F. Supp. at 571.

<sup>67</sup> Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989), motion for reargument denied, No. 87-Civ-1115, slip op. at 1-3 (S.D.N.Y. May 23, 1990).

<sup>68</sup> See, e.g., Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 567 (1st Cir. 1992) (source statements not entitled to Exemption 7(D) protection where individuals expressly waived confidentiality); Key Bank of Me., Inc. v. SBA, No. 91-362, slip op. at 16 (D. Me. Dec. 31, 1992) (given that subject of documents has specifically waived any privacy interest she might have in requested information, agency has not demonstrated that release of information would harm any privacy interest) (Exemption 6). But see Church of Scientology Int'l v. IRS, 995 F.2d 916, 921 (9th Cir. 1993) (IRS agents' purported waivers of privacy interests held insufficient to compel disclosure).

<sup>69</sup> See Williams v. United States Dep't of Justice, 556 F. Supp. 63, 66 (D.D.C. 1982) (court refused, in FOIA action brought by former Senator convicted in Abscam investigation, to impose upon agency duty to search for possibility that privacy interests "may have been partially breached in the course of

(continued...)

## DISCRETIONARY DISCLOSURE AND WAIVER

the plaintiff to show that the information sought is public.<sup>70</sup> As the Court of Appeals for the District of Columbia Circuit pointedly observed: "It is far more efficient, and obviously fairer, to place the burden of production on the party who claims that the information is publicly available."<sup>71</sup>

<sup>69</sup>(...continued)

many-faceted proceedings occurring in different courts over a period of prior years," for to do so "would defeat the exemption in its entirety or at least lead to extended delay and uncertainty"); cf. McGehee v. Casey, 718 F.2d 1137, 1141 n.9 (D.C. Cir. 1983) (in non-FOIA case involving CIA's prepublication review, agency "cannot reasonably bear the burden of conducting an exhaustive search to prove that a given piece of information is not published anywhere" else).

<sup>70</sup> See, e.g., Davis v. United States Dep't of Justice, 968 F.2d 1276, 1279-82 (D.C. Cir. 1992) ("party who asserts . . . material publicly available carries the burden of production on that issue . . . because the task of proving the negative--that the information has not been revealed--might require the government to undertake an exhaustive, potentially limitless search"; where neither requester nor agency knows exactly which portions of wiretap tapes were played in open court, requester has burden of proving actual disclosure to establish waiver); Freeman v. United States Dep't of Justice, slip op. at 6-9 (finding that requester failed to demonstrate that agencies have shown "complete disregard for confidentiality" and had not shown that information available to public duplicated that being withheld); Public Citizen v. Department of State, 782 F. Supp. 144, 145-46 (D.D.C. 1992) ("fact [plaintiff has shown] that some of the information [contained in documents] was revealed does not negate the confidentiality of the documents as they exist"), reconsideration & summary judgment granted, 787 F. Supp. 12 (D.D.C. 1992) (appeal pending); Pfeiffer v. CIA, 721 F. Supp. 337, 342 (D.D.C. 1989) (plaintiff must do more than simply identify "information that happens to find its way into a published account" to meet this burden); Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba, 624 F. Supp. at 578 ("Unless plaintiff can demonstrate that specific information in the public domain appears to duplicate that being withheld, it has failed to bear its burden of showing prior disclosure."); United States Student Ass'n v. CIA, 620 F. Supp. at 571 (plaintiff's generalized assertion rejected as unsupported by factual submission); cf. Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) ("It is far more efficient, and . . . fairer, to place the burden of production on the party who claims that the information is publicly available.") (reverse FOIA case). But see Resolution Trust Corp. v. Dean, 813 F. Supp. at 1429 ("[A] party seeking to invoke the attorney-client privilege has the burden of affirmatively demonstrating non-waiver.") (non-FOIA case); Washington Post v. DOD, 766 F. Supp. 1, 12-13 (D.D.C. 1991) (agency has ultimate burden of proof when comparing publicly disclosed information with information being withheld, determining whether information is identical and, if not, determining whether release of slightly different information would harm national security).

<sup>71</sup> Occidental Petroleum Corp. v. SEC, 873 F.2d at 342 (reverse FOIA case).

## FEES AND FEE WAIVERS

(The related issue of whether an agency waives its ability to invoke an exemption in litigation by not raising it at an early stage of the proceedings is discussed in the Waiver of Exemptions in Litigation subsection of Litigation Considerations, below.)

## FEES AND FEE WAIVERS

Prior to the passage of the Freedom of Information Reform Act of 1986, the FOIA authorized agencies to assess reasonable charges only for document search and duplication, and any assessable fees were to be waived or reduced if disclosure of the requested information was found to be generally in the "public interest."<sup>1</sup> The FOIA Reform Act brought significant changes to the way in which fees are now assessed under the FOIA. A new fee structure was established, including a new provision authorizing agencies to assess "review" charges when processing records in response to a commercial-use request, and specific fee limitations and restrictions were set on the assessment of certain fees both in general as well as for certain categories of requesters.<sup>2</sup> Additionally, this FOIA amendment replaced the statutory fee waiver provision with a revised standard.<sup>3</sup>

These new fee and fee waiver provisions were made effective as of April 25, 1987, but required implementing agency regulations to be fully effective.<sup>4</sup> Under the FOIA Reform Act, the Office of Management and Budget was charged with the responsibility of promulgating, pursuant to notice and receipt of public comment, a "uniform schedule of fees" for individual agencies to follow when promulgating their FOIA fee regulations.<sup>5</sup> On March 27, 1987, the Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines] were published in final form.<sup>6</sup>

The FOIA Reform Act required agencies to promulgate not only a fee schedule but also specific "procedures and guidelines for determining when such fees should be waived or reduced."<sup>7</sup> Thus, the Department of Justice, in accordance with its statutory responsibility to encourage agency compliance

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<sup>1</sup> 5 U.S.C. § 552(a)(4)(A) (1982), amended by Pub. L. 99-570, § 1803, 100 Stat. 3207, 3207-49 to 3207-50.

<sup>2</sup> See Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-49, 3207-50 (codified as amended at 5 U.S.C. § 552(a)(4)(A) (1988)).

<sup>3</sup> See id. § 1803, 100 Stat. at 3207-50.

<sup>4</sup> See id. § 1804(b), 100 Stat. at 3207-50.

<sup>5</sup> Id. § 1803, 100 Stat. at 3207-49; Media Access Project v. FCC, 883 F.2d 1063, 1069 (D.C. Cir. 1989) (OMB expressly mandated to establish fee schedule and guidelines for statutory fee categories).

<sup>6</sup> 52 Fed. Reg. 10,011 (1987).

<sup>7</sup> Pub. L. No. 99-570, § 1803, 100 Stat. at 3207-49.



## FEES AND FEE WAIVERS

with the FOIA,<sup>8</sup> developed new governmentwide policy guidance on the waiver of FOIA fees, to replace its previous guidance issued in January 1983 (supplemented in November 1986) implementing the predecessor statutory fee waiver standard.<sup>9</sup> On April 2, 1987, to assist federal agencies in addressing fee waivers in their new FOIA fee regulations, the former Assistant Attorney General for Legal Policy issued the New FOIA Fee Waiver Policy Guidance to the heads of all federal departments and agencies.<sup>10</sup>

Because Congress provided only a 180-day period for the preparation and implementation of new agency fee regulations, virtually all federal agencies were still engaged in this multiple-step process as of the April 25, 1987 effective date. Consequently, the Office of Management and Budget advised agencies to give FOIA requesters the full benefits of both the old and the new provisions, consistent with the clear contemplation of the new law,<sup>11</sup> for the interim period between April 25, 1987, and the time at which an agency's new implementing regulation became effective; the Department of Justice advised likewise regarding the making of fee waiver determinations.<sup>12</sup>

### Fees

As amended by the Freedom of Information Reform Act of 1986, the FOIA sets forth three levels of fees which may be assessed in response to FOIA requests according to categories of FOIA requesters. These categorical provisions contain limitations on the assessment of fees, with the level of fees to be charged depending upon the identity of the requester and the intended use of the information sought.<sup>13</sup> The following discussion will summarize these fee provisions. The OMB Fee Guidelines, however, discuss these provisions in greater, authoritative detail and should be consulted by anyone with a FOIA fee (as opposed to fee waiver) question.<sup>14</sup>

The first level of fees includes charges for "document search, duplication

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<sup>8</sup> See 5 U.S.C. § 552(e) (1988).

<sup>9</sup> See FOIA Update, Winter/Spring 1987, at 1-2; FOIA Update, Summer 1986, at 3; FOIA Update, Jan. 1983, at 3-4.

<sup>10</sup> See FOIA Update, Winter/Spring 1987, at 3-10; Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 41-50 (Dec. 1987).

<sup>11</sup> See Pub. L. No. 99-570, § 1804(b)(2), 100 Stat. at 3207-50.

<sup>12</sup> See FOIA Update, Winter/Spring 1987, at 2. (For a sample fee regulation, see the Department of Justice's final regulation, published at 28 C.F.R. § 16.10 (1993).)

<sup>13</sup> See 5 U.S.C. § 552(a)(4)(A)(ii) (1988); see also FOIA Update, Winter/Spring 1987, at 4.

<sup>14</sup> See OMB Fee Guidelines, 52 Fed. Reg. 10,011 (1987).

## FEES AND FEE WAIVERS

and review, when records are requested for commercial use."<sup>15</sup> The OMB Fee Guidelines define the term "commercial use" as "a use or purpose that furthers the commercial, trade or profit interests of the requester or the person on whose behalf the request is being made," which can include furthering those interests through litigation.<sup>16</sup> The "review" costs which may be charged on such requests consist of the "direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed [under the FOIA]."<sup>17</sup> Review time thus includes processing the documents for disclosure, i.e., doing all that is necessary to prepare them for release; but it does not include time spent resolving general legal or policy issues regarding the applicability of particular exemptions or reviewing on appeal exemptions already applied.<sup>18</sup>

The second level of fees limits charges to document duplication costs only, "when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media."<sup>19</sup> Although FOIA requesters falling into one or more of these three subcategories of requesters under the amended Act enjoy a complete "exemption" from the assessment of search fees, their requests, like those made by any FOIA requester, still must "reasonably describe" the records sought in order to not impose upon an agency "an unreasonably burdensome search."<sup>20</sup> (For a further discussion of this requirement, see Procedural Requirements, above.)

The OMB Fee Guidelines define "educational institution" to include various categories of schools, as well as institutions of higher learning and vocational education.<sup>21</sup> This definition is limited, however, by the requirement that the educational institution be one "which operates a program or programs of

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<sup>15</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(I).

<sup>16</sup> OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18. But see McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987) (no "commercial interest" found in records sought in furtherance of requesters' tort claim); Muffoletto v. Sessions, 760 F. Supp. 268, 277-78 (E.D.N.Y. 1991) (no commercial use found where records were sought to defend against state court action to recover debts).

<sup>17</sup> 5 U.S.C. § 552(a)(4)(A)(iv).

<sup>18</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18.

<sup>19</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>20</sup> American Fed'n of Gov't Employees v. United States 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 also Nance v. United States Postal Serv., No. 91-1183, slip op. at 5 n.3 (D.D.C. Jan. 24, 1992) (dictum) (in some instances, search burden might be too disruptive to agency).

<sup>21</sup> OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

## FEES AND FEE WAIVERS

scholarly research."<sup>22</sup> The definition of a "non-commercial scientific institution" refers to a "non-commercial" institution "operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."<sup>23</sup>

The definition of a "representative of the news media" refers to any person actively gathering information of current interest to the public for an organization that is organized and operated to publish or broadcast news to the general public.<sup>24</sup> The Court of Appeals for the District of Columbia Circuit has elaborated upon this definition, holding that "a representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."<sup>25</sup> Such a definition, the D.C. Circuit made clear, excludes "'private librar[ies]' or 'private repositories'" of government records, or middlemen such as "'information vendors [or] data brokers,'" who request records for use by others.<sup>26</sup> This fee category, however, may include freelance journalists, where they can demonstrate a solid basis for expecting the information disclosed to be published by a news organization.<sup>27</sup> The first case to construe this provision held that even a foreign news service may qualify as a representative of the news media.<sup>28</sup>

The third level of fees, which applies to all requesters who do not fall within either of the preceding two fee levels, consists of reasonable charges for document search and duplication, as was provided for in the former statutory FOIA fee provision.<sup>29</sup> Reasonable charges for search time include all the time spent looking for responsive material, including page-by-page or line-by-line identification of material within documents.<sup>30</sup> Additionally, agencies may charge for search time even if they fail to locate any records responsive to the request or even if the records located are subsequently determined to be exempt

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<sup>22</sup> Id.; see also National Sec. Archive v. DOD, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989) (approving implementation of this standard in DOD regulation), cert. denied, 494 U.S. 1029 (1990).

<sup>23</sup> OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

<sup>24</sup> Id.

<sup>25</sup> National Sec. Archive v. DOD, 880 F.2d at 1387; cf. Carney v. United States Dep't of Justice, No. 92-Cv-6204, slip op. at 16-17 (W.D.N.Y. Apr. 27, 1993) (occasional journalistic activities do not qualify requester as representative of news media) (appeal pending).

<sup>26</sup> National Sec. Archive v. DOD, 880 F.2d at 1387.

<sup>27</sup> OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

<sup>28</sup> Southam News v. INS, 674 F. Supp. 881, 892 (D.D.C. 1987).

<sup>29</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(III).

<sup>30</sup> OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

## FEES AND FEE WAIVERS

from disclosure.<sup>31</sup>

The fee structure now also includes restrictions both on the assessment of certain fees and on the authority of agencies to ask for an advance payment of a fee.<sup>32</sup> No FOIA fee may be charged by an agency if the government's cost of collecting and processing the fee is likely to equal or exceed the amount of the fee itself.<sup>33</sup> In addition, except with respect to requesters seeking records for a commercial use, agencies must provide the first 100 pages of duplication, as well as the first two hours of search time, without charge to the requester.<sup>34</sup> These two provisions work together so that, except with respect to commercial-use requesters, agencies should not begin to assess fees until after they provide this amount of free search and duplication; the assessable fee for any requester then must be greater than the agency's cost to collect and process it in order for the fee actually to be charged.<sup>35</sup>

Agencies also may not require a requester to make an advance payment, i.e., payment before work is begun or continued on a request, unless the agency first estimates that the assessable fee is likely to exceed \$250.00, or unless the requester has previously failed to pay a properly assessed fee in a timely manner (i.e., within 30 days of the billing date).<sup>36</sup> This restriction does not prevent agencies from requiring payment before records which have been processed are released. Where an agency reasonably believes that a requester is attempting to break a request down into a series of requests for the purpose of avoiding the assessment of fees, the agency may aggregate those requests and

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<sup>31</sup> Id. at 10,019; see also Cheek v. IRS, No. 83 C 6851, slip op. at 2 (N.D. Ill. June 11, 1984).

<sup>32</sup> See 5 U.S.C. § 552(a)(4)(A)(iv)-(v).

<sup>33</sup> Id. § 552(a)(4)(A)(iv)(I); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

<sup>34</sup> 5 U.S.C. § 552(a)(4)(A)(iv)(II); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018-19.

<sup>35</sup> 5 U.S.C. § 552(a)(4)(A)(iv)(I); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

<sup>36</sup> 5 U.S.C. § 552(a)(4)(A)(v); see OMB Fee Guidelines, 52 Fed. Reg. at 10,020; see also Centracchio v. FBI, No. 92-357, slip op. at 5 (D.D.C. Mar. 16, 1993) (failure to pay requested advance deposit on fee in excess of \$250 held fatal to requester's FOIA claim); Nance v. United States Postal Serv., slip op. at 3 (where fees exceed \$250 and fee waiver is inappropriate, agency may refuse to begin search until requester makes advance payment); Schmanke v. United States Postal Serv., No. 89-1551, slip op. at 6 (D.D.C. Jan. 4, 1990) (advance payment appropriate where requester previously failed to pay fees in timely manner and fee is likely to exceed \$250); Hall v. United States Dep't of Justice, No. 88-3071, slip op. at 2-3, 5 (D.D.C. Mar. 31, 1989) (where request for advance payment permissible and agency requests mere promise to pay instead, requester's failure to provide such promise warrants summary judgment for agency).

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charge accordingly.<sup>37</sup> The OMB Fee Guidelines should be consulted for additional guidance on aggregating requests.<sup>38</sup>

The amended law also provides that FOIA fees are superseded by "fees chargeable under a statute specifically providing for setting the level of fees for particular types of records."<sup>39</sup> Thus, when documents responsive to a FOIA request are maintained for distribution by an agency according to a statutorily based fee schedule, requesters must obtain the documents from that source and pay the applicable fees in accordance with the fee schedule of that other statute.<sup>40</sup> The superseding of FOIA fees by the fee provisions of another statute raises a related question as to whether an agency with a statutorily based fee schedule is subject to the FOIA's fee waiver provision; although this question has been raised, it has not yet been reached by the courts.<sup>41</sup>

Because the FOIA Reform Act is silent with respect to the standard and scope of judicial review of FOIA fee issues,<sup>42</sup> the standard should remain the same as that under the predecessor statutory fee provision--i.e., agency action should be upheld unless it is found to be "arbitrary or capricious," in accordance with the Administrative Procedure Act.<sup>43</sup> Perhaps due to this lack of statutory clarity, the appropriate standard of review has yet to be clearly established and the extent of judicial deference to agency fee regulations, based upon the OMB Fee Guidelines, remains somewhat unclear.<sup>44</sup>

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<sup>37</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,019; see also Atkin v. EEOC, No. 91-2508, slip op. at 20-21 (D.N.J. Dec. 4, 1992) (agency's decision to aggregate requests found proper; it was reasonable for agency to believe that 13 requests submitted within three-month period relating to same subject matter were made by requester to evade payment of fees) (appeal pending).

<sup>38</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,019-20.

<sup>39</sup> 5 U.S.C. § 552(a)(4)(A)(vi).

<sup>40</sup> See OMB Fee Guidelines, 52 Fed. Reg. at 10,017, 10,018.

<sup>41</sup> Compare Oglesby v. United States Dep't of the Army, 920 F.2d 57, 70 n.17 (D.C. Cir. 1990) (fee waiver issue not reached because plaintiff failed to exhaust administrative remedies) with St. Hilaire v. Department of Justice, No. 91-0078, slip op. at 4-5 (D.D.C. Sept. 10, 1991) (fee waiver issue not reached because requested records made publicly available).

<sup>42</sup> See 5 U.S.C. § 552(a)(4)(A)(vii) (specifying new de novo/administrative record standard and scope of review for fee waiver issues).

<sup>43</sup> 5 U.S.C. § 706 (1988).

<sup>44</sup> Compare Media Access Project v. FCC, 883 F.2d 1063, 1071 (D.C. Cir. 1989) (agency's interpretation of its own fee regulations "must be given at least some deference") with National Sec. Archive v. DOD, 880 F.2d at 1383 (question of deference owed to agency's fee regulations not resolved).

## FEES AND FEE WAIVERS

### Fee Waivers

Prior to the passage of the Freedom of Information Reform Act of 1986, the FOIA authorized agencies to waive or reduce the customary charges for document search and duplication where it was determined that such action was "in the public interest because furnishing the information can be considered as primarily benefiting the general public."<sup>45</sup> As the Court of Appeals for the District of Columbia Circuit had emphasized, this provision "was enacted to ensure that the public would benefit from any expenditure of public funds for the disclosure of public records."<sup>46</sup> In January 1983, the Department of Justice issued fee waiver guidelines setting forth five specific criteria, developed in numerous court decisions, for federal agencies to apply in determining whether the public interest warranted a waiver or reduction of fees.<sup>47</sup> These criteria called upon agencies to determine: (1) whether there was a genuine public interest in the subject matter of the request; (2) whether the responsive records were informative on the issue of public interest; (3) whether the requested information was already in the public domain; (4) whether the requester had the qualifications and ability to use and disseminate the information; and (5) whether the benefit to the general public was outweighed by any commercial or personal benefit to the requester.<sup>48</sup>

The replacement fee waiver standard established by the FOIA Reform Act, effective as of April 25, 1987, now more specifically defines the term "public interest," by providing that fees should be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."<sup>49</sup> In light of this new fee waiver provision, the Department of Justice issued new fee waiver policy guidance on April 2, 1987—which superseded its 1983 substantive fee waiver guidance, as well as that issued in November 1986 (concerning institutions and record repositories)—and it advised agencies of six analytical factors logically to be considered in applying the new statutory fee waiver standard.<sup>50</sup> These six factors, as incorporated in the Department of Defense's fee regulation, were applied and implicitly approved by the Court of Appeals for the

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<sup>45</sup> 5 U.S.C. § 552(a)(4)(A) (1982), amended by Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-49 to 3207-50 (1986).

<sup>46</sup> Ely v. United States Postal Serv., 753 F.2d 163, 165 (D.C. Cir.), cert. denied, 471 U.S. 1106 (1985).

<sup>47</sup> See FOIA Update, Jan. 1983, at 3-4.

<sup>48</sup> See id.

<sup>49</sup> Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-50 (codified as amended at 5 U.S.C. § 552(a)(4)(A)(iii) (1988)).

<sup>50</sup> See FOIA Update, Winter/Spring 1987, at 3-10; see also id. at 10 (specifying that previous "procedural" guidance on fee waiver issues remains in effect); FOIA Update, Jan. 1983, at 4.

## FEES AND FEE WAIVERS

Ninth Circuit in McClellan Ecological Seepage Situation v. Carlucci.<sup>51</sup>

The amended statutory fee waiver standard sets forth two basic requirements, both of which must be satisfied before properly assessable fees can, and should, be waived or reduced under the statutory standard.<sup>52</sup> Requests for a waiver or reduction of fees must be considered on a case-by-case basis and should address both of these requirements in sufficient detail for the agency to make an informed decision as to whether it can appropriately waive or reduce the fees in question.<sup>53</sup>

In order to determine whether the first fee waiver requirement has been met--i.e., that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities<sup>54</sup>--agencies should consider the following four factors in sequence:

1. First, the subject matter of the requested records, in the context of the request, must specifically concern identifiable "operations or activities of the government." As the D.C. Circuit specifically indicated in applying the prede-

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<sup>51</sup> 835 F.2d 1282, 1286 (9th Cir. 1987); see also Sloman v. United States Dep't of Justice, No. 92 Civ. 4982, slip op. at 11-12 (S.D.N.Y. May 4, 1993); Hoffman v. IRS, No. 90-459, slip op. at 3 (D.D.C. Oct. 23, 1991).

<sup>52</sup> See FOIA Update, Winter/Spring 1987, at 4; see also Sloman v. United States Dep't of Justice, slip op. at 9 (two-pronged statutory test used to determine when fees should be waived); Hoffman v. IRS, slip op. at 2 (burden on requester to establish that fee waiver standard has been met); Martorano v. FBI, No. 89-1345, slip op. at 8 (D.D.C. Sept. 30, 1991) (requester not entitled to documents where he failed to provide agency with information necessary to justify a fee waiver, nor has agreed to pay fees).

<sup>53</sup> See FOIA Update, Winter/Spring 1987, at 6; National Sec. Archive v. DOD, 880 F.2d 1381, 1383 (D.C. Cir. 1989) (dictum) (fee waiver decisions made on "case-by-case" basis), cert. denied, 494 U.S. 1029 (1990); Wilson v. CIA, No. 91-0087, slip op. at 3 (D.D.C. Nov. 5, 1991) (agency must necessarily evaluate each fee waiver request); see also McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1285 (conclusory statements will not support fee waiver request).

<sup>54</sup> See, e.g., Oglesby v. United States Dep't of the Army, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990) (conclusory statements insufficient to make public interest showing); National Treasury Employees Union v. Griffin, 811 F.2d 644, 647 (D.C. Cir. 1987) (requester seeking fee waiver bears burden of identifying "public interest" involved); Sloman v. United States Dep't of Justice, slip op. at 11 (public interest requirement not met by merely quoting statutory standard); Schmanke v. United States Postal Serv., No. 92-701, slip op. at 2 (D.D.C. Dec. 30, 1992) (requester bears burden of identifying "with reasonable specificity" public interest to be served); Prows v. United States Dep't of Justice, No. 90-2561, slip op. at 2 (D.D.C. Mar. 30, 1992) (denial of fee waiver proper where plaintiff failed to identify specific public interest).

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cessor fee waiver standard, "the links between furnishing the requested information and benefiting the general public" should not be "tenuous."<sup>55</sup> Although in most cases records possessed by a federal agency will meet this threshold, the records must be sought for their informative value in relation to specifically identified government operations or activities;<sup>56</sup> a request for access to records for their intrinsic informational content alone would not satisfy this threshold consideration.<sup>57</sup>

2. Second, in order for the disclosure to be "likely to contribute" to an understanding of specific government operations or activities, the disclosable portions of the requested information must be meaningfully informative in relation to the subject matter of the request.<sup>58</sup> It has been held that requests for information that is already in the public domain, either in a duplicative or a substantially identical form, may not warrant a fee waiver where the disclosure would not be likely to contribute to an understanding of government operations or activities where nothing new would be added to the existing public record.<sup>59</sup>

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<sup>55</sup> National Treasury Employees Union v. Griffin, 811 F.2d at 648.

<sup>56</sup> See, e.g., Atkin v. EEOC, No. 91-2508, slip op. at 27-28 (D.N.J. Dec. 4, 1992) (requested list of agency attorneys and their bar affiliations "clearly does not concern identifiable government activities or operations") (appeal pending); Nance v. United States Postal Serv., No. 91-1183, slip op. at 3-4 (D.D.C. Jan. 24, 1992) (disclosure of illegally cashed money orders will not contribute significantly to public understanding of operations of government).

<sup>57</sup> See FOIA Update, Winter/Spring 1987, at 6.

<sup>58</sup> Id.; Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (character of information proper factor to consider); Gray v. United States Dep't of Agric., No. 91-1383, slip op. at 3 (D.D.C. Nov. 25, 1991) (no showing that minute amount of relevant information that may be found among masses of irrelevant material will enlighten public understanding of agency's operations); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (union's allegations of malfeasance too ephemeral to warrant waiver of search fees without further evidence that informative material will be found), aff'd on other grounds, 907 F.2d 203 (D.C. Cir. 1990); Shaw v. CIA, 3 Gov't Disclosure Serv. (P-H) ¶ 83,009, at 83,444 (D.D.C. Oct. 29, 1982) (denying fee waiver request so "broadly framed" it would include large amount of material uninformative on issue).

<sup>59</sup> See McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286 (new information has more potential to contribute to public understanding); Durham v. United States Dep't of Justice, No. 91-2636, slip op. at 11-12 (D.D.C. Aug. 17, 1993) (no fee waiver for 2,340 pages of public court records); Harrison v. United States Nat'l Archives, No. 93-448, slip op. at 1-2 (D.D.C. May 21, 1993) (upholding agency denial of fee waiver request on voluminous amount of JFK assassination records already released under FOIA and available through National Archives and Records Administration); Atkin v. EEOC, slip op. at 28 (disclosure of information already in public domain has little if any potential for contributing to understanding of government activities); (continued...)



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3. Third, the disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.<sup>60</sup> Whether the "public at large" encom-

<sup>59</sup>(...continued)

Siminoski v. FBI, No. 83-6499, slip op. at 12 n.2, 13 (C.D. Cal. Jan. 16, 1990) (doubtful that rerelease of documents would contribute significantly to public understanding of agency's investigations); Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 9 (D.D.C. Apr. 13, 1989) (no fee waiver for "564 pages of public court records"), aff'd, No. 89-5185 (D.C. Cir. Feb. 26, 1990); Conner v. CIA, No. 84-3625, slip op. at 2 (D.D.C. Jan. 31, 1986) (no fee waiver for information available in agency's public reading room), appeal dismissed for lack of prosecution, No. 86-5221 (D.C. Cir. Jan. 25, 1987); Blakey v. Department of Justice, 549 F. Supp. 362, 364-65 (D.D.C. 1982) (applying this principle under the previous statutory fee waiver standard), aff'd, 720 F.2d 215 (D.C. Cir. 1983) (table cite); see also FOIA Update, Winter/Spring 1987, at 7; cf. Tax Analysts v. United States Dep't of Justice, 965 F.2d 1092, 1094-96 (D.C. Cir. 1992) (news organization not entitled to attorney fees because, inter alia, requested information already in public domain). But see also Sinito v. United States Dep't of Justice, No. 87-814, slip op. at 4-5 (D.D.C. Feb. 13, 1991) (although documents did not appear to add to information already disclosed in media, they were likely to contribute to public's understanding of government activities); Fitzgibbon v. Agency for Int'l Dev., 724 F. Supp. 1048, 1051 & n.10 (D.D.C. 1989) (agencies failed to demonstrate "public's understanding" of publicly available information in public reading rooms and reports to Congress); Coalition for Safe Power, Inc. v. United States Dep't of Energy, No. 87-1380, slip op. at 6-8 (D. Or. July 22, 1988) (material's availability in agency's public reading room only one factor to consider).

<sup>60</sup> See Wagner v. United States Dep't of Justice, No. 86-5477, slip op. at 2 (D.C. Cir. Mar. 24, 1987) (general public must benefit from release); Hoffman v. IRS, slip op. at 3 (no showing that information will contribute to understanding of IRS operations by anyone other than requester); D'Alessandro v. United States Dep't of Justice, No. 90-2088, slip op. at 10 (D.D.C. Feb. 28, 1991) (plaintiff failed to make requisite showing that request was in public interest); Frankenberry v. United States Dep't of Justice, No. 87-3284, slip op. at 2 (D.D.C. Sept. 20, 1989) (records used in requester's criminal prosecution are "personal" to requester and will not enhance public understanding); Cox v. O'Brien, No. 86-1639, slip op. at 2 (D.D.C. Dec. 16, 1986) (fee waiver denial proper where prisoners, not general public, would be beneficiaries of information pertaining to wholesalers for prison commissary); Crooker v. Department of the Army, 577 F. Supp. 1220, 1223 (D.D.C. 1984) (rejecting fee waiver under previous standard for information of interest to "a small segment of the scientific community," which would not "benefit the public at large"), appeal dismissed as frivolous, No. 84-5089 (D.C. Cir. June 22, 1984); see also National Treasury Employees Union v. Griffin, 811 F.2d at 648 (rejecting "union's suggestion that its size insures that any benefit to it amounts to a public benefit"); Fazzini v. United States Dep't of Justice, No. 90 C 3303, slip op. at 12 (N.D. Ill. May 2, 1991) (requester cannot establish public benefit merely by

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passes only the population of the United States has not yet been clearly resolved by the courts. One case has held that disclosure to a foreign news syndicate that publishes only in Canada satisfies the requirement that it contribute to "public understanding."<sup>61</sup>

As the proper focus must be on the benefit to be derived by the general public, any personal benefit to be derived by the requester, or the requester's particular financial situation, are not factors entitling him or her to a fee waiver.<sup>62</sup> Indeed, it is well settled that indigence alone, without a showing of a public benefit, is insufficient to warrant a fee waiver.<sup>63</sup>

<sup>60</sup>(...continued)

alleging he has "corresponded" with members of media and intends to share requested information with them), summary affirmance granted, No. 91-2219 (7th Cir. July 26, 1991); Schmanke v. United States Postal Serv., No. 89-1551, slip op. at 5 (D.D.C. Jan. 4, 1990) (mere fact that information relates to governmental activity is insufficient to demonstrate "public benefit"). But see Johnson v. United States Dep't of Justice, No. 89-2842, slip op. at 3 (D.D.C. May 2, 1990) (death-row prisoner seeking previously unreleased and possibly exculpatory information entitled to partial fee waiver because potential "miscarriage of justice . . . is a matter of great public interest"), summary judgment granted, 758 F. Supp. 2, 5 (D.D.C. 1991) (holding, ultimately, that FBI not required to review records or to forego statutory exemption for possibly exculpatory information).

<sup>61</sup> Southam News v. INS, 674 F. Supp. 881, 892-93 (D.D.C. 1987). But cf. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (basic purpose of FOIA is to hold governors accountable to governed).

<sup>62</sup> See, e.g., Nance v. United States Postal Serv., slip op. at 4 n.2 (fee waiver inappropriate where only purpose for seeking records is collateral attack on criminal conviction); Martorano v. FBI, slip op. at 9 (no indication release would benefit public; only person to benefit is requester); Perotti v. United States Dep't of Justice, No. C-1-89-844, slip op. at 4 (S.D. Ohio Apr. 26, 1991) (magistrate's recommendation) (requester failed to substantiate that fee waiver would benefit public rather than individual), adopted (S.D. Ohio Aug. 22, 1991); Warmack v. Huff, No. CV-88-H-1191-E, slip op. at 30 (N.D. Ala. May 16, 1990) (magistrate's recommendation) (fee waiver denial appropriate where disclosure benefits only person making request), adopted (N.D. Ala. Aug. 14, 1990), aff'd on other grounds, No. 90-7630 (11th Cir. Nov. 18, 1991); Crooker v. Department of the Army, 577 F. Supp. at 1223-24 (prison inmate's intent to write book about brother's connection with dangerous toxin not considered benefit to public).

<sup>63</sup> See, e.g., Wagner v. United States Dep't of Justice, slip op. at 2 ("indigence does not ipso facto require a fee waiver"); Ely v. United States Postal Serv., 753 F.2d at 165 ("Congress rejected a fee waiver provision for indigents."); Durham v. United States Dep't of Justice, slip op. at 12 n.10 (indigence alone does constitute adequate grounds for fee waiver); Rodriguez-Estrada v. United States, No. 92-2360, slip op. at 2 (D.D.C. Apr. 16, 1993)

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Additionally, agencies should evaluate the identity and qualifications of the requester--e.g., expertise in the subject area of the request and ability and intention to disseminate the information to the general public--in order to determine whether the general public would benefit from disclosure to that requester.<sup>64</sup> Specialized knowledge may be required to extract, synthesize and effectively convey the information to the public and requesters vary in their ability to do so.<sup>65</sup> Although established representatives of the news media, as defined in the OMB Fee Guidelines,<sup>66</sup> should readily be able to meet this aspect of the statutory requirement by showing their connection to a ready means of effective dissemination,<sup>67</sup> other requesters should be required to describe with greater

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<sup>63</sup>(...continued)

(no entitlement to fee waiver on basis of plaintiff's in forma pauperis status under 28 U.S.C. § 1915); Perotti v. United States Dep't of Justice, slip op. at 4 (indigence does not entitle requester to fee waiver); Crooker v. Department of the Army, 577 F. Supp. at 1224 (indigence alone does not automatically entitle requester to fee waiver); see also S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 8 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6287 (specific fee waiver provision for indigents eliminated; "such matters are properly the subject for individual agency determination in regulations").

<sup>64</sup> See, e.g., Larson v. CIA, 843 F.2d at 1483 & n.5 (inability to disseminate information alone is sufficient basis for denying fee waiver request; requester cannot rely on tenuous link to newspaper); McClain v. United States Dep't of Justice, No. 91 C 241, slip op. at 5 (N.D. Ill. Nov. 27, 1992) (plaintiff's "contention that he intends to give the requested information to a reporter . . . [and] to two public interest groups" insufficient to show dissemination to public); Hoffman v. IRS, slip op. at 3-4 (principal consideration in fee waiver cases is requester's ability to disseminate information to general public; requester cannot satisfy statutory standard merely by representing that he will make information available to others); Fazzini v. United States Dep't of Justice, slip op. at 12 (plaintiff's intention to share requested information with members of media not evidence of ability to disseminate information to public); Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 15 (denial of fee waiver upheld where requester "is incarcerated, has no apparent connection with the news media, and has no apparent access to facilities or personnel that might enable him to disseminate the information"); Eudey v. CIA, 478 F. Supp. 1175, 1177 (D.D.C. 1979) (articulating such approach under predecessor fee waiver standard); cf. Wilson v. CIA, slip op. at 2 (plaintiff's failure to demonstrate intent and ability to disseminate information no impediment to subsequently filing revised and perfected request).

<sup>65</sup> McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286 (fee waiver request gave no indication of requesters' ability to understand and process the information nor whether they intended to actually disseminate it); see FOIA Update, Winter/Spring 1987, at 7.

<sup>66</sup> OMB Fee Guidelines, 52 Fed. Reg. 10,011, 10,018 (1987); see also National Sec. Archive v. DOD, 880 F.2d at 1387 (elaborating on OMB definition of news media representative to include requester organization in this case).

<sup>67</sup> See FOIA Update, Winter/Spring 1987, at 8 & n.5.

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substantiation their expertise in the subject area and their ability and intention to disseminate the information.<sup>68</sup>

Some decisions under the former fee waiver standard suggested that journalists should presumptively be granted fee waivers.<sup>69</sup> The Department of Justice encourages agencies to give special weight to journalistic credentials under this factor,<sup>70</sup> though the statute provides no specific presumption that journalistic status alone is to be dispositive under the fee waiver standard overall and such a presumption would run counter to the amended fee provisions which set forth a special fee category for representatives of the news media.<sup>71</sup> (For a discussion of news media requesters in the context of attorney fee awards under the FOIA, see Tax Analysts v. United States Department of Justice,<sup>72</sup> and Litigation Considerations, below.)

Additionally, the requirement that a requester demonstrate a contribution to the understanding of the public at large is not satisfied simply because a fee waiver request is made by a library or other record repository, or by a requester who intends merely to disseminate the information to such an institution.<sup>73</sup> Such requests which make no showing of how the information would be disseminated, other than through passively making it available to anyone who

<sup>68</sup> See id.; see, e.g., Oglesby v. United States Dep't of the Army, 920 F.2d at 66 n.11 (assertion that requester was writer and had disseminated in past, coupled with bare statement of public interest, insufficient to meet statutory standard); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286-87 (agency may request additional information; 23 questions not burdensome); Burriss v. CIA, 524 F. Supp. 448, 449 (M.D. Tenn. 1981) (denial of plaintiff's fee waiver request "based upon mere representation that he is a researcher who plans to write a book" held not abuse of discretion).

<sup>69</sup> See National Treasury Employees Union v. Griffin, 811 F.2d at 649; Goldberg v. United States Dep't of State, No. 85-1496, slip op. at 3-4 (D.D.C. Apr. 29, 1986), modified (D.D.C. July 25, 1986); Badhwar v. United States Dep't of the Air Force, 615 F. Supp. 698, 708 (D.D.C. 1985); Rosenfeld v. United States Dep't of Justice, No. C-85-2247, slip op. at 4-5 (N.D. Cal. Oct. 29, 1985), motion for reconsideration denied (N.D. Cal. Mar. 25, 1986); Leach v. United States Customs Serv., No. 85-1195, slip op. at 8-9 (D.D.C. Oct. 22, 1985).

<sup>70</sup> Accord FOIA Update, Fall 1983, at 14; see also FOIA Update, Winter/Spring 1987, at 8.

<sup>71</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II) (1988); cf. National Sec. Archive v. DOD, 880 F.2d at 1383 (dictum) (fee waiver decisions are to be made on "case-by-case" basis); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1284 (legislative history makes plain that "public interest" groups must satisfy statutory test).

<sup>72</sup> 965 F.2d at 1095-96 (litigant's status as news organization does not render award of attorney fees automatic).

<sup>73</sup> See FOIA Update, Winter/Spring 1987, at 8.

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might seek access to it, do not meet the burden of demonstrating with particularity that the information will be communicated to the public.<sup>74</sup> These requests, like those of other requesters, should be analyzed to identify a particular person who actually will use the requested information in scholarly or other analytic work and then disseminate it to the general public.<sup>75</sup>

4. Lastly, the disclosure must contribute "significantly" to public understanding of government operations or activities. To warrant a waiver or reduction of fees, the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent.<sup>76</sup> Such a determination must be an objective one; agencies are not permitted to make separate value judgments as to whether any information that would in fact contribute significantly to public understanding of government operations or activities is "important" enough to be made public.<sup>77</sup>

Once an agency determines that the "public interest" requirement for a fee waiver has been met, the statutory standard's second requirement calls for the agency to determine whether "disclosure of the information . . . is not primarily in the commercial interest of the requester."<sup>78</sup> In order to decide whether this requirement has been satisfied, agencies should consider the following two factors in sequence:

1. First, an agency must determine as a threshold matter whether the request involves any commercial interest of the requester which would be furthered by the disclosure.<sup>79</sup> A "commercial interest" is one that furthers a commercial, trade or profit interest as those terms are commonly understood.<sup>80</sup>

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<sup>74</sup> Id.

<sup>75</sup> Id.; accord National Treasury Employees Union v. Griffin, 811 F.2d at 647 (observing under previous standard that public benefit should be "identified with reasonable specificity").

<sup>76</sup> See Sloman v. United States Dep't of Justice, slip op. at 11-12 (information previously released to author and "more important[ly]" available in agency's reading room will not contribute significantly to public understanding of operations of government); Carney v. United States Dep't of Justice, No. 92-Cv-6204, slip op. at 16 (W.D.N.Y. Apr. 27, 1993) (requester's proposed dissertation, scholarly publishing, and tentative book publication found insufficient to establish that release would contribute significantly to public understanding) (appeal pending).

<sup>77</sup> Ettlinger v. FBI, 596 F. Supp. 867, 875 (D. Mass. 1984); see FOIA Update, Winter/Spring 1987, at 8.

<sup>78</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>79</sup> See FOIA Update, Winter/Spring 1987, at 9.

<sup>80</sup> Id.; OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18; accord, e.g.,  
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Information sought in furtherance of a tort claim for compensation or retribution for the requester is not considered to involve a "commercial interest."<sup>81</sup> However, not only profit-making corporations but also individuals or other organizations may have a commercial interest to be furthered by the disclosure, depending upon the circumstances involved.<sup>82</sup> Agencies may properly consider the requester's identity and the circumstances surrounding the request and draw reasonable inferences regarding the existence of a commercial interest.<sup>83</sup>

Where a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order subsequently to compare it to the "public interest" in disclosure.<sup>84</sup> In assessing the magnitude of the commercial interest, the agency should reasonably consider the extent to which the FOIA disclosure will serve the requester's identified commercial interest.<sup>85</sup>

2. Then, an agency must balance the requester's commercial interest against the identified public interest in disclosure and determine which interest is "primary." A fee waiver or reduction must be granted where the public interest in disclosure is greater in magnitude than the requester's commercial interest.<sup>86</sup> Or, as one court phrased it when considering the balance to be struck under the predecessor fee waiver standard: "[I]n simple terms, the public should not foot the bill unless it will be the primary beneficiary of the [disclosure]."<sup>87</sup>

Although newsgathering organizations ordinarily have a commercial interest in obtaining information, agencies may generally presume that where a news media requester has satisfied the "public interest" standard, that will be the primary interest served.<sup>88</sup> On the other hand, disclosure to private reposi-

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<sup>80</sup>(...continued)

American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978) (defining "commercial" in Exemption 4 as meaning anything "pertaining or relating to or dealing with commerce").

<sup>81</sup> McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1285.

<sup>82</sup> See FOIA Update, Winter/Spring 1987, at 9; Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (entity's "non-profit status is not determinative" of commercial status) (Exemption 4 case).

<sup>83</sup> See FOIA Update, Winter/Spring 1987, at 9.

<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> Burriss v. CIA, 524 F. Supp. at 449.

<sup>88</sup> See FOIA Update, Winter/Spring 1987, at 10; accord National Sec. Archive v. DOD, 880 F.2d at 1388 (requests from news media entities, in furtherance of their newsgathering function, are not for "commercial use").

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tories of government records or data brokers may not be presumed to primarily serve the public interest; rather, requests on behalf of such entities can more readily be considered as primarily in their commercial interest, depending upon the nature of the records and their relation to the exact circumstances of the enterprise.<sup>89</sup>

When agencies analyze fee waiver requests by considering these six factors, they can rest assured that they have carried out their statutory obligation to determine whether a waiver is in the public interest.<sup>90</sup> Where an agency has relied on factors unrelated to the public benefit standard to deny a fee waiver request, however, courts have found an abuse of discretion.<sup>91</sup>

An analysis of the foregoing factors routinely requires an agency to first assess the nature of the information likely to be released in response to an access request, because the statutory standard speaks to whether "disclosure" of the responsive information will significantly contribute to public understanding.<sup>92</sup> This assessment thus necessarily focuses on the information that would be disclosed, which in turn logically requires an estimation of the applicability of any relevant FOIA exemption(s). Yet the extent to which an agency must establish at the fee waiver determination stage the precise contours of its anticipated withholdings was raised in Project on Military Procurement v. Depart-

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<sup>89</sup> See FOIA Update, Winter/Spring 1987, at 10; see also National Sec. Archive v. DOD, 880 F.2d at 1387-88.

<sup>90</sup> See FOIA Update, Winter/Spring 1987, at 10.

<sup>91</sup> See, e.g., Goldberg v. United States Dep't of State, slip op. at 3-5 (agency policy of granting waiver of search fees but refusing to grant waiver of duplication fees for "public interest" documents held "both irrational and in violation of the statute"); Idaho Wildlife Fed'n v. United States Forest Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,271, at 84,056 (D.D.C. July 21, 1983) (reliance on regulation that proscribes granting of fee waiver where records are sought for litigation is abuse of discretion because regulation is overbroad in that it ignores "public interest" in certain litigation); Diamond v. FBI, 548 F. Supp. 1158, 1160 (S.D.N.Y. 1982) (agency may not decline to waive fees based merely upon perceived obligation to collect them); Common Cause v. IRS, 1 Gov't Disclosure Serv. (P-H) ¶ 79,188, at 79,351 (D.D.C. Nov. 8, 1979) (IRS cannot deny requests for waiver of search fees simply on ground that search would be burdensome), aff'd, 646 F.2d 656 (D.C. Cir. 1981) (table cite); Eudey v. CIA, 478 F. Supp. at 1177 (agency may not consider quantity of documents to be released); Fitzgibbon v. CIA, No. 76-700, slip op. at 1 (D.D.C. Jan. 19, 1977) ("An agency's determination not to waive fees is arbitrary and capricious where there is nothing in the agency's refusal of fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public.").

<sup>92</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

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ment of the Navy,<sup>93</sup> where the district court seemed to suggest that an agency must defend the contemplated application of FOIA exemptions in the fee waiver context with an index pursuant to the requirements of Vaughn v. Rosen.<sup>94</sup> Such a requirement not only is unprecedented, it is also unworkable--as it would compel an agency to actually process responsive records at the threshold fee waiver determination stage in order to compile the Vaughn Index. This would turn the normal, longstanding procedure for responding to FOIA/fee waiver requests on its head. Until a fee waiver determination has been made and (if a full fee waiver is not granted) the requester has agreed to pay all the assessable fees, the request is not yet ripe for processing because there has been no compliance with the fee requirements of the FOIA.<sup>95</sup> Because the decision on this issue in Project on Military Procurement would yield impracticable results, it should not be followed. Agencies should retain the general discretion, though, to consider the cost-effectiveness of their investment of administrative resources in their fee and fee waiver determinations.<sup>96</sup>

The FOIA does not specifically provide for administrative appeals of denials of requests for fee waivers. Nevertheless, many agencies, either by regulation or by practice, have appropriately considered appeals of such actions. The Court of Appeals for the Fifth Circuit and the D.C. Circuit have recently made it clear, moreover, that administrative appeal exhaustion is required for any adverse determination, including fee waiver denials.<sup>97</sup>

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<sup>93</sup> 710 F. Supp. 362, 366-68 (D.D.C. 1989); see also Wilson v. CIA, No. 89-3356, slip op. at 3-4 (D.D.C. Mar. 25, 1991) (agency may not deny fee waiver request based upon "likelihood" that information will be withheld); Sinito v. United States Dep't of Justice, slip op. at 5 (denial of fee waiver based upon claim of exempt status of documents inappropriate before validity of exemptions established).

<sup>94</sup> 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

<sup>95</sup> See 5 U.S.C. § 552(a)(3); see also Vennes v. IRS, No. 89-5136, slip op. at 2-3 (8th Cir. Oct. 13, 1989) (agency under no obligation to produce material until either requester agrees to pay fee or fee waiver approved); Perotti v. United States Dep't of Justice, slip op. at 4-5 (where fee waiver properly denied, requester must comply with procedural requirements before documents are processed); Irons v. FBI, 571 F. Supp. 1241, 1243 (D. Mass. 1983) (upholding regulation requiring payment of fees or waiver of fees before FOIA request is deemed to have been received); cf. Nance v. United States Postal Serv., slip op. at 3 (where fee waiver inappropriate and fees exceed \$250, agency may refuse to begin search until requester makes advance payment).

<sup>96</sup> Cf. Rodriguez v. United States Postal Serv., No. 90-1886, slip op. at 3 n.1 (D.D.C. Oct. 2, 1991) (despite requester's failure to comply with exhaustion requirement, court suggests agency "consider" waiving de minimis fee).

<sup>97</sup> See Voinche v. United States Dep't of the Air Force, 983 F.2d 667, 669 (5th Cir. 1993) (requester seeking fee waiver under FOIA must exhaust admin-  
(continued...)



## FEES AND FEE WAIVERS

Prior to the FOIA Reform Act, the discretionary nature of the FOIA's fee waiver provision led the majority of courts to conclude that "the proper standard for judicial review of an agency denial of a fee waiver is whether that decision was arbitrary and capricious,"<sup>98</sup> in accordance with the Administrative Procedure Act.<sup>99</sup> This meant that a court could not "replace its own judgment for that of [an agency] without first concluding that the [agency's] decision was completely unreasonable and unfair."<sup>100</sup>

This standard was changed, however, with the passage of the FOIA Reform Act. A specific judicial review provision was included in the amended FOIA,<sup>101</sup> which now provides for the review of agency fee waiver denials according to a de novo standard. Yet this provision also explicitly provides that the scope of judicial review remains limited to the administrative record established before the agency,<sup>102</sup> and thus it is crucial that the agency's fee waiver denial letter create a comprehensive administrative record of all the reasons for the denial.<sup>103</sup> In this regard, agencies should also be aware that a challenge

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<sup>97</sup>(...continued)

istrative remedies before seeking judicial review), petition for cert. filed, 61 U.S.L.W. 3820 (U.S. May 17, 1993); Oglesby v. United States Dep't of the Army, 920 F.2d at 66 & n.11, 71 ("Exhaustion does not occur until fees are paid or an appeal is taken from the refusal to waive fees."); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d at 209 (court declined to consider fee waiver request when not pursued during agency administrative proceeding); see also Rodriguez v. United States Postal Serv., slip op. at 3 (in fairness to agency and judicial economy, administrative appeal of fee waiver denial required before judicial review); Williams v. Executive Office for United States Attorneys, No. 89-3071, slip op. at 7 (D.D.C. Mar. 19, 1991) (requester seeking fee waiver must first exhaust his administrative remedies); cf. Campbell v. Unknown Power Superintendent of Flathead Irrigation & Power Project, No. 91-35104, slip op. at 3 (9th Cir. Apr. 22, 1992) (exhaustion requirement not imposed where agency ignored fee waiver request).

<sup>98</sup> Eudey v. CIA, 478 F. Supp. at 1176; see also Ely v. United States Postal Serv., 753 F.2d at 165; Ettlinger v. FBI, 596 F. Supp. at 871. But see Rizzo v. Tyler, 438 F. Supp. 895, 899 (S.D.N.Y. 1977) (agency fee waiver denial reviewed de novo).

<sup>99</sup> 5 U.S.C. § 706 (1988).

<sup>100</sup> Crooker v. Department of the Army, 577 F. Supp. at 1224.

<sup>101</sup> 5 U.S.C. § 552(a)(4)(A)(vii).

<sup>102</sup> Id.; see, e.g., American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d at 209 (judicial review limited to record before agency); Carney v. United States Dep't of Justice, slip op. at 16 (court's consideration of fee waiver request limited to record before agency).

<sup>103</sup> See National Treasury Employees Union v. Griffin, 811 F.2d at 648 (court may consider only information before the agency at time of decision);  
(continued...)

## LITIGATION CONSIDERATIONS

to an agency's fee waiver policy is not automatically rendered moot where the agency reverses itself and grants the specific fee waiver request; courts may still entertain such challenges from plaintiffs who are frequent FOIA requesters.<sup>104</sup>

Because the FOIA Reform Act's statutory fee waiver provision has still received only relatively limited interpretation by the courts thus far,<sup>105</sup> it still remains to be seen how novel issues of interpretation regarding its "public interest" standard will be adjudicated. For additional guidance on any particular fee waiver issue, agencies may contact OIP's FOIA Counselor Service.

## LITIGATION CONSIDERATIONS

A Freedom of Information Act lawsuit involves unique procedural and substantive concerns that even the experienced litigator might at first find bewildering. As one appellate court has frankly acknowledged: "Freedom of Information Act cases are peculiarly difficult."<sup>1</sup> To provide a general overview of selected FOIA litigation considerations, this discussion will follow a rough chronology of a typical FOIA lawsuit, from the point of determining whether jurisdictional prerequisites have been met to the assessment of costs on appeal.

### Jurisdiction and Venue

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

On complaint, the district court of the United States in the

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<sup>103</sup>(...continued)

Larson v. CIA, 843 F.2d at 1483 (information not part of administrative record may not be considered by district court when reviewing agency fee waiver denial); Fitzgibbon v. Agency for Int'l Dev., 724 F. Supp. at 1051 n.10 ("post hoc rationales" offered in response to lawsuit held untimely); Gilday v. United States Dep't of Justice, No. 85-292, slip op. at 5 (D.D.C. July 22, 1985) (agency cannot wait until after litigation has commenced before giving reasons for denying fee waiver); Allen v. DOD, No. 81-2543, slip op. at 12 (D.D.C. Aug. 24, 1984) (post hoc rationalization for fee waiver denial rejected); see also FOIA Update, Winter/Spring 1987, at 10; FOIA Update, Winter 1985, at 6.

<sup>104</sup> See Better Gov't Ass'n v. Department of State, 780 F.2d 86, 91-92 (D.C. Cir. 1986); Public Citizen v. OSHA, No. 86-705, slip op. at 2-3 (D.D.C. Aug. 5, 1987).

<sup>105</sup> See Hoffman v. IRS, slip op. at 3 (observing that relatively little precedent exists construing fee waiver standard).

<sup>1</sup> Miscavige v. IRS, No. 92-8659, slip op. 3284, 3285 (11th Cir. Sept. 17, 1993) (to be published).

## LITIGATION CONSIDERATIONS

district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.<sup>2</sup>

Initially, it should be noted that subject matter jurisdiction is determined as of the date on which the complaint in a FOIA lawsuit is filed.<sup>3</sup> The Supreme Court ruled in 1980 that jurisdiction in a FOIA case is predicated upon the plaintiff showing that an agency has (1) improperly (2) withheld (3) agency records.<sup>4</sup> Thus, a plaintiff who does not allege any improper withholding of agency records fails to state a claim for which a court has jurisdiction under the FOIA.<sup>5</sup> In a companion case, the Supreme Court elaborated upon the definition of agency records, explaining that "an agency must first either create or obtain a record as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA."<sup>6</sup> More recently, in United States Department of Justice v. Tax Analysts, the Supreme Court further refined the agency record definition by requiring that a record be in the agency's possession for official purposes at

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<sup>2</sup> 5 U.S.C. § 552(a)(4)(B) (1988); see also Rogers v. United States, 15 Ct. Cl. 692, 698 (1988) (no FOIA jurisdiction in Court of Claims).

<sup>3</sup> Atkin v. EEOC, No. 92-3275, slip op. at 6-7 (D.N.J. June 24, 1993) (where plaintiff exhausted administrative remedies by paying requisite FOIA fees only after complaint was filed, court lacked subject matter jurisdiction in case) (appeal pending).

<sup>4</sup> Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980).

<sup>5</sup> See, e.g., Shafmaster Fishing Co. v. United States, 814 F. Supp. 182, 184 (D.N.H. 1993) ("The court thus lacks subject matter jurisdiction if the information was properly withheld under FOIA exemptions."); National Fed'n of Fed. Employees v. United States, No. 87-2284, slip op. at 39 (D.D.C. May 27, 1988) (The FOIA "authorizes this Court only to 'enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.'" (quoting 5 U.S.C. § 552(a)(4)(B))). But see Payne Enters. v. United States, 837 F.2d 486, 490-92 (D.C. Cir. 1988) (repeated, unacceptably long agency delays in providing nonexempt information found sufficient to create jurisdiction); Public Citizen v. Office of the United States Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (court has jurisdiction to consider "agency's policy to withhold temporarily, on a regular basis, certain types of documents").

<sup>6</sup> Forsham v. Harris, 445 U.S. 169, 182 (1980); see also Rush Franklin Publishing, Inc. v. NASA, No. 90-CV-2885, slip op. at 8-9 (E.D.N.Y. Apr. 13, 1992) (mailing list generated and maintained by contractor for purposes of disseminating agency publication held not an agency record); Conservation Law Found. v. Department of the Air Force, No. 85-4377, slip op. at 8 (D. Mass. June 6, 1986) (computer program produced and possessed exclusively by government contractor in connection with contract to analyze federal data held not an agency record).

## LITIGATION CONSIDERATIONS

the time of the FOIA request.<sup>7</sup> (For a further discussion of "agency records," see Procedural Requirements, above.)

Whether an agency has "improperly" withheld records usually turns on the application of one or more exemptions applied to the documents at issue.<sup>8</sup> Of course, if the agency can establish that no responsive records exist,<sup>9</sup> or that all responsive records have been released to the requester,<sup>10</sup> the agency's refusal to produce them should not be deemed "improper" withholding within the meaning of the FOIA's jurisdictional provision. Similarly, an agency has not improperly withheld records where it is prohibited from disclosing them by a preexisting court order.<sup>11</sup> While the validity of such a preexisting court

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<sup>7</sup> 492 U.S. 136, 145 (1989).

<sup>8</sup> See United States Dep't of Justice v. Tax Analysts, 492 U.S. at 152-54 (nonexempt federal district court tax case opinions maintained by Justice Department's Tax Division found to be "improperly" withheld notwithstanding public availability through another source).

<sup>9</sup> See, e.g., Cal-Almond, Inc. v. United States Dep't of Agric., 960 F.2d 105, 108-09 (9th Cir. 1992) (absent improper conduct by government, FOIA does not require recreation of destroyed records); Ray v. United States Dep't of Justice, 908 F.2d 1549, 1558-59 (11th Cir. 1990), rev'd on other grounds sub nom. United States Dep't of State v. Ray, 112 S. Ct. 541 (1991); Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 17 (D.D.C. Apr. 13, 1989), aff'd, No. 89-5185 (D.C. Cir. Feb. 26, 1990). But see Cal-Almond, Inc. v. United States Dep't of Agric., No. CV-F-89-574, slip op. at 2-3 (E.D. Cal. Mar. 12, 1993) (where agency returned requested records to submitter four days after denying requester's administrative appeal, in violation of its own records-retention requirements, and court determined such records were required to be disclosed, agency must seek return of records from submitter for disclosure to requester); see also FOIA Update, Spring 1991, at 5 (advising agencies to afford administrative appeal rights to FOIA requesters in "no record" situations (citing Oglesby v. United States Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990))).

<sup>10</sup> See, e.g., Steffen v. United States Dep't of Justice, No. 89-3434, slip op. at 7-8 (D.D.C. July 12, 1990); Williams v. United States Dep't of Justice, No. 87-1567, slip op. at 1 (D.D.C. Nov. 5, 1987), summary affirmance granted, No. 87-5410 (D.C. Cir. Aug. 31, 1988); Southam News v. INS, 674 F. Supp. 881, 889 (D.D.C. 1987).

<sup>11</sup> See, e.g., GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 384-86 (1980); Freeman v. United States Dep't of Justice, 723 F. Supp. 1115, 1120 (D. Md. 1988); Legal Times, Inc. v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,234, at 80,585 (D.D.C. Sept. 2, 1980); see also FOIA Update, Summer 1983, at 5. But see also FOIA Update, Summer 1992, at 5 (advising that "protective orders" issued by administrative law judges do not qualify as such court orders).

## LITIGATION CONSIDERATIONS

order does not depend upon whether it is based upon FOIA exemptions,<sup>12</sup> it is the agency's burden to demonstrate that the order was intended to operate as an injunction against the agency, rather than as a mere court seal.<sup>13</sup>

A somewhat related principle under the FOIA, although one not at all well settled or commonly applied, is that in a rare case, a court may decline to order the disclosure of nonexempt information as a matter of "equitable discretion." The Court of Appeals for the District of Columbia Circuit has recognized that this principle can be applicable under "exceptional circumstances."<sup>14</sup> This principle should be advanced in court only under strongly compelling circumstances.<sup>15</sup>

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<sup>12</sup> See Wagar v. United States Dep't of Justice, 846 F.2d 1040, 1047 (6th Cir. 1988).

<sup>13</sup> Morgan v. United States Dep't of Justice, 923 F.2d 195, 197-99 (D.C. Cir. 1991); see, e.g., Armstrong v. Executive Office of the President, No. 89-142, slip op. at 8 (D.D.C. Sept. 3, 1993) ("[I]t is also clear that the Protective Order was not intended to act as a limitation on the Government's ability to determine the final disposition of these classified materials."); Senate of P.R. v. United States Dep't of Justice, No. 84-1829, slip op. at 13-14 (D.D.C. Aug. 24, 1993) (finding agency declaration failed to satisfy Morgan test and requiring more detailed explanation of intended effect of sealing order); McDonnell Douglas Corp. v. NASA, No. 91-3134, slip op. at 1-2 (D.D.C. July 12, 1993) ("While this court's sealing Order temporarily precluded release, that order was not intended to operate as the functional equivalent of an injunction prohibiting release. It was only approved by the court for the purposes of expediting this litigation and protecting information . . . until this lawsuit was resolved.") (appeal pending); see also Lykins v. United States Dep't of Justice, 725 F.2d 1455, 1460-61 & n.7 (D.C. Cir. 1984) (state court order does not affect analysis or conclusion of federal court as to whether document "improperly withheld").

<sup>14</sup> See Halperin v. Department of State, 565 F.2d 699, 706 (D.C. Cir. 1977) (citing Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971)), cert. denied, 434 U.S. 1046 (1978); see also Weber Aircraft Corp. v. United States, 688 F.2d 638, 646 (9th Cir. 1982), rev'd on other grounds, 465 U.S. 792 (1984); Patriarca v. FBI, No. 85-707, slip op. at 1 (D.R.I. Nov. 13, 1985) (order preliminarily enjoining defendants from making release of nonexempt records), motion to dismiss denied, 639 F. Supp. 1193 (D.R.I. 1986); K. Davis, Administrative Law Treatise § 5:25 (2d ed. 1978 & Supp. 1989). But see Washington Post Co. v. United States Dep't of State, 685 F.2d 698, 700, 704 (D.C. Cir. 1982), vacated & remanded, 464 U.S. 979 (1983).

<sup>15</sup> See, e.g., O'Rourke v. United States Dep't of Justice, 684 F. Supp. 716, 719 (D.D.C. 1988) (finding insufficient basis for denying access on such equitable grounds); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 445 F. Supp. 699, 705-06 (S.D.N.Y. 1978) (denial based on equitable discretion), aff'd on other grounds, 587 F.2d 544, 546 (2d Cir. 1978) (equitable discretion accepted in principle).

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The venue provision of the FOIA, quoted above, provides requesters with a broad choice of forums in which to bring suit. The United States District Court for the District of Columbia has over the years decided a great many of the leading cases under the FOIA, largely as the result of its designation as an appropriate forum for any FOIA action against a federal agency under 5 U.S.C. § 552(a)(4)(B). Indeed, the District of Columbia has been held to be the sole appropriate forum for cases in which the requester resides and works outside the United States and the records requested are located in the District of Columbia.<sup>16</sup> It is not yet settled, however, whether this provision affords "personal jurisdiction" in that judicial district for FOIA suits brought against the Tennessee Valley Authority, a wholly owned federal corporation outside the court's normal extraterritorial service of process.<sup>17</sup> It should also be noted that, unlike under other federal venue provisions, aliens are treated the same as citizens for FOIA venue purposes.<sup>18</sup>

The judicial doctrine of forum non conveniens--as codified in 28 U.S.C. § 1404(a)--can permit the transfer of a FOIA case to a different judicial district. The courts have invoked this doctrine to transfer FOIA cases under a variety of circumstances.<sup>19</sup> Similarly, where the requested records are the subject of

<sup>16</sup> See Akutowicz v. United States, 859 F.2d 1122, 1126 (2d Cir. 1988).

<sup>17</sup> Compare Jones v. NRC, 654 F. Supp. 130, 132 (D.D.C. 1987) (no) with Murphy v. TVA, 559 F. Supp. 58, 59 (D.D.C. 1983) (yes).

<sup>18</sup> See Arevalo-Franco v. INS, 889 F.2d 589, 590-91 (5th Cir. 1989) (alien may bring FOIA suit in district where he in fact resides).

<sup>19</sup> See, e.g., Bauer v. United States, No. Civ. 91-374A, slip op. at 3 (W.D.N.Y. Feb. 3, 1992) (venue improper where pro se suit filed; action transferred to jurisdiction where records located); Housley v. United States Dep't of Justice, No. 89-436, slip op. at 3-4 (D.D.C. Nov. 13, 1989) (transfer to district where criminal proceeding against plaintiff was held and where evidence obtained by government's electronic surveillance allegedly was improperly withheld); Sims v. United States Dep't of Justice, No. 86-231, slip op. at 1 (D.D.C. Apr. 22, 1986) (transfer to district where documents are located, near where plaintiff resides, when "[n]one of the matters at issue . . . have any connection with the District of Columbia"); General Dynamics Corp. v. Department of the Army, No. 85-3901, slip op. at 2 (D.D.C. Jan. 10, 1986) (transfer to district where there are pending criminal charges relating generally to subject matter of requested documents); Mobil Corp. v. SEC, 550 F. Supp. 67, 70-71 (S.D.N.Y. 1982) (sua sponte transfer to district where the 7,000 documents at issue were located and where related litigation was pending); Ferri v. United States Dep't of Justice, 441 F. Supp. 404, 406-07 (M.D. Pa. 1977) (sua sponte transfer because records sought were located in District of Columbia, all administrative action on request was taken there, and plaintiff's only nexus with transferring forum was his incarceration there); see also Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 79 (2d Cir. 1979) (expressing dissatisfaction with plaintiff's decision to lay venue for FOIA action in Southern District of New York where related, highly complex review of substantive OSHA rule was pending in (continued...))

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pending FOIA litigation in another judicial district, the related doctrine of "federal comity" can permit a court to defer to the jurisdiction of the other court, in order to avoid unnecessarily burdening the federal judiciary and delivering conflicting FOIA judgments.<sup>20</sup>

On rare occasions, FOIA plaintiffs have attempted to expedite judicial consideration of their suits by seeking a preliminary injunction to "enjoin" the agency from continuing to withhold the requested records.<sup>21</sup> When such extraordinary relief is sought, the court does not adjudicate the parties' substantive claims, but rather weighs: (1) whether the plaintiff is likely to prevail upon the merits; (2) whether the plaintiff will be irreparably harmed absent relief; (3) whether the defendant will be substantially harmed by the issuance of injunctive relief; and (4) whether the public interest will be benefited by such relief.<sup>22</sup>

In a FOIA case, the granting of such an injunction would invariably force the government to irrevocably disclose the very information that is the subject of the litigation prematurely, without affording it any opportunity to fully and fairly litigate its position on the merits; such an injunction would moot the government's claims before they could ever be adjudicated and would effectively

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<sup>19</sup>(...continued)

District of Columbia; suggesting transfers or stays on court's own motion if such cases arise in future). But see In re Scott, 709 F.2d 717, 721-22 (D.C. Cir. 1983) (writ of mandamus issued and case remanded where district court sua sponte transferred case, without determination of whether venue was proper in other forum, merely in effort to reduce burden of "very large number of in forma pauperis cases").

<sup>20</sup> See, e.g., Atkin v. EEOC, No. 92-1061, slip op. at 2 (D.D.C. July 7, 1992); Beck v. United States Dep't of Justice, No. 88-3433, slip op. at 11-12 (D.D.C. Jan. 31, 1991), summary affirmance granted in relevant part, No. 91-5292 (D.C. Cir. Nov. 19, 1992); see also FOIA Update, Summer 1985, at 6 ("[G]iving a litigant more than one opportunity in court is a 'luxury that cannot be afforded.'" (quoting C. Wright, Law of Federal Courts 678 (4th ed. 1983))).

<sup>21</sup> See United States Dep't of Commerce v. Assembly of Cal., 112 S. Ct. 19 (1991) (staying preliminary injunction issued in No. Civ. S-91-0990 (E.D. Cal. Aug. 20, 1991)); Aronson v. HUD, 869 F.2d 646, 648 (1st Cir. 1989); Assassination Archives & Research Ctr., Inc. v. CIA, No. 88-2600, slip op. at 1 (D.D.C. Sept. 29, 1988), summary reversal denied, No. 88-5315 (D.C. Cir. Oct. 13, 1988).

<sup>22</sup> Nation Magazine v. United States Dep't of State, 805 F. Supp. 68, 72 (D.D.C. 1992); see Assassination Archives & Research Ctr., Inc. v. CIA, slip op. at 1; accord Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (non-FOIA case); see also Mayo v. United States Gov't Printing Office, No. C-92-1922, slip op. at 4-5 (N.D. Cal. June 16, 1992) (fact that FOIA expressly authorizes injunctive relief does not divest district court of obligation to "exercise its sound discretion," relying on traditional legal standards, in granting such relief (citing Weinberger v. Romero Barcelo, 456 U.S. 305, 312 (1982))).

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destroy any possibility of appellate review.<sup>23</sup> Consequently, the government would presumptively sustain irreparable harm in any instance in which a preliminary injunction were issued in a FOIA case.<sup>24</sup>

Moreover, because a court can exercise FOIA jurisdiction only after it has first determined that there has been an improper withholding, there exists a substantial question as to whether the statute even empowers a court to issue a preliminary injunction.<sup>25</sup> These considerations lead to the conclusion that the extraordinary mechanism of preliminary injunctive relief should be unavailable in FOIA cases, although expedited processing may sometimes be appropriate. (See discussion of expedited processing under "Open America" Stays, below.)

As a final jurisdictional point, it should be remembered that a FOIA plaintiff, like any other, must file suit before expiration of the applicable statute of limitations. In Spannaus v. Department of Justice, the D.C. Circuit applied the general federal statute of limitations, 28 U.S.C. § 2401(a) (1988), to FOIA actions.<sup>26</sup> Section 2401(a) states, in pertinent part, that "every action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." In Spannaus it was held that the FOIA cause of action accrued--and, therefore, the statute of limitations began to run--once the plaintiff had "constructively" exhausted his administrative remedies (see discussion of Exhaustion of Administrative Remedies, below) and not when all administrative appeals had been finally adjudicated.<sup>27</sup> In accordance with the Spannaus decision, the National Archives and Records Administration propounded NARA Bulletin No. 87-6 (Apr. 6, 1987), which now sets the record-retention period at six years for all correspondence and supporting documentation relating to denied FOIA requests.<sup>28</sup>

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<sup>23</sup> See Aronson v. HUD, 869 F.2d at 648 ("To issue the preliminary injunction discloses the names, permanently injuring the interest HUD seeks to protect . . .").

<sup>24</sup> See generally FOIA Update, Summer 1991, at 1-2 (discussing comparable situation of unstayed disclosure orders).

<sup>25</sup> Cf. Kissinger v. Reporters Comm. for Freedom of the Press, 455 U.S. at 150 (absent improper withholding, FOIA confers no "[j]udicial authority to devise remedies and enjoin agencies"); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 147-48 (1975) (once it is determined that withheld information falls within one of FOIA's exemptions FOIA "'does not apply' to such documents").

<sup>26</sup> 824 F.2d 52, 55-56 (D.C. Cir. 1987).

<sup>27</sup> Id. at 57-59; see Peck v. CIA, 787 F. Supp. 63, 65-66 (S.D.N.Y. 1992) (once ten-day constructive exhaustion period has run, statute of limitations is not tolled while request for information is pending before agency).

<sup>28</sup> See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 28 n.51 (Dec. 1987) (agencies should be sure to maintain any "excluded" records for purposes of possible further review) (citing FOIA Update, Fall 1984, at 4 (same regarding "personal" records)); see also (continued...)



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### Pleadings

The agency's time to answer a FOIA complaint is 30 days from the date of service of process,<sup>29</sup> not the usual 60 days that are permitted by Federal Rule of Civil Procedure 12(a). While courts are no longer required to automatically accord expedited treatment to FOIA lawsuits, they may still, in their discretion, expedite any such case "if good cause therefor is shown."<sup>30</sup>

FOIA lawsuits are adjudicated according to standards and procedures that are quite atypical within the field of administrative law. Not only is the usual "substantial evidence" standard of review of agency action replaced in the FOIA by a de novo review standard, but the defendant agency bears the burden of justifying its decision to withhold any information.<sup>31</sup> (Lawsuits brought ostensibly under the FOIA may be summarily dismissed, pursuant to 28 U.S.C. § 1915(d), where "[r]eview of the complaint, and its supplements and amendments, show that [the] suit is utterly frivolous, vexatious, and malicious."<sup>32</sup>)

<sup>28</sup>(...continued)

Cal-Almond, Inc. v. United States Dep't of Agric., slip op. at 2-3 (where agency returned requested records to submitter in violation of its own records-retention requirements, and court determined such records were required to be disclosed, agency must seek return of records from submitter for disclosure to requester).

<sup>29</sup> 5 U.S.C. § 552(a)(4)(C) (1988).

<sup>30</sup> 28 U.S.C. § 1657 (1988) (repealing 5 U.S.C. § 552(a)(4)(D) (1982)); see also FOIA Update, Spring 1985, at 6.

<sup>31</sup> 5 U.S.C. § 552(a)(4)(B); see also King v. United States Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987); Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 315 (D.C. Cir. 1988); Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974); cf. Trenerry v. United States Dep't of Treasury, No. 92-5052, slip op. at 9-10 (10th Cir. Feb. 5, 1993) (although district court used phrase "arbitrary and capricious" in discussing scope of review, its decision will be upheld where "reviewing the entire order clearly reveals that the court performed a de novo review and correctly placed the burden on IRS").

<sup>32</sup> Chambers v. Carlson, No. 87-0390, slip op. at 2 (D.D.C. June 16, 1987); see, e.g., Butler v. Marshall, No. 92-16955, slip op. at 1-2 (9th Cir. May 25, 1993) (district court properly dismissed, as frivolous, in forma pauperis complaint before service of process where plaintiff sought to sue state agency under federal FOIA); McCloud v. Meese, No. 87-3011, slip op. at 2 (6th Cir. Sept. 30, 1987) (suit dismissed as frivolous when plaintiff failed to amend complaint to allege which records were improperly withheld); Franklin v. Oregon, 563 F. Supp. 1310, 1331 (D. Or. 1983) (suit dismissed as frivolous where plaintiff failed to explain how state officials could have violated FOIA); cf. United States v. Kaun, 827 F.2d 1144, 1152-53 (7th Cir. 1987) (frivolous FOIA suits not constitutionally protected, so injunction against filing one not overbroad); Crooker v. Marshals Serv., 641 F. Supp. 1141, 1143 (D.D.C.

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Where Exemption 1 is invoked, most courts have applied a somewhat lesser standard of review for classified documents in order not to compromise national security. (See discussion of Exemption 1, above.) With respect to FOIA issues other than those involving the propriety of agency withholding of records, one circuit court has applied the de novo standard of review in a lawsuit dealing with an alleged violation of subsection (a)(1) of the FOIA, 5 U.S.C. § 552(a)(1).<sup>33</sup>

A major exception to the de novo standard of review are "reverse" FOIA lawsuits, in which the more deferential "arbitrary and capricious" standard is applied. (See discussion of "Reverse" FOIA, below.) Judicial review of fee waiver denials was undertaken according to the "arbitrary and capricious" standard prior to the 1986 FOIA amendments, which now mandate that courts are to determine fee waiver issues under the de novo standard of review, but are to limit their scope of review to the record before the agency. (See discussion of Fees and Fee Waivers, above.)

There is a sound general rule that only federal agencies and departments are proper party defendants in FOIA litigation. This rule is derived from the language of 5 U.S.C. § 552(a)(4)(B), which vests the district courts with jurisdiction to enjoin "the agency" from withholding records.<sup>34</sup> The great majority of courts have held that the head of an agency or other agency officials or employees sued in their official capacities are not proper party defendants under the FOIA.<sup>35</sup> A minority of courts, however, has disagreed with this posi-

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<sup>32</sup>(...continued)

1986) (given "plethora" of FOIA suits filed by plaintiff and fact that plaintiff fails routinely to oppose motions to dismiss, plaintiff's "litigation efforts have been for purposes of harassment"; plaintiff ordered to attach a memorandum to any subsequent lawsuit explaining why that suit is not barred by res judicata).

<sup>33</sup> See Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1011 (9th Cir. 1987).

<sup>34</sup> See, e.g., Voinche v. United States Dep't of Justice, No. 87-4781, slip op. at 1-2 (5th Cir. Feb. 4, 1988) (no basis for suit against state governor, private citizen or telephone company), cert. denied, 486 U.S. 1040 (1988); Maxberry v. Eastern Plasma, No. 87-3022, slip op. at 3 (6th Cir. Aug. 11, 1987) (private institutions not proper party defendants); Espenshade v. Carbone, No. 86-2610, slip op. at 2-3 (D.D.C. May 15, 1987) (no proper party defendant where plaintiff sued individuals, Pennsylvania State University and the United States, without naming agency that allegedly withheld records improperly); Gillard v. United States Marshals Serv., No. 87-689, slip op. at 1-2 (D.D.C. May 11, 1987) (District of Columbia not proper party defendant under federal FOIA).

<sup>35</sup> See, e.g., Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993); Petrus v. Bowen, 833 F.2d 581, 582 (5th Cir. 1987); Stone v. Defense Investigative Serv., 816 F. Supp. 782, 785 (D.D.C. 1993) (appeal pending); Sherwood Van Lines v. United States Dep't of the Navy, 732 F. Supp. 240, 241 (D.D.C. 1990); Friedman v. FBI, 605 F. Supp. 314, 317 (N.D. Ga. 1984);

(continued...)

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tion.<sup>36</sup> It also has been observed that the "United States," as such, is not a proper party defendant in a FOIA case.<sup>37</sup>

It is clear that an agency in possession of records originating with another agency cannot refuse to process those records merely by advising the requester to seek them directly from the other agency.<sup>38</sup> In litigation, the defendant agency ordinarily will include, in its court submissions, affidavits from the originating agency to address any contested withholdings in its records.<sup>39</sup> (For a further discussion of agency referral practices, see Procedural Requirements, above.)

### Exhaustion of Administrative Remedies

The general rule under the FOIA is that administrative remedies must be exhausted prior to judicial review.<sup>40</sup> Indeed, where a FOIA plaintiff attempts to obtain judicial review without first properly undertaking full and timely administrative exhaustion, his lawsuit is subject to ready dismissal for lack of

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<sup>35</sup>(...continued)

Providence Journal Co. v. FBI, 460 F. Supp. 778, 782-83 & n.2 (D.R.I. 1978) rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980).

<sup>36</sup> See, e.g., Henry v. FBI, No. 90-1987, slip op. at 5-6 (W.D. La. Oct. 7, 1991); Diamond v. FBI, 532 F. Supp. 216, 219-20 (S.D.N.Y. 1981), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984); Hamlin v. Kelley, 433 F. Supp. 180, 181 (N.D. Ill. 1977).

<sup>37</sup> See Maginn v. United States, No. 92-313, slip op. at 7 (W.D. Pa. May 29, 1992); Western Life Ins. Co. v. United States, 512 F. Supp. 454, 463 (N.D. Tex. 1980).

<sup>38</sup> See Ostrer v. Department of Justice, No. 85-506, slip op. at 7-8 (D.D.C. Feb. 7, 1986), amended, slip op. at 2-3 (D.D.C. Apr. 9, 1986).

<sup>39</sup> See, e.g., Williams v. FBI, No. 92-5176, slip op. at 2 (D.C. Cir. May 7, 1993); Oglesby v. United States Dep't of the Army, 920 F.2d 57, 69 & n.15 (D.C. Cir. 1990); Fitzgibbon v. CIA, 911 F.2d 755, 757 (D.C. Cir. 1990); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 706-07 & n.1 (W.D.N.Y. 1991); see also FOIA Update, Summer 1991, at 3-4 ("OIP Guidance: Referral and Consultation Procedures").

<sup>40</sup> Oglesby v. United States Dep't of the Army, 920 F.2d 57, 61-62 (D.C. Cir. 1990); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990); Spannaus v. United States Dep't of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987); Stebbins v. Nationwide Mutual Ins. Co., 757 F.2d 364, 366 (D.C. Cir. 1985); Tuchinsky v. Selective Serv. Sys., 418 F.2d 155, 158 (7th Cir. 1969); Gale v. United States Gov't, 786 F. Supp. 697, 699 (N.D. Ill. 1990).

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subject matter jurisdiction.<sup>41</sup> It is self-evident that a plaintiff cannot evade proper FOIA procedures by attempting to file his FOIA request as part of a judicial proceeding.<sup>42</sup> (For a further discussion of the proper submission of requests, see Procedural Requirements, above.)

It is important to recognize, though, that the FOIA permits requesters to treat an agency's failure to comply with its specific time limits as full, or "constructive," exhaustion of administrative remedies.<sup>43</sup> Thus, when an agency does not respond to a perfected request within the ten-day statutory time limitation set forth in 5 U.S.C. § 552(a)(6)(A)(i), the requester is deemed to have exhausted administrative remedies and can seek immediate judicial review, even where the requester has not filed an administrative appeal.<sup>44</sup> Interestingly, the

<sup>41</sup> See, e.g., Dettman v. United States Dep't of Justice, 802 F.2d 1472, 1477 (D.C. Cir. 1986); Hymen v. MSPB, 799 F.2d 1421, 1423 (9th Cir. 1986); Brumley v. United States Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 790 (D.D.C. 1992) (although U.S. Attorney's Office aware that information requester sought from FBI included certain U.S. Attorney's Office material, it was under no obligation to independently search its own files for responsive information absent a direct request); Crooker v. United States Secret Serv., 577 F. Supp. 1218, 1219-20 (D.D.C. 1983), appeal dismissed, No. 83-2203 (D.C. Cir. Feb. 21, 1984).

<sup>42</sup> Gillin v. IRS, 980 F.2d 819, 822-23 (1st Cir. 1992) (where "flawed" request was predicated upon a misunderstanding with agency but, within one week after submission, information provided by agency should have prompted requester to revise his request, requester cannot salvage request by clarification in litigation); Pollack v. United States Dep't of Justice, No. 89-2569, slip op. at 8-9 (D. Md. July 23, 1993) (court lacks subject matter jurisdiction where request not submitted until after litigation filed); Centracchio v. FBI, No. 92-357, slip op. at 13 (D.D.C. Mar. 16, 1993); Muhammad v. United States Bureau of Prisons, 789 F. Supp. 449, 450-51 (D.D.C. 1992); see also McDonnell v. United States, No. 91-5916, slip op. at 11 (3d Cir. Sept. 21, 1993) ("[A] person . . . whose names does not appear on a FOIA request for records may not sue in district court when the agency refuses to release requested documents because he has not administratively asserted a right to receive them in the first place.") (to be published). But see Hammie v. Social Sec. Admin., 765 F. Supp. 1224, 1226 (E.D. Pa. 1991) (in considering government's dismissal motion, court is required to accept plaintiff's averments that he submitted requests).

<sup>43</sup> 5 U.S.C. § 552(a)(6)(C) (1988).

<sup>44</sup> See, e.g., Campbell v. Unknown Power Superintendent, No. 91-35104, slip op. at 3 (9th Cir. Apr. 22, 1992); Association of Community Orgs. for Reform Now v. Barclay, No. 3-89-409, slip op. at 4-7 (N.D. Tex. June 9, 1989); Virginia Transformer Corp. v. United States Dep't of Energy, 628 F. Supp. 944, 947 (W.D. Va. 1986); Jenks v. United States Marshals Serv., 514 F. Supp. 1383, 1384-87 (S.D. Ohio 1981); Information Acquisition Corp. v.

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Court of Appeals for the Fifth Circuit has recently held that a lawsuit brought under 5 U.S.C. § 552(a)(6)(e) as a result of the agency's failure to comply with these time limits is properly dismissed for mootness as soon as the agency makes a determination to either disclose or withhold the requested records.<sup>45</sup> The special right to immediate judicial review lapses, however, if an agency responds to a request at any time before suit is filed. In that situation, the requester must administratively appeal a denial and wait at least twenty working days for the agency to adjudicate that appeal--as is required by 5 U.S.C. § 552(a)(6)(A)(ii)--before commencing litigation. This point was made by the Court of Appeals for the District of Columbia Circuit in Oglesby v. United States Department of the Army, which held that "an administrative appeal is mandatory if the agency cures its failure to respond within the statutory [ten-day] period by responding to the FOIA request before suit is filed."<sup>46</sup> Thus, under Oglesby, if a FOIA requester waits beyond the ten-day period for the agency's initial response and then, in fact, receives that response before suing the agency, the requester must exhaust his administrative appeal rights before litigating the matter.<sup>47</sup>

Furthermore, of additional significance under Oglesby is a requester's obligation to file an administrative appeal within the time limit specified in an

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<sup>44</sup>(...continued)

Department of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978); see also FOIA Update, Jan. 1983, at 6.

<sup>45</sup> Voinche v. FBI, No. 93-4262, slip op. 6153, 6154 (5th Cir. Sept. 3, 1993) (to be published).

<sup>46</sup> 920 F.2d at 63; see, e.g., Government Employees' Advisors & Representatives, Inc. v. United States Dep't of Labor, No. 4-85-498-K, slip op. at 5-6 (N.D. Tex. Nov. 6, 1986); Walker v. IRS, No. 86-0073, slip op. at 4 (M.D. Pa. June 16, 1986); Caifano v. Parole Comm'n, No. 85-3513, slip op. at 2 (D.D.C. Feb. 26, 1986), dismissed (D.D.C. Sept. 18, 1986). But see generally Manos v. United States Dep't of the Air Force, No. C-92-3986, slip op. at 10-12 (N.D. Cal. Feb. 10, 1993) (exceptional decision holding that period for agency response determined by date response actually received by requester, not date response mailed by agency).

<sup>47</sup> 920 F.2d at 63-64; see, e.g., McDonnell v. United States, slip op. at 18-19 (applying Oglesby); Sloman v. United States Dep't of Justice, No. 92 Civ. 4982, slip op. at 6-8 (S.D.N.Y. May 4, 1993) (same); Triplett v. Attorney General, No. C-2-92-211, slip op. at 13-14 (S.D. Ohio Feb. 22, 1993) (same); Maryland Coalition for Integrated Educ., Inc. v. United States Dep't of Educ., No. 89-2851, slip op. at 7-8 (D.D.C. July 20, 1992) (same) (appeal pending); Gassei v. United States Dep't of Justice, No. 91-1031, slip op. at 1 (W.D. Okla. Nov. 22, 1991) (same); Grove v. CIA, 752 F. Supp. 28, 31 (D.D.C. 1990) (same); see also FOIA Update, Spring 1991, at 3-5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision").

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agency's FOIA regulations.<sup>48</sup> Indeed, even prior to Oglesby, several courts had held that once a requester receives an initial response, he must file an appeal within any applicable time limit, or else his lawsuit is subject to dismissal for failure to exhaust administrative remedies.<sup>49</sup>

In any event, it must be remembered that an agency response which merely acknowledges receipt of a request does not constitute a "determination" under the FOIA in that it neither denies records nor grants the right to appeal the agency's determination.<sup>50</sup> Significantly, the ten-day time period does not run until the request is received by the appropriate office in the agency, as set forth in the agency's regulations.<sup>51</sup> In fact, when an agency has regulations requiring that requests be made to specific offices for specific records, a request will not be deemed received--and no search for responsive records need be performed--if the requester does not follow those regulations.<sup>52</sup> Additionally, even where a requester has "constructively" exhausted his administrative remedies by the agency's failure to respond determinatively to the request within the statutory time limits, the requester is not entitled to a Vaughn Index during the administrative process.<sup>53</sup>

Even if the agency has exceeded its ten-day time limit for the processing of initial responses to a request, its twenty-day time limit for the processing of administrative appeals, or its ten-day extension of either time limit,<sup>54</sup> requesters have been deemed not to have constructively exhausted administrative remedies where they have failed to comply with agency requisites--for example,

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<sup>48</sup> See, e.g., 920 F.2d at 65 & n.9 (citing regulations of agencies involved in Oglesby); Lanter v. Department of Justice, No. 93-34, slip op. at 2 (W.D. Okla. July 30, 1993) (court compelled to dismiss FOIA claim when plaintiff's administrative appeal from agency's response not filed in timely manner); see also FOIA Update, Spring 1991, at 4-5.

<sup>49</sup> See, e.g., Lindsey v. NSA, No. 90-2408, slip op. at 3 (4th Cir. Oct. 9, 1990); Tripathi v. United States Dep't of Justice, No. 87-3301, slip op. at 2 (D.D.C. Apr. 15, 1988).

<sup>50</sup> See Martinez v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,005, at 83,435 (D.D.C. Dec. 1, 1982); FOIA Update, Summer 1992, at 5; see also Brumley v. United States Dep't of Labor, 767 F.2d at 445; cf. Dickstein v. IRS, 635 F. Supp. 1004, 1006 (D. Alaska 1986) (letter referring requester to alternative "procedures which involved less red tape and bureaucratic hassle" not deemed to be denial).

<sup>51</sup> Brumley v. United States Dep't of Labor, 767 F.2d at 445.

<sup>52</sup> See Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986); Hahn v. IRS, No. CA3-89-3254-D, slip op. at 2-3 (N.D. Tex. Aug. 24, 1990).

<sup>53</sup> See SafeCard Servs., Inc. v. SEC, No. 84-3073, slip op. at 3-5 (D.D.C. Apr. 21, 1986); Schaake v. IRS, No. 91-958, slip op. at 7-8 (S.D. Ill. June 3, 1992); see also FOIA Update, Summer 1986, at 6.

<sup>54</sup> See 5 U.S.C. § 552(a)(6).

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failed to provide required proof of identity<sup>55</sup> in first-party requests<sup>56</sup> or authorization by third parties,<sup>57</sup> failed to "reasonably describe" the records sought,<sup>58</sup> failed to comply with fee requirements,<sup>59</sup> failed to pay authorized fees incurred in a prior request before making new requests,<sup>60</sup> failed to present for review at the administrative appeal level any objection to earlier processing

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<sup>55</sup> See Summers v. United States Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (holding that authorization for release of records need not be notarized, but can be attested to under penalty of perjury pursuant to 28 U.S.C. § 1746).

<sup>56</sup> See, e.g., Lilienthal v. Parks, 574 F. Supp. 14, 17-18 (E.D. Ark. 1983).

<sup>57</sup> Freedom Magazine v. IRS, No. CV-91-4536, slip op. at 7-10 (C.D. Cal. Nov. 13, 1992) (court lacked jurisdiction where, prior to filing suit, plaintiff failed to provide waivers for third-party records as required by IRS regulations). But see LaRouche v. United States Dep't of Justice, No. 90-2753, slip op. at 15 (D.D.C. June 24, 1993) (although third-party waivers not submitted during administrative process, "they present solely legal issues which can properly be resolved by [the] Court").

<sup>58</sup> See, e.g., Gillin v. IRS, 980 F.2d at 822-23 (where defective request was predicated upon misunderstanding with agency, but within one week after submission, information provided by agency should have prompted requester to revise his request; request does not "reasonably describe" records actually sought); Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978); see also Voinche v. United States Dep't of the Air Force, 983 F.2d 667, 669 n.5 (5th Cir. 1993) (administrative remedies on fee waiver not exhausted where requester failed to amend request to conform to specificity required by agency regulations), petition for cert. filed, 61 U.S.L.W. 3820 (U.S. May 17, 1993).

<sup>59</sup> See, e.g., Kuchta v. Harris, No. 92-1121, slip op. at 5-9 (D. Md. Mar. 25, 1993) (failure to either pay fees or request fee waiver halts administrative process and precludes exhaustion); Centracchio v. FBI, slip op. at 5 ("Plaintiff's failure to pay the deposit or request a waiver is fatal to his claim and requires dismissal . . ."); Atkin v. EEOC, No. 91-2508, slip op. at 21-22 (D.N.J. Dec. 4, 1992) ("exhaustion does not occur where the requester has failed to pay the assessed fees, even though the agency failed to timely process a request") (appeal pending); Martorano v. FBI, No. 89-377, slip op. at 8 (D.D.C. Sept. 30, 1991) (plaintiff failed to either pay processing fees or provide information supporting fee waiver); Morello v. United States Dep't of Justice, No. 90-1078, slip op. at 4-5 (D.D.C. Oct. 16, 1990), *aff'd*, 948 F.2d 1337 (D.C. Cir. 1991) (table cite); Crooker v. CIA, 577 F. Supp. 1225, 1225 (D.D.C. 1984); see also Atkin v. EEOC, slip op. at 8-9 ("the fact that Atkin paid his fees after he instituted this action does not confer jurisdiction").

<sup>60</sup> See, e.g., Crooker v. United States Secret Serv., 577 F. Supp. at 1219-20; Mahler v. Department of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,032, at 82,262 (D.D.C. Sept. 29, 1981).

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practices,<sup>61</sup> or failed to administratively request a waiver of fees<sup>62</sup> or to challenge a fee waiver denial at the administrative appeal stage.<sup>63</sup>

### "Open America" Stays

Even when a requester has constructively exhausted administrative remedies, due to an agency's failure to comply with the FOIA's time deadlines, the Act provides that a court may retain jurisdiction and allow the agency additional time to complete its processing of the request if it can be shown that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request."<sup>64</sup>

The leading case construing this important "safety valve" provision of the FOIA is Open America v. Watergate Special Prosecution Force.<sup>65</sup> In Open America, the Court of Appeals for the District of Columbia Circuit held that "exceptional circumstances" may exist when an agency can show that it "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A)."<sup>66</sup> The D.C. Circuit further ruled that the "due diligence" requirement may be satisfied by an agency's good faith processing of all requests on a "first-in/first-out" basis, and that a requester's right to have his request processed out of turn requires a particularized showing of "exceptional need or urgency."<sup>67</sup> In so ruling, the D.C. Circuit rejected the notion that the mere filing of a lawsuit was a basis for such expedited treatment.<sup>68</sup>

Where Open America's requirements are met, an agency can apply for a stay of judicial proceedings to obtain whatever additional time is necessary to complete the administrative processing of the request.<sup>69</sup> In considering such

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<sup>61</sup> See, e.g., Dettman v. United States Dep't of Justice, 802 F.2d at 1477.

<sup>62</sup> Voinche v. United States Dep't of the Air Force, 983 F.2d at 669.

<sup>63</sup> See, e.g., Crooker v. CIA, No. 86-3055, slip op. at 4-5 (D.D.C. May 10, 1988).

<sup>64</sup> 5 U.S.C. § 552(a)(6)(C) (1988).

<sup>65</sup> 547 F.2d 605 (D.C. Cir. 1976).

<sup>66</sup> Id. at 616.

<sup>67</sup> Id.

<sup>68</sup> Id. at 615. But see Exner v. FBI, 542 F.2d 1121, 1123 (9th Cir. 1976) (adopting Judge Leventhal's concurring opinion in Open America and holding that filing of suit can move requester "up the line").

<sup>69</sup> See, e.g., Billington v. United States Dep't of Justice, No. 92-462, slip op. at 2-3 (D.D.C. July 27, 1992) (circumstances justify nearly three-year stay from date of order); Samuel Gruber Educ. Project v. United States Dep't of  
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applications, most courts have found "exceptional circumstances" where the agency is unable to meet the FOIA's time deadlines due to increased backlogs of requests and inadequate resources to handle them, and have found "due diligence" where the agency acts in good faith to process requests on a "first in/first out" basis.<sup>70</sup> Nevertheless, in Mayock v. INS,<sup>71</sup> a district court ruled that Open America's requisites were not satisfied when processing delays resulted from a "normal" backlog of routine requests.<sup>72</sup> Significantly, though, the

<sup>69</sup>(...continued)

Justice, No. 90-1912, slip op. at 6 (D.D.C. Feb. 8, 1991) (circumstances justify 22-month stay from date of order); Lisee v. CIA, 741 F. Supp. 988, 989-90 (D.D.C. 1990) (circumstances justify 26-month stay from date of order); Summers v. United States Dep't of Justice, 729 F. Supp. 1379, 1379 (D.D.C. 1989) (circumstances justify 22-month stay from date of order); Benny v. United States Dep't of Justice, No. 86-1172, slip op. at 4-6 (D.D.C. Oct. 21, 1986) (circumstances justify 12-month stay from date of order); Ely v. Executive Office for U.S. Attorneys, No. 84-2962, slip op. at 1 (D.D.C. Dec. 21, 1984) (24-month stay from date of FOIA request granted).

<sup>70</sup> See, e.g., Williamson v. INS, No. H-89-3421, slip op. at 2-3 (S.D. Tex. Apr. 11, 1991), aff'd per curiam, No. 91-2526, slip op. at 2 (5th Cir. May 4, 1992) (due diligence employed in "responding to the seemingly limitless number of FOIA requests on a first in/first out basis") (dicta); Freeman v. United States Dep't of Justice, 822 F. Supp. 1064, 1967 (S.D.N.Y. 1993) ("Defendant has established that it faces exceptional circumstances in that it has a substantial backlog even though it processes requests as quickly as possible within its financial ability."); Russell v. Barr, No. 92-2546, slip op. at 1-2 (D.D.C. Mar. 5, 1993); Wisconsin Project on Nuclear Arms Control v. United States Dep't of Energy, No. 90-1432, slip op. at 2-5 (D.D.C. Dec. 18, 1990); see generally FOIA Update, Spring 1992, at 8-10; FOIA Update, Winter 1990, at 1-2. But see Laroque v. United States Dep't of Justice, No. 86-2677, slip op. at 1-2 (D.D.C. Aug. 11, 1987) (further stays denied because agency failed to process records during one year since previous court deadline and failed to give reason for delay); Ely v. United States Marshals Serv., No. 83-C-569-S, slip op. at 2 (W.D. Wis. Oct. 31, 1983) (stay denied because length of agency backlog had not improved in six years); cf. Gilmore v. NSA, No. C-92-3646, slip op. at 20 (N.D. Cal. Sept. 13, 1993) (declining to exercise jurisdiction because "[g]iven the substantial number of FOIA requests that the NSA receives and the short deadline that FOIA imposes, the only way in which the NSA could consistently meet the deadlines would be if it vastly expanded the resources it devotes to responding to FOIA requests"); Caifano v. Wampler, 588 F. Supp. 1392, 1394-95 (N.D. Ill. 1984) (expressing concern that when agency is exercising due diligence no relief can be given for violation of 10-day response period; cannot order agency to reallocate resources; will not permit filing of suit to jump requester to "front of line").

<sup>71</sup> 714 F. Supp. 1558 (N.D. Cal. 1989), rev'd & remanded sub nom. Mayock v. Nelson, 938 F.2d 1066 (9th Cir. 1991).

<sup>72</sup> 714 F. Supp. at 1565-66; accord Ray v. United States Dep't of Justice, No. 89-288, slip op. at 11-12 (S.D. Fla. Dec. 27, 1990).

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Court of Appeals for the Ninth Circuit subsequently reversed and remanded Mayock, finding that it was unclear whether the district court had considered agency evidence that it had attempted to get increased funding to reduce its backlog.<sup>73</sup>

It should be remembered that an "Open America" stay may be denied where the requester can show an "exceptional need or urgency" for having his request processed out of turn.<sup>74</sup> Such a showing has been made in cases where the requester's life or personal safety, or substantial due process rights, would be jeopardized by the failure to process a request immediately.<sup>75</sup> Absent truly exceptional circumstances, though, most courts have declined to order expedited processing where records are "needed" for post-judgment attacks on

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<sup>73</sup> 938 F.2d at 1007-08; see also Narducci v. United States Dep't of Justice, No. 91-2972, slip op. at 2 (D.D.C. June 16, 1992) (government's motion to dismiss denied when year had passed since request was made, it did not appear that request would be processed in near future, and FBI had not indicated that it had attempted to reduce its large backlog by proposing legislation or requesting additional staff); Rosenfeld v. United States Dep't of Justice, No. C-90-3576, slip op. at 8-13 (N.D. Cal. Feb. 18, 1992) ("exceptional circumstances" justifying processing stay not present where, despite substantial backlog, FBI made no significant effort to increase resources to satisfy FOIA obligations; nonetheless, FBI given one year to complete processing of 220,000 pages of records).

<sup>74</sup> Open America, 547 F.2d at 616.

<sup>75</sup> See, e.g., Ferguson v. FBI, 722 F. Supp. 1137, 1141-44 (S.D.N.Y. 1989) (need for documents, not otherwise available, in post-conviction challenge and upcoming criminal trial); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (plaintiff facing multiple criminal charges carrying possible death penalty in state court); Boult v. Department of Justice, No. C76-1217A, slip op. at 3-4 (N.D. Ga. Oct. 22, 1976) (pending deportation that could endanger requester's physical safety); see also Florida Rural Legal Servs. v. United States Dep't of Justice, No. 87-1264, slip op. at 3-4 (S.D. Fla. Feb. 10, 1988) (processing priority granted to nonprofit organization needing list of undocumented aliens in order to assist them in making timely applications for legalization); FOIA Update, Summer 1983, at 3 ("OIP Guidance: When to Expedite FOIA Requests"); Compare Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 6 (D.D.C. Oct. 2, 1992) (expedited processing granted where scope of request limited, "Jenks Act" type material unavailable in state prosecution, and information useful to plaintiff's criminal defense may be contained in requested documents) with Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 11-12 (D.D.C. June 28, 1993) (denying further expedited treatment where processing "would require a hand search of approximately 50,000 pages, taking approximately 120 days"). But see Billington v. United States Dep't of Justice, No. 92-462, slip op. at 3-5 (D.D.C. July 27, 1992) (expedited treatment denied despite pendency of prosecutions, where requester had not shown any likelihood that files contain "materially exculpatory information").

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criminal convictions,<sup>76</sup> or for use in other civil litigation.<sup>77</sup> In addition, it has been held firmly that publishing deadlines are not sufficient grounds for expedited processing.<sup>78</sup> (For a further discussion of expedited processing, see Procedural Requirements, above.)

Where there is a large volume of responsive documents that have not been processed, instead of granting an unconditional Open America stay to the agency until all initial processing has been completed, a court may grant a stay that provides for interim or "timed" releases.<sup>79</sup>

Finally, an "Open America" stay should, where necessary, include the time required for preparation of a Vaughn Index.<sup>80</sup> While the Open America decision does not directly address the additional time needed by an agency to

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<sup>76</sup> See, e.g., Russell v. Barr, slip op. at 2 ("[p]laintiff's claim that the requested information may 'minister [his] defense in the civil proceeding and motion for a new trial' in his criminal proceeding" inadequate to justify expedition); Thompson v. FBI, No. 90-3020, slip op. at 3 (D.D.C. July 8, 1991); Shilling v. Bureau of Alcohol, Tobacco & Firearms, No. 90-1422, slip op. at 3 (D.D.C. Dec. 3, 1990); Crabtree v. United States Dep't of Justice, No. 88-0861, slip op. at 5 (D.D.C. Aug. 26, 1988); Antonelli v. FBI, No. 84-1047, slip op. at 2-3 (D.D.C. Nov. 13, 1984); Gonzalez v. DEA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,016, at 81,069 (D.D.C. Nov. 20, 1980).

<sup>77</sup> See, e.g., Price v. CIA, No. 90-1507, slip op. at 2 (4th Cir. Oct. 2, 1990); Steffen v. United States Dep't of Justice, No. 89-3434, slip op. at 3 (D.D.C. July 12, 1990); Benny v. United States Dep't of Justice, slip op. at 5; Grandison v. DEA, No. 81-1001, slip op. at 2 (D.D.C. July 9, 1981); cf. Armstrong v. Bush, 807 F. Supp. 816, 819 (D.D.C. 1992) (priority afforded to additional FOIA requests added to those already subject of litigation, where responsive records might otherwise be destroyed).

<sup>78</sup> See, e.g., Freeman v. United States Dep't of Justice, 822 F. Supp. 1064, 1067 (S.D.N.Y. 1993) ("Plaintiff's desire to inform the public [through publication and submission to a Congressional committee], while commendable, does not constitute an exceptional need. Since almost every request can be linked to such a desire, granting expedited treatment for that purpose would allow the exception to swallow the rule."); Nation Magazine v. United States Dep't of State, 805 F. Supp. 64, 73 (D.D.C. 1992) ("[T]here are numerous reasons why this Court should not broaden the definition of 'exceptional need or urgency' to include FOIA requests concerning Presidential candidates pending weeks before an election."); Lisee v. CIA, 741 F. Supp. 988, 989 (D.D.C. 1990); Summers v. United States Dep't of Justice, 733 F. Supp. 443, 444 (D.D.C. 1990), appeal dismissed on procedural grounds, 925 F.2d 450 (D.C. Cir. 1991); Summers v. United States Dep't of Justice, 729 F. Supp. 1379, 1379 (D.D.C. 1989); Mangold v. CIA, No. 88-1826, slip op. at 6-7 (D.D.C. May 3, 1989).

<sup>79</sup> See, e.g., Samuel Gruber Educ. Project v. United States Dep't of Justice, slip op. at 6 (71,000 pages of documents); Hinton v. FBI, 527 F. Supp. 223, 223-25 (E.D. Pa. 1981) (21,000 pages of documents).

<sup>80</sup> See FOIA Update, Fall 1988, at 5.

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justify nondisclosure of any withheld records once they are processed, courts have, as a practical matter, tended to merge the record-processing and the affidavit-preparation stages when issuing stays of proceedings under Open America.<sup>81</sup>

### Adequacy of Search

In many suits under the FOIA, the defendant agency will face challenges not only to its reliance on particular exemptions, but also to the manner in which, and extent to which, it has endeavored to locate responsive documents. (For a discussion of administrative considerations in conducting searches, see Procedural Requirements, above.) To prevail in a FOIA action, the agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements."<sup>82</sup> Thus, the agency is under a duty to conduct a "reasonable" search for responsive records.<sup>83</sup>

Courts generally evaluate a search's reasonableness by reviewing the agency's retrieval efforts in light of the parameters specified in the FOIA request.<sup>84</sup> Although the adequacy of a search is "dependent upon the circum-

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<sup>81</sup> See, e.g., Lisee v. CIA, 741 F. Supp. at 989-90 ("Open America" stay granted for both processing records and preparing Vaughn Index); Ettlinger v. FBI, 596 F. Supp. 867, 878-79 (D. Mass. 1984) (same); Shaw v. Department of State, 1 Gov't Disclosure Serv. (P-H) ¶ 80,250, at 80,630 (D.D.C. July 31, 1980) (same).

<sup>82</sup> Miller v. United States Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (citing National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)).

<sup>83</sup> See, e.g., In re Wade, 969 F.2d 241, 249 n.11 (7th Cir. 1992); Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1352 (D.C. Cir. 1983).

<sup>84</sup> See, e.g., Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986) (where agency regulations require requests be made to specific offices for specific records, no need to search additional offices when those regulations are not followed); Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978) (no duty to search FBI field offices where requester directed request only to FBI Headquarters and did not specify which field offices he wanted searched); Church of Scientology Int'l v. IRS, No. 90-2567, slip op. at 5-6 (C.D. Cal. Aug. 2, 1991) (where request plainly limited to IRS national and international offices, IRS under no obligation to search offices other than those specified); Marrera v. United States Dep't of Justice, 622 F. Supp. 51, 54 (D.D.C. 1985) ("There is no requirement that an agency search every division or field office in response to a FOIA request, especially where the requester has indicated specific areas where responsive documents might be located . . ."); Biberman v. FBI, 528 F. Supp. 1140, 1144 (S.D.N.Y. 1982) ("It has frequently been held that a general FOIA request to headquarters does not 'reasonably  
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stances of the case,"<sup>85</sup> the agency "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."<sup>86</sup> In this connection, it is firmly settled that "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate."<sup>87</sup>

A requester's "[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable

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<sup>84</sup>(...continued)

describe' a search of numerous field offices."); cf. American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (agency's refusal to perform canvass of 356 bureau offices for multitude of files held justified), aff'd, 907 F.2d 203 (D.C. Cir. 1990). But cf. Krikorian v. United States Dep't of State, 984 F.2d 461, 468-69 (D.C. Cir. 1993) (on remand, district court must explain why it was unnecessary for agency to search 11 regional security offices identified in article which formed basis for plaintiff's FOIA request).

<sup>85</sup> Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990); see also Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993) ("depends upon the facts of each case").

<sup>86</sup> Oglesby v. Department of the Army, 920 F.2d at 68; See Maynard v. CIA, 986 F.2d at 559; SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991); see also Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978) (production of records not previously segregated required only where material can be identified with reasonable effort), vacated in other part & reh'g denied, 607 F.2d 367 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980); Dettman v. United States Dep't of Justice, No. 82-1108, slip op. at 8 (D.D.C. Mar. 21, 1985) (government expected to operate under "reasonable plan designed to produce the requested documents"), aff'd on other grounds, 802 F.2d 1472 (D.C. Cir. 1986).

<sup>87</sup> Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); see also In re Wade, 969 F.2d at 249 n.11; Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986) ("a search is not unreasonable simply because it fails to produce all relevant material; no search of this [large] size . . . will be free from error"); Miller v. United States Dep't of State, 779 F.2d at 1385 ("[P]laintiff alleges that the search was insufficient because the Department did not do all that it could; we agree . . . , however, that it did all the Act required."); Freeman v. United States Dep't of Justice, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish."); Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 54 (D.D.C. 1990) (paucity of documents produced held to be "of no legal consequence" where search is shown to be reasonable).

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search for them."<sup>88</sup> It has been observed that "[n]othing in the law requires the agency to document the fate of documents it cannot find."<sup>89</sup> And when agencies do subsequently locate documents initially believed to have been lost or destroyed, courts have accepted this as evidence of the agency's good-faith efforts.<sup>90</sup>

Additionally, it has been held that the FBI is not required to search beyond its indices in pro se cases where the requester has refused to pay the cost of the search, unless the requester pinpoints a specific file.<sup>91</sup> The FBI's search of its indices has been deemed "reasonable" where it has searched through "main files" (where the subject of the request was the subject of the file) and "cross" or "see references" (where the subject of the request was merely mentioned in a file in which another individual or organization was the subject).<sup>92</sup> It has also been held that, "[b]ecause the scope of a search is limit-

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<sup>88</sup> SafeCard Servs., Inc. v. SEC, 926 F.2d at 1201; see also Oglesby v. Department of the Army, 920 F.2d at 67 n.13 (adequacy of agency's search not undercut by requester's speculative claim that other records "must exist" due to perceived importance of subject matter); Stone v. Defense Investigative Serv., 816 F. Supp. 782, 786 (D.D.C. 1993) (appeal pending); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1295 (N.D. Cal. 1992) ("Plaintiff's incredulity at the fact that no responsive documents were uncovered . . . does not constitute evidence of unreasonableness or bad faith.").

<sup>89</sup> Roberts v. United States Dep't of Justice, No. 92-1707, slip op. at 4 (D.D.C. Jan. 28, 1993); see Maynard v. CIA, 986 F.2d at 564 ("The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it." (quoting Miller v. United States Dep't of State, 779 F.2d at 1385)).

<sup>90</sup> See Maynard v. CIA, 986 F.2d at 565 ("Rather than bad faith, we think that the forthright disclosure by the INS that it had located the misplaced file suggests good faith on the part of the agency."); Meeropol v. Meese, 790 F.2d at 953; Goland v. CIA, 607 F.2d at 370 (revelation one week following decision by court of appeals that agency had discovered numerous, potentially responsive, additional documents several months earlier, insufficient to undermine validity of agency's prior search); Gilmore v. NSA, No. 92-3646, slip op. at 21-22 (N.D. Cal. Apr. 30, 1993) (acceptance of plaintiff's "'perverse theory that a forthcoming agency is less to be trusted in its allegations than an unyielding agency'" would "'work mischief in the future by creating a disincentive for the agency to reappraise its position'" (quoting Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981))).

<sup>91</sup> See Ely v. FBI, No. 84-1615, slip op. at 2-3 (D.D.C. Jan. 28, 1985). But see Larouche v. Webster, No. 75-6010, slip op. at 10 (S.D.N.Y. Oct. 23, 1984) (FBI must search all specialized files on subject of request about which requester is unlikely to know).

<sup>92</sup> See Beauman v. FBI, No. CV-92-7603, slip op. at 9 (C.D. Cal. Apr. 28, 1993); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 567 n.12 (continued...)

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ed by a plaintiff's FOIA request, there is no general requirement that an agency search secondary references or variant spellings."<sup>93</sup>

Similarly, with respect to the processing of "cross" or "see references," only those portions of the file which pertain directly to the subject of the request are considered within the scope of the request.<sup>94</sup> As one court has phrased it, "[t]o require the government to release an entire document where plaintiff's name is only mentioned a few times would be to impose on the government a burdensome and time consuming task."<sup>95</sup> With respect to a document in the requester's file which pertained entirely to a third party, one court has held that "[g]iven the lack of any relation between these pages and [the requester], as well as the minimal information that would remain after redaction, [the agency's] decision not to release these documents was not erroneous."<sup>96</sup>

To prove the adequacy of its search, as in sustaining its claims of exemption, an agency may rely upon affidavits (see the discussion of Vaughn Indexes, below), provided that they are "relatively detailed, nonconclusory, and submitted in good faith."<sup>97</sup> Such affidavits must show "that the search method was

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<sup>92</sup>(...continued)

(S.D.N.Y. 1989); Freeman v. United States Dep't of Justice, No. 85-0958A, slip op. at 6 (E.D. Va. Mar. 12, 1986), aff'd, No. 86-1073 (4th Cir. Dec. 29, 1986); Friedman v. FBI, 605 F. Supp. 306, 311 (N.D. Ga. 1981); Stern v. United States Dep't of Justice, No. 77-3812-C, slip op. at 7 (D. Mass. Aug. 25, 1980); see also Maynard v. CIA, 986 F.2d at 562 (Treasury Department properly limited its search to its automated Treasury Enforcement Communications System ("TECS")); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 817-18 (D.N.J. 1993) (indices search by United States Attorney's Office held adequate).

<sup>93</sup> Maynard v. CIA, 986 F.2d at 560.

<sup>94</sup> See Posner v. Department of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,229, at 82,650 (D.D.C. Mar. 9, 1982).

<sup>95</sup> Dettman v. United States Dep't of Justice, slip op. at 5-6; see also Osborne v. United States Dep't of Justice, No. 84-1910, slip op. at 2-3 (D.D.C. Feb. 28, 1985) (DEA search of relevant records systems and case files regarding requester held sufficient); Dunaway v. Webster, 519 F. Supp. 1059, 1083 (N.D. Cal. 1981).

<sup>96</sup> Greenspun v. IRS, No. 84-3426, slip op. at 4 (D.D.C. Sept. 30, 1985).

<sup>97</sup> Pollack v. Bureau of Prisons, 879 F.2d 406, 409 (8th Cir. 1989); see Miller v. United States Dep't of State, 779 F.2d at 1383; Weisberg v. United States Dep't of Justice, 705 F.2d at 1351; Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982) ("affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA"); Goland v. CIA, 607 F.2d at 352; Grove v. United States Dep't of Justice, 802 F. Supp. 506, 518

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reasonably calculated to uncover all relevant documents" and must "identify the terms searched or explain how the search was conducted."<sup>98</sup> It is not necessary that the agency employee who actually performed the search supply an affidavit describing the search; rather, the affidavit of an official responsible for supervising or coordinating the search efforts should be sufficient to fulfill the personal knowledge requirement of Rule 56(e) of the Federal Rules of Civil Procedure.<sup>99</sup> (For a further discussion of this "personal knowledge" requirement, see Summary Judgment, below.)

An inadequate description of the search process, or a description which reveals an inadequate search, will necessitate denial of summary judgment.<sup>100</sup>

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<sup>97</sup>(...continued)

(D.D.C. 1992); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 10 (D.D.C. Sept. 29, 1987) (affidavits held to sufficiently describe adequate search "[i]n the absence of countervailing evidence or apparent inconsistency of proof"); see also FOIA Update, Jan. 1983, at 6.

<sup>98</sup> Oglesby v. Department of the Army, 920 F.2d at 68; see Maynard v. CIA, 986 F.2d at 559.

<sup>99</sup> See, e.g., Maynard v. CIA, 986 F.2d at 560 ("[A]n agency need not submit an affidavit from the employee who actually conducted the search. Instead, an agency may rely on an affidavit of an agency employee responsible for supervising the search."); Safecard Servs., Inc. v. SEC, 926 F.2d at 1202 (employee "in charge of coordinating the [agency's] search and recovery efforts [is] most appropriate person to provide a comprehensive affidavit"); Meeropol v. Meese, 790 F.2d at 951 (supervisor/affiant properly relied on information provided by personnel who actually performed search); Carney v. United States Dep't of Justice, No. 92-CV-6204, slip op. at 11-12 (W.D.N.Y. Apr. 27, 1993) ("There is no basis in either the statute or the relevant caselaw to require that an agency effectively establish by a series of sworn affidavits a 'chain of custody' over its search process. The format of the proof submitted by defendant--declarations of supervisory employees, signed under penalty of perjury--is sufficient for purposes of both the statute and Fed.R.Civ.P. 56.") (appeal pending); Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992) (where third party claimed to have knowledge of additional documents, affidavit of agency employee who contacted that party found sufficient); Pennsylvania Dep't of Pub. Welfare v. HHS, No. 84-0690, slip op. at 3-4 (M.D. Pa. Nov. 10, 1985) (affidavits of supervisory officials who directed search held adequate); cf. Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (although agency employee with "firsthand knowledge" of relevant files was appropriate person to supervise search undertaken by contractor, affidavit must also describe search).

<sup>100</sup> See, e.g., Oglesby v. Department of the Army, 920 F.2d at 68; Southam News v. INS, 674 F. Supp. 881, 889-91 (D.D.C. 1987); Hydron Lab., Inc. v. EPA, 560 F. Supp. 718, 721 (D.R.I. 1983); see also Lindsey v. NSC, No. 84-3897, slip op. at 2 (D.D.C. Mar. 11, 1985) (government rebuked for not submitting affidavit describing whether search was legally sufficient); Applegate v.  
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For example, summary judgment has been denied where the agency's affidavit described circumstances in which destruction of the requested records may have occurred, but the affidavit failed to specify that destruction had in fact occurred.<sup>101</sup> Where an agency's search is disputed, a grant of summary judgment to the agency may be reversed and remanded where the district court fails to expressly hold that a disputed search was adequate under the "reasonableness" standard.<sup>102</sup>

### Mootness

In a FOIA action, the courts have jurisdiction only where an agency has improperly withheld agency records.<sup>103</sup> Therefore, if during the litigation of a FOIA lawsuit it is determined that all documents found responsive to the underlying FOIA request have been released in full to the requester, the suit should be dismissed on mootness grounds as there is no justiciable controversy.<sup>104</sup>

Dismissal of a FOIA lawsuit can be appropriate also when the plaintiff

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<sup>100</sup>(...continued)

NRC, 3 Gov't Disclosure Serv. (P-H) ¶ 83,081, at 83,614 (D.D.C. Jan. 18, 1983) (permitting discovery on adequacy of search), summary judgment granted, 3 Gov't Disclosure Serv. (P-H) ¶ 83,201, at 83,887 (D.D.C. May 24, 1983) (court held for government but found it "disturbing" that agency designed "a filing and oral search system which could frustrate the clear and express purposes of FOIA").

<sup>101</sup> Pafenberg v. Department of the Army, No. 82-2113, slip op. at 12 (D.D.C. Nov. 22, 1983) ("Casual destruction of [the requested] materials seems unlikely, and cannot be demonstrated by the conjecture of one official, where defendants have themselves admitted the existence of a body of information pertaining to the handling of the requested materials.").

<sup>102</sup> Krikorian v. Department of State, 984 F.2d at 468 (requiring express findings by district court on adequacy of search issue).

<sup>103</sup> 5 U.S.C. § 552(a)(4)(B) (1988).

<sup>104</sup> See In re Wade, 969 F.2d 241, 248 (7th Cir. 1992); Tijerina v. Walters, 821 F.2d 789, 799 (D.C. Cir. 1987); DeBold v. Stimson, 735 F.2d 1037, 1040 (7th Cir. 1984); Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982); Crooker v. United States Dep't of State, 628 F.2d 9, 10 (D.C. Cir. 1980); see also, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 842 (6th Cir. 1988) (full disclosure of records pursuant to district court order moots appeal); Mitchell v. Kemp, No. 91 Civ. 2983, slip op. at 8-9, 11 (S.D.N.Y. July 27, 1992) (dismissal for mootness warranted where "all unproduced documents that would have been responsive to [plaintiff's] request were destroyed before he requested them"); cf. Anderson v. HHS, 907 F.2d 936, 941 (10th Cir. 1990) (although plaintiff had already obtained all responsive documents, subject to protective order, in private civil litigation, plaintiff's FOIA litigation to obtain documents free from any such restriction still viable).

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fails to prosecute the suit.<sup>105</sup> Dismissal likewise may be appropriate where: (1) records are publicly available upon payment of fees;<sup>106</sup> (2) a complete factual record has yet to be presented to the agency;<sup>107</sup> (3) there is a change in the factual circumstances underlying the lawsuit;<sup>108</sup> or (4) the agency is processing responsive records.<sup>109</sup> However, it has been held that a FOIA claim may survive the death of the plaintiff and, under some circumstances, may be continued by a properly substituted party.<sup>110</sup>

In Payne Enterprises v. United States, the Court of Appeals for the District of Columbia Circuit held that when records are routinely withheld at the initial processing level, but consistently released after an administrative appeal, and when this situation results in continuing injury to the requester, a lawsuit challenging that practice is ripe for adjudication and is not subject to dismissal on the basis of mootness.<sup>111</sup> The defendant agency's "voluntary cessation" of that practice in Payne did not moot the case where the plaintiff challenged the agency's policy as an unlawful, continuing wrong.<sup>112</sup>

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<sup>105</sup> See, e.g., Warden v. FBI, 530 F. Supp. 66, 68-69 (N.D. Ill. 1981).

<sup>106</sup> See, e.g., Kleiner v. Patent & Trademark Office, No. 82-295, slip op. at 2-3 (D. Mass. Apr. 25, 1983).

<sup>107</sup> See, e.g., Rodrequez v. United States Postal Serv., No. 90-1886, slip op. at 4-5 (D.D.C. Oct. 2, 1991) (absent submission of further information enabling identification of plaintiff's records from among those of 36 persons with same name, case not yet ripe); National Sec. Archive v. United States Dep't of Commerce, No. 87-1581, slip op. at 6 (D.D.C. Nov. 25, 1987) (fee waiver case).

<sup>108</sup> See, e.g., National Wildlife Fed'n v. Department of the Interior, No. 83-3586, slip op. at 6-7 (D.D.C. Oct. 15, 1987) (suit challenging fee waiver guidelines dismissed as moot after pertinent FOIA section amended).

<sup>109</sup> See, e.g., Voinche v. FBI, No. 93-4262, slip op. 6153, 6154 (5th Cir. Sept. 3, 1993) (because sole issue in action based on 5 U.S.C. § 552(a)(6)(C) is "tardiness" of agency response, district court litigation rendered moot by agency's disclosure determination) (to be published); Larson v. Executive Office for United States Attorneys, No. 85-6226, slip op. at 4-5 (D.C. Cir. Apr. 6, 1988) (appeal of district court denial of relief to plaintiff for defendant's processing delays mooted upon completion of processing).

<sup>110</sup> See D'Aleo v. Department of the Navy, No. 89-2347, slip op. at 2-3 (D.D.C. Mar. 27, 1991) (deceased plaintiff's sister, appointed executrix of his estate, substituted as plaintiff). But see Hayles v. United States Dep't of Justice, No. H-79-1599, slip op. at 3 (S.D. Tex. Nov. 2, 1982) (case dismissed upon death of plaintiff where no timely motion for substitution filed).

<sup>111</sup> 837 F.2d 486, 488-93 (D.C. Cir. 1988).

<sup>112</sup> Id. at 491; see also, e.g., Hercules, Inc. v. Marsh, 839 F.2d 1027, 1028 (4th Cir. 1988) (threat of disclosure of agency telephone directory not mooted (continued...))

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Of course, a claim for attorney fees or costs survives dismissal of a FOIA action for mootness.<sup>113</sup> When agencies belatedly release requested records in the midst of a FOIA lawsuit, courts frown upon efforts to avoid, on mootness grounds, the payment of attorney fees.<sup>114</sup> (See discussion of Attorney Fees and Litigation Costs, below.)

A FOIA lawsuit may be precluded by the doctrine of res judicata (claim preclusion) when it is brought by a plaintiff against the same agency for the same documents whose withholding has been previously adjudicated.<sup>115</sup> How-

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<sup>112</sup>(...continued)

by release because new request for subsequent directory pending; agency action thus "capable of repetition yet evading review") ("reverse" FOIA context); Better Gov't Ass'n v. Department of State, 780 F.2d 86, 90-91 (D.C. Cir. 1986) (although challenge to fee waiver standards as applied held moot, challenge to facial validity of standards held ripe and not moot); Public Citizen v. Office of the United States Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (despite disclosure of specific records requested, court retains jurisdiction where plaintiff challenges "agency's policy to withhold temporarily, on a regular basis, certain types of documents"); accord Public Citizen v. OSHA, No. 86-705, slip op. at 2 (D.D.C. Aug. 5, 1987). But see Atkins v. Department of Justice, No. 90-5095, slip op. at 1 (D.C. Cir. Sept. 18, 1991) ("The question whether DEA complied with the [FOIA's] time limitation in responding to [plaintiff's] request is moot because DEA has now responded to this request.").

<sup>113</sup> Anderson v. HHS, No. 92-4125, slip op. at 4 (10th Cir. Aug. 27, 1993) ("We think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain." (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200 (1988))); Carter v. VA, 780 F.2d 1479, 1481-82 (9th Cir. 1986); Seagull Mfg. Co. v. NLRB, 741 F.2d 882, 884-86 (6th Cir. 1984); DeBold v. Stimson, 735 F.2d at 1040; Webb v. HHS, 696 F.2d 101, 107-08 (D.C. Cir. 1982).

<sup>114</sup> See, e.g., Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 4-5 (D. Ariz. Dec. 12, 1987) (government should not be able to foreclose recovery of attorney fees whenever it chooses to moot an action by releasing records after having denied disclosure at administrative level); Harrison Bros. Meat Packing Co. v. United States Dep't of Agric., 640 F. Supp. 402, 405-06 (M.D. Pa. 1986) (finding it "ludicrous" for government to "suddenly and inexplicably" release records and assert mootness to avoid paying fees after having denied disclosure at administrative level).

<sup>115</sup> Fazzini v. United States Dep't of Justice, No. 92-5043, slip op. at 1 (D.C. Cir. Oct. 14, 1992) (per curiam); National Treasury Employees Union v. IRS, 765 F.2d 1174, 1177 (D.C. Cir. 1985); Hanner v. Stone, No. 92-CV-72719, slip op. at 3-7 (E.D. Mich. Oct. 26, 1992), aff'd, No. 92-2565 (6th Cir. Aug. 6, 1993); see also Heckman v. Olive, No. CV-88-2981, slip op. at 14 (E.D.N.Y. Dec. 9, 1992) (appeal pending); Prows v. United States Dep't of Justice, No. 90-2561, slip op. at 3-4 (D.D.C. Mar. 30, 1992); Stimac v. Treas-  
(continued...)

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ever, a subsequent claim for records is not precluded by res judicata where the litigation of an earlier, non-FOIA case involving the same records did not permit raising a FOIA claim.<sup>116</sup> In addition, res judicata is not applicable where there has been a change in the factual circumstances or legal principles applicable to the lawsuit.<sup>117</sup>

Litigation also may be foreclosed by the applicability of the doctrine of collateral estoppel (issue preclusion), which precludes relitigation of an issue previously litigated by one party to the action.<sup>118</sup> As with the doctrine of res judicata, collateral estoppel is not applicable to a subsequent lawsuit if there is

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<sup>115</sup>(...continued)

ury Dep't, No. 87-C-4005, slip op. at 4 (N.D. Ill. Jan. 15, 1988), aff'd, 872 F.2d 424 (4th Cir. 1989) (table cite); Crooker v. United States Dep't of Justice, No. 86-2333, slip op. at 3-4 (D.D.C. Oct. 2, 1987), aff'd, No. 87-5372 (D.C. Cir. Apr. 8, 1988); Crooker v. United States Marshals Serv., 641 F. Supp. 1141, 1143 (D.D.C. 1986); FOIA Update, Summer 1985, at 6 ("FOIA Counselor: 'Preclusion' Doctrines Under the FOIA"); compare Hanner v. Stone, No. 92-2565, slip op. at 2 (under doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in a prior action") (emphasis added) with Hanner v. Stone, No. 92-1579, slip op. at 1 (6th Cir. Dec. 8, 1992) (where appellate court had previously adjudicated a claim that is similar, but involving a different issue, present claim not precluded under res judicata).

<sup>116</sup> See North v. Walsh, 881 F.2d 1088, 1093-95 (D.C. Cir. 1989) (claim for records under FOIA not barred by prior discovery prohibition for same records in criminal case in which FOIA claim could not have been interposed).

<sup>117</sup> See, e.g., Graphic Communications Int'l Union, Local 554 v. Salem-Gravure, 843 F.2d 1490, 1493 (D.C. Cir. 1988) (non-FOIA case); Wolfe v. Froehlke, 358 F. Supp. 1318, 1219 (D.D.C. 1973) (lawsuit not barred because national security status changed), aff'd, 510 F.2d 654 (D.C. Cir. 1974); see also FOIA Update, Summer 1985, at 6.

<sup>118</sup> Yahama Corp. of America v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992) (non-FOIA case); see Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 750-51 (9th Cir. 1980) (complete identity of plaintiff and document at issue precludes relitigation); Williams v. Executive Office for United States Attorneys, No. 89-3071, slip op. at 3-4 (D.D.C. Mar. 19, 1991) (same); see also FOIA Update, Summer 1985, at 6. But see North v. Walsh, 881 F.2d at 1093-95 (issue preclusion inapplicable where exemption issues raised in FOIA action differ from relevancy issues raised in prior action for discovery access to same records); Ely v. FBI, No. 83-876-T-15, slip op. at 4 (M.D. Fla. July 13, 1988) (collateral estoppel not appropriate where plaintiff did not have "full and fair opportunity to litigate" defendant's claim of privilege); Robertson v. DOD, 402 F. Supp. 1342, 1347 (D.D.C. 1973) (private citizen's interest in subsequent FOIA action was not protected by government in prior "reverse" FOIA suit over same documents because interests not congruent).

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an intervening material change in the law or factual predicate.<sup>119</sup>

### "Vaughn Index"

A distinguishing feature of FOIA litigation is that the defending agency bears the burden of sustaining its action of withholding records.<sup>120</sup> 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 Vaughn v. Rosen.<sup>121</sup>

The Vaughn Index came into prominence mainly as a result of the 1974 amendments to the FOIA, especially due to the addition of the "reasonably segregable" provision to subsection (b).<sup>122</sup> This requirement that agencies segregate and release disclosable information from that which is exempt grew out of congressional concern in 1974 over the agencies' sweeping application of exemptions up to that time.<sup>123</sup> Particularly in cases involving large numbers of documents, the requirement that courts conduct a de novo review of each portion of a record at issue effectively transferred the burden from agencies to the courts themselves. Moreover, reliance on in camera examination had the effect of weakening the adversarial process somewhat, as it afforded a plaintiff and his counsel no real input to the merits of a case.<sup>124</sup>

The Vaughn decision addressed these concerns by requiring agencies to prepare an itemized index, correlating each withheld document (or portion) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification.<sup>125</sup> Such an index not only makes the trial court's job more manageable, it also enhances appellate review by ensuring that a full public record is available upon which to base an appellate decision.<sup>126</sup> If an index is

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<sup>119</sup> See, e.g., Minnis v. United States Dep't of Agric., 737 F.2d 784, 786 n.1 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985).

<sup>120</sup> 5 U.S.C. § 552(a)(4)(B) (1988).

<sup>121</sup> 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

<sup>122</sup> 5 U.S.C. § 552(b) (final sentence).

<sup>123</sup> See generally H.R. Rep. No. 876, 93d Cong., 2d Sess. 7 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6292.

<sup>124</sup> See King v. United States Dep't of Justice, 830 F.2d 210, 218 (D.C. Cir. 1987); Vaughn v. Rosen, 484 F.2d at 826.

<sup>125</sup> Vaughn v. Rosen 484 F.2d at 827; accord King v. United States Dep't of Justice, 830 F.2d at 217.

<sup>126</sup> See Vaughn v. Rosen, 484 F.2d at 824-25; King v. United States Dep't of Justice, 830 F.2d at 219; see also Ingle v. Department of Justice, 698 F.2d 259, 263-64 (6th Cir. 1983). But see Antonelli v. Sullivan, 732 F.2d 560, 562 (7th Cir. 1984) (no index required where small number of documents at issue

(continued...)

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not sufficiently detailed, a court may remand and require a more detailed index.<sup>127</sup>

The Vaughn Index has evolved into an extremely effective tool with which to resolve FOIA cases, developing various permutations to fit particular circumstances. Courts have routinely accepted the observation that "[t]here is no set formula for a Vaughn index; . . . it is the function, not the form, which is important."<sup>128</sup> In fact, "[a]ll that is required, and that is the least that is required, is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure."<sup>129</sup> Therefore, "[t]he degree of specificity of itemization, justification, and correlation required in a particular case will . . . depend on the nature of the document at issue and the particular exemption asserted."<sup>130</sup> However, in order to fulfill its purpose, a Vaughn

<sup>126</sup>(...continued)

and affidavit contains sufficient detail); National Treasury Employees Union v. United States Customs Serv., 602 F. Supp. 469, 473 (D.D.C. 1984) (fact that only one exemption is involved "nullif[ies] the need to formulate the type of itemization and correlation system required by the Court of Appeals in Vaughn"), aff'd, 802 F.2d 525 (D.C. Cir. 1986).

<sup>127</sup> See Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979) (also seemingly establishing requirement that Vaughn Index be contained in no more than one document per case).

<sup>128</sup> Hinton v. Department of Justice, 844 F.2d 126, 129 (3d Cir. 1988); see Keys v. United States Dep't of Justice, 830 F.2d 337, 349 (D.C. Cir. 1987).

<sup>129</sup> Hinton v. Department of Justice, 844 F.2d at 129; see Miscavige v. IRS, No. 92-8659, slip op. 3284, 3826-27 (11th Cir. Sept. 17, 1993) (separate document, expressly designated as "Vaughn Index" unnecessary where agency "declarations are highly detailed, focus on the individual documents, and provide a factual base for withholding each document at issue") (to be published).

<sup>130</sup> Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978); see, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24 (1978) (generic explanations, focusing on types of records and harm to investigations resulting from disclosure, permitted under Exemption 7(A)); Davis v. United States Dep't of Justice, 968 F.2d 1276, 1282 n.4 (D.C. Cir. 1992) (precise matching of exemptions with specific withheld items "may well be unnecessary" when all of government's generic claims have merit); Vaughn v. United States, 936 F.2d 862, 868 (6th Cir. 1991) (categorical approach approved where over 1,000 pages were withheld under Exemptions 3, 5, 7(A), 7(C), 7(D) and 7(E)); Keys v. United States Dep't of Justice, 839 F.2d at 349 (upholding adequacy of indexing system of generic explanations which need not specifically address each deletion); Antonelli v. FBI, 721 F.2d 615, 617-19 (7th Cir. 1983) (no index required in third-party request for records where agency would neither confirm nor deny existence of records on particular individuals absent showing of public interest in disclosure), cert. denied, 467 U.S. 1210 (1984); Linneman v. FBI, No. 89-505, slip op. at 7-8 (D.D.C. July (continued...))

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Index should either expressly specify<sup>131</sup> or, at a minimum, plainly reflect<sup>132</sup> that all segregable information has been disclosed.

When voluminous records are at issue, courts have sanctioned the use of

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<sup>130</sup>(...continued)

13, 1992) ("traditional" index not required to justify withholding solely of identities of confidential sources and law enforcement personnel in criminal investigation); Peco v. United States Dep't of Justice, No. 86-3185, slip op. at 1-2 (D.D.C. July 28, 1988) (Vaughn Index not required where affidavit provides sufficient justification for claimed exemptions); Ferri v. United States Dep't of Justice, 573 F. Supp. 852, 856-57 (W.D. Pa. 1983) (6,000 pages of grand jury testimony not indexed held sufficiently described); Agee v. CIA, 517 F. Supp. 1335, 1337-38 (D.D.C. 1981) (index listing 15 categories upheld where more specific index would compromise national security); see also Air-line Pilots Ass'n v. FAA, 552 F. Supp. 811, 815 (D.D.C. 1982) (Vaughn Index not required where agency provided requester with equivalent of information that it would provide). But see King v United States Dep't of Justice, 830 F.2d at 224 (requiring more complete Vaughn Index to support Exemption 1 claim for particularly old records).

<sup>131</sup> See Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (inherently erroneous for district court to approve withholding of entire document without entering finding on segregability); Krikorian v. Department of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (same); PHE, Inc. v. United States Dep't of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993) (remand required because of failure of either affidavit or district court to address issue of segregability of Exemption 7(E) material); Schiller v. NLRB, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992) (notwithstanding district court's in camera review, case remanded for specific findings on segregability where agency withheld documents in entireties and failed to correlate exemptions with particular record segments to which exemptions applied); Wiener v. FBI, 943 F.2d 972, 988 (9th Cir. 1991) ("The court on remand must make a specific finding that no information contained in each document or substantial portion of a document withheld is segregable."), cert. denied, 112 S. Ct. 3013 (1992); see also Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) ("boilerplate" statement that "no segregation of non-exempt, meaningful information can be made for disclosure" deemed "entirely insufficient").

<sup>132</sup> See Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, No. C-89-1843, slip op. at 12 (N.D. Cal. June 4, 1993) ("specific claim regarding segregability" not required where "brevity of the document in question and the detail in which the contents of the document and the reason for its withholding are described" were sufficient to enable court to discern absence of segregable, nonexempt, material); Holland v. CIA, No. 91-1233, slip op. at 22 (D.D.C. Aug. 31, 1992) (proper segregation apparent from express statement by affiant combined with review of documents as redacted); Dusenberry v. FBI, No. 91-665, slip op. at 5 (D.D.C. May 5, 1992) (accepting government's representations that "[t]he subject matter of these specific pages, as described, makes it impossible to segregate disclosable material").

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Vaughn Indexes based upon representative samplings of the withheld documents.<sup>133</sup> This special procedure "allows the court and the parties to reduce a voluminous FOIA exemption case to a manageable number of items" for the Vaughn Index and, "[i]f the sample is well-chosen, a court can, with some confidence, 'extrapolate its conclusions from the representative sample to the larger group of withheld materials.'"<sup>134</sup> Once a representative sampling of the withheld documents is agreed to, however, the agency's subsequent release of some of those documents may destroy the representativeness of the sample and thereby raise questions about the propriety of withholding other responsive, non-sample, documents.<sup>135</sup> In recognition of this danger, the D.C. Circuit has held that an agency "must justify its initial withholdings and is not relieved of that burden by a later turnover of sample documents," and that "the district court must determine whether the released documents were properly redacted [when] initially reviewed."<sup>136</sup>

The courts have generally accepted the use of "coded" indexes--in which agencies break certain FOIA exemptions into several categories, explain the particular nondisclosure rationales for each category, and then correlate the exemption and category to the particular documents at issue.<sup>137</sup> The general

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<sup>133</sup> See, e.g., Meeropol v. Meese, 790 F.2d 942, 956-57 (D.C. Cir. 1986) (index of sampling of every 100th document allowed where approximately 20,000 documents were at issue); Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1490 (D.C. Cir. 1984) (index of sampling of withheld documents allowed, where over 60,000 pages at issue, even though no example of certain exemptions provided); Jones v. FBI, No. C77-1001, slip op. at 4 (N.D. Ohio Aug. 12, 1992) (sample of 57 documents, comprising two percent of total number of documents at issue, held adequate) (appeal pending); Washington Post v. DOD, 766 F. Supp. 1, 15-16 (D.D.C. 1991) (where more than 14,000 pages of responsive material involved, agency should produce detailed Vaughn Index for sample of files, such sample to be determined by parties or court); Peck v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 82,353, at 82,916 (N.D. Ohio Nov. 25, 1981) (sample Vaughn Index of "one of every 50 documents" employed "for the purpose of relieving defendants of the burden and expense of preparing a complete index"). But see SafeCard Servs., Inc. v. SEC, No. 84-3073, slip op. at 7-9 (D.D.C. May 19, 1988) (burden of indexing relatively small number of documents--approximately 200--insufficient to justify sampling).

<sup>134</sup> Bonner v. United States Dep't of State, 928 F.2d 1148, 1151 (D.C. Cir. 1991) (quoting Fensterwald v. CIA, 443 F. Supp. 667, 669 (D.D.C. 1977)).

<sup>135</sup> Id. at 1153-54.

<sup>136</sup> Id. at 1154.

<sup>137</sup> See, e.g., Maynard v. CIA, 986 F.2d 547, 559 n.13 (1st Cir. 1993); Keys v. United States Dep't of Justice, 830 F.2d at 349; Steinberg v. United States Dep't of Justice, 801 F. Supp. 800, 803 (D.D.C. 1992) (appeal pending); Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. 851, 859 (D.D.C. 1989); Branch v. FBI, 658 F. Supp. 204, 206-07 (continued...)



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acceptability of coded indexes is consistent with the Supreme Court's endorsement of "workable rules" under which general categories of records may be uniformly withheld under FOIA exemptions "without regard to individual circumstances."<sup>138</sup> Innovative formats for "coded" affidavits have been found acceptable, so long as they enhance the ultimate goal of overall "descriptive accuracy" of the affidavit.<sup>139</sup> A "coded" affidavit has been held sufficient when "[e]ach deletion was correlated specifically and unambiguously to the corresponding exemption [which] . . . was adequately explained by functional categories . . . [so as to] place[] each document into its historical and investigative perspective."<sup>140</sup>

The D.C. Circuit has gone so far as to hold that the district court judge's review of only the expurgated documents--an integral part of the "coded" affidavit--was sufficient in a situation in which the applicable exemption was obvious from the face of the documents.<sup>141</sup> However, this approach has been found inadequate where the coded categories are too "far ranging" and more detailed subcategories could be provided.<sup>142</sup> Indeed, where numerous pages of records are withheld in full, a "coded" affidavit that does not specifically

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<sup>137</sup>(...continued)

(D.D.C. 1987); United States Student Ass'n v. CIA, 620 F. Supp. 565, 568 (D.D.C. 1985); Bevis v. Department of State, 575 F. Supp. 1253, 1255 (D.D.C. 1983); Bubar v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 82,477, at 83,158 (D.D.C. Sept. 3, 1982). But see Wiener v. FBI, 943 F.2d at 978-79 (rejecting coded affidavits on ground that such categorical descriptions fail to give requester sufficient opportunity to contest withholdings).

<sup>138</sup> United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 779-80 (1989).

<sup>139</sup> National Sec. Archive v. Office of Indep. Counsel, No. 89-2308, slip op. at 6-7 (D.D.C. Aug. 28, 1992) (where information withheld by multiple agencies under various exemptions, "alphabetical classification" employed to facilitate coordination of withholding justifications); see King v. United States Dep't of Justice, 830 F.2d at 225.

<sup>140</sup> Keys v. United States Dep't of Justice, 830 F.2d at 349-50 (citations omitted); see Maynard v. CIA, 986 F.2d at 559 n.13; cf. Varelli v. FBI, No. 88-1865, slip op. at 5-6 & n.4 (D.D.C. Oct. 4, 1991) (coded index employing "eight separate codes for the national security information withheld" deemed adequate).

<sup>141</sup> Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 128 (D.C. Cir. 1987); see Whittle v. Moschella, 756 F. Supp. 589, 595 (D.D.C. 1991) ("For two large redactions, the contents are not readily apparent, but since the information there redacted was provided by confidential sources, it is entirely protected from disclosure."); see also King v. United States Dep't of Justice, 830 F.2d at 221 ("Utilization of reproductions of the material released to supply contextual information about material withheld is clearly permissible, but caution should be exercised in resorting to this method of description.").

<sup>142</sup> King v. United States Dep't of Justice, 830 F.2d at 221-22.

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correlate multiple exemption claims to particular portions of the pages withheld has been found to be impermissibly conclusory.<sup>143</sup>

Agencies employing "coded" indexes ordinarily attach copies of the records released in part--i.e., the "expurgated" documents--as part of their public Vaughn submission. But agencies seeking to justify withholding records from first-party FOIA requesters should be mindful of the fact that the public filing of expurgated documents about the individual requester (or even detailed descriptions of them in briefs) may constitute a "disclosure" under subsection (b) of the Privacy Act of 1974.<sup>144</sup> Unless proceeding under seal, or with the prior written consent of the requester, an agency should make such a disclosure only in accordance with one of the exceptions set forth in the Privacy Act--such as the "routine use" exception.<sup>145</sup>

In an extreme, and probably unworkable, departure from the overall trend toward "workable rules" and more efficient and streamlined Vaughn indices, the Court of Appeals for the Ninth Circuit has rejected the government's use of a coded Vaughn Index, even where further supplemented by the district court's in camera review of all withheld documents.<sup>146</sup> In reaching this singular conclusion, the Ninth Circuit placed an unprecedented emphasis upon the role of the Vaughn Index in "afford[ing] the requester an opportunity to intelligently advocate the release of the withheld documents."<sup>147</sup> It entirely neglected to explain, however, how such exacting specificity could be made public without

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<sup>143</sup> See Coleman v. FBI, No. 89-2773, slip op. at 9-12 (D.D.C. Apr. 3, 1991) (allowing "coded" affidavit for expurgated pages, but rejecting it as to pages withheld in full), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992); see also Williams v. FBI, No. 90-2299, slip op. at 11-12 (D.D.C. Aug. 6, 1991) ("coded" affidavit found insufficiently descriptive as to documents withheld in their entirety).

<sup>144</sup> 5 U.S.C. § 552a(b) (1988 & Supp. IV 1992); see, e.g., Krohn v. United States Dep't of Justice, No. 78-1536, slip op. at 2-7 (D.D.C. Mar. 19, 1984), vacated in part on other grounds (D.D.C. Nov. 29, 1984); Citizens Bureau of Investigation v. FBI, No. C78-80, slip op. at 3 (N.D. Ohio Dec. 12, 1979); see also Laningham v. United States Navy, No. 83-3238, slip op. at 2-3 (D.D.C. Sept. 25, 1984), summary judgment granted (D.D.C. Jan. 7, 1985), aff'd per curiam, 813 F.2d 1236 (D.C. Cir. 1987).

<sup>145</sup> 5 U.S.C. § 552a(b)(3); see, e.g., 53 Fed. Reg. 2651 (1988) (routine use (number 7) applicable to records in Justice Department's "Civil Division Case File System"); 53 Fed. Reg. 1865 (1988) (routine uses (letters "o" and "p") applicable to records in U.S. Attorneys' Offices' "Civil Case Files").

<sup>146</sup> Wiener v. FBI, 943 F.2d at 977 (rejecting adequacy of Vaughn Index for withholdings under Exemptions 1, 3, 7(C) and 7(D) for "lack of specificity").

<sup>147</sup> Id. at 979; see also United States Dep't of Justice v. Landano, 113 S. Ct. 2014, 2024 (1993).

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jeopardizing disclosure of the very information being protected.<sup>148</sup> Within the Ninth Circuit, this decision has led district courts to order the preparation of far more detailed Vaughn Indexes in a number of cases.<sup>149</sup>

Although, an agency ordinarily must justify its withholdings on a page-by-page or document-by-document basis, under certain circumstances courts have approved withholdings of entire, but discrete, categories of records which encompass similar information.<sup>150</sup> Most commonly, courts have permitted the withholding of records under Exemption 7(A) on a category-by-category or "generic" basis.<sup>151</sup> While the outermost contours of what constitutes an ac-

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<sup>148</sup> Cf. Simon v. United States Dep't of Justice, 980 F.2d 782, 784 (D.C. Cir. 1992) (rejecting appellant's Wiener-based argument and holding that despite inadequacy of Vaughn Index, in camera review--"although admittedly imperfect for the reason the appellant states--is the best way to assure both that the agency is entitled to the exemption it claims and that the confidential source is protected").

<sup>149</sup> See, e.g., Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. at 1298 (declarations insufficient "for failure to identify what specific harm will befall disclosure of a particular withheld document"); Church of Scientology Int'l v. IRS, No. 89-4504, slip op. at 2-4 (C.D. Cal. Jan. 7, 1992) (in light of Wiener, IRS ordered to supplement 38-volume Vaughn Index, exceeding 3800 pages, within 90 days); Church of Scientology Int'l v. IRS, No. 91-1025, slip op. at 3 (C.D. Cal. Nov. 14, 1991) ("The Ninth Circuit has made it very clear that withholdings under the FOIA must be very specifically detailed, and that where Vaughn Indexes are ordered, they are not only for the benefit of courts, but also to enable plaintiffs to competently engage in the adversarial process.").

<sup>150</sup> See NLRB v. Robbins Tire & Rubber Co., 437 U.S. at 212-13 (language of Exemption 7(A) "appears to contemplate that certain generic determinations may be made"); Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F.2d 64, 66-67 (D.C. Cir. 1986) (distinguishing between unacceptable "blanket" exemptions and permissible generic determinations); see also United States Dep't of Justice v. Landano, 113 S. Ct. at 2023 ("There may well be other generic circumstances in which an implied assurance of confidentiality fairly can be inferred."); United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. at 776 ("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").

<sup>151</sup> See, e.g., NLRB v. Robbins Tire & Rubber Co., 417 U.S. at 218-23 (endorsing government's position "that a particularized, case-by-case showing is neither required nor practical, and that witness statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure [under Exemption 7(A)] while the hearing is pending"); In re Department of Justice, No. 91-2080, slip op. at 13-14 (8th Cir. Aug. 5, 1993) (en banc) (to be published); Dickerson v. Department of Justice, 992 F.2d 1426, 1428-31 (6th Cir. 1993) (approving FBI justification of Exemption 7(A) for documents pertaining

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ceptable "generic" Vaughn are sometimes unclear,<sup>152</sup> it appears well established that if the agency has (1) defined its Exemption 7(A) categories functionally, (2) conducted a document-by-document review in order to assign documents to the proper category, and (3) explained how the release of each category of information would interfere with the enforcement proceedings, the description will be found sufficient.<sup>153</sup> Moreover, where "a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains [so that] resort to a Vaughn index is futile,"<sup>154</sup> such generic descriptions can also satisfy an agency's Vaughn obligation with regard to other exemptions as well.<sup>155</sup>

<sup>151</sup>(...continued)

to disappearance of Jimmy Hoffa on "category-by-document" basis by supplying "a general description of the contents of the investigatory files, categorizing the records by source or function"); Lewis v. IRS, 823 F.2d 375, 389 (9th Cir. 1987) ("The IRS need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings."); Helmsley v. United States Dep't of Justice, No. 90-2413, slip op. at 9 (D.D.C. Sept. 25, 1992) ("The agency is allowed to use categorical descriptions to explain how the information would interfere with law enforcement proceedings, as long as the categories are sufficiently defined so as to allow the Court to determine whether the alleged harm is likely to occur."); May v. IRS, No. 90-1123, slip op. at 5 (W.D. Mo. Dec. 9, 1991) ("Because the plaintiff's requests basically encompass all documents relating to his pending investigation, the documents in question fit into a genus that does not warrant a document-by-document review."); see also FOIA Update, Spring 1984, at 3-4.

<sup>152</sup> Compare Curran v. Department of Justice, 813 F.2d 473, 476 (1st Cir. 1987) (approving category entitled "other sundry items of information" because "[a]bsent a 'miscellaneous' category of this sort, the FBI would, especially in the case of one-of-a-kind record, have to resort to just the sort of precise description which would itself compromise the exemption") and May v. IRS, slip op. at 6-7 (approving categories of "intra-agency memoranda" and "work sheets") with Bevis v. Department of State, 801 F.2d 1386, 1390 (D.C. Cir. 1986) ("categories identified only as 'teletypes,' or 'airtels,' or 'letters'" held inadequate).

<sup>153</sup> In re Department of Justice, slip op. at 14 (citing Bevis v. Department of State, 801 F.2d at 1389-90); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 806 (D.N.J. 1993); see Dickerson v. Department of Justice, 992 F.2d at 1433 (enumerating categories of information withheld); Curran v. Department of Justice, 813 F.2d at 476 (same); May v. IRS, slip op. at 6-7 (same); see also Docal v. Benninger, 543 F. Supp. 38, 44 n.12 (M.D. Pa. 1981) (enumerating categories of "interference"); cf. Curran v. Department of Justice, 813 F.2d at 476 (stating that FBI affidavit met Bevis test and therefore finding it unnecessary to determine whether Bevis test is too demanding).

<sup>154</sup> Church of Scientology v. IRS, 792 F.2d 146, 152 (D.C. Cir. 1986).

<sup>155</sup> See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. at 779-80 (authorizing "categorical" protection of information)  
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It also should be noted that the "single document Vaughn index requirement" purportedly established in Founding Church of Scientology v. Bell,<sup>156</sup> is not followed as a practical matter, particularly where more than one agency is involved in a suit.<sup>157</sup> Additionally, it has been suggested that in certain circumstances a Vaughn affidavit which by itself would be inadequate to support withholding may be supplemented by in camera review of withheld material.<sup>158</sup> (See discussion of In Camera Inspection, below.)

In a broad range of contexts, most courts have refused to require agencies to file public Vaughn Indexes which are so detailed as to reveal sensitive information, the withholding of which is the very issue in the litigation.<sup>159</sup> There-

<sup>155</sup>(...continued)

tion under Exemption 7(C)); Church of Scientology v. IRS, 792 F.2d at 152 (generic exemption under IRS Exemption 3 statute, 26 U.S.C. § 6103, appropriate if "affidavit sufficiently detailed to establish that the document or group of documents in question actually falls into the exempted category"); Helmsley v. United States Dep't of Justice, slip op. at 3-13 (categorical descriptions accepted for withholdings under Exemptions 3 (in conjunction with Rule 6(e) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 6103), 5, 7(A), 7(C) and 7(D)); MCI Telecommunications Corp. v. GSA, No. 89-0746, slip op. at 5-10 (D.D.C. Mar. 25, 1992) (Exemption 5 withholdings); May v IRS, slip op. at 9 (withholdings protected under both Exemption 7(A) and 28 U.S.C. § 6103); National Treasury Employees Union v. United States Customs Serv., 602 F. Supp. 469, 472-73 (D.D.C. 1984) (no index required for 44 employee-evaluation forms withheld under Exemption 2); see also FOIA Update, Spring 1989, at 6.

<sup>156</sup> 603 F.2d at 949.

<sup>157</sup> See, e.g., Afshar v. Department of State, 702 F.2d 1125, 1144-45 (D.C. Cir. 1983) (more than one affidavit may be supplied); United States Student Ass'n v. CIA, 620 F. Supp. at 567-68 (in request for voluminous documents, agency filed monthly indices as documents indexed).

<sup>158</sup> See, e.g., Maynard v. CIA, 986 F.2d at 557 ("Where, as here, the agency, for good reason, does not furnish publicly the kind of detail required for a satisfactory Vaughn index, a district court may review the documents in camera."); King v. United States Dep't of Justice, 830 F.2d at 225; Williams v. FBI, slip op. at 12; SafeCard Servs., Inc. v. SEC, slip op. at 12 n.7; Struth v. FBI, 673 F. Supp. 949, 956 (E.D. Wis. 1987); see also National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988) ("[W]here a trial court properly reviewed contested documents in camera, an adequate factual basis for the decision exists."). Contra Wiener v. FBI, 943 F.2d at 979 ("In camera review of the withheld documents by the court is not an acceptable substitute for an adequate Vaughn index.").

<sup>159</sup> See, e.g., United States Dep't of Justice v. Landano, 113 S. Ct. at 2024 ("To the extent that the Government's proof may compromise legitimate interests, of course, the Government still can attempt to meet its burden with in camera affidavits."); Maynard v. CIA, 986 F.2d at 557 (although public decla-

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fore, in camera affidavits are frequently utilized in Exemption 1 cases, as is discussed below, where a public description of responsive documents would compromise national security.<sup>160</sup> The same principle has been applied in Exemption 5 cases,<sup>161</sup> in the context of Exemption 7(A),<sup>162</sup> and in Exemption 7(D) litigation.<sup>163</sup>

Finally, it should be noted that courts generally do not require the submission of a Vaughn Index prior to the time at which a dispositive motion is filed. This standard practice is based upon the need to maintain an orderly and efficient adjudicative process in FOIA cases, and upon the practical reality that

<sup>159</sup>(...continued)

ration "lacked specifics, a more detailed affidavit could have revealed the very intelligence sources or methods that the CIA wished to keep secret"); Curran v. Department of Justice, 813 F.2d at 476 (agency should not be forced "to resort to just the sort of precise description which would itself compromise the exemption"); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 742 (9th Cir. 1980) ("the government need not specify its objections in such detail as to compromise the secrecy of the information"); Manna v. United States Dep't of Justice, 815 F. Supp. at 817 ("[P]laintiff's request for a Vaughn index must be denied because submission of a detailed Vaughn index may present the same risks that production of the underlying documents presents."). But see Wiener v. FBI, 943 F.2d at 977-87.

<sup>160</sup> See, e.g., Doyle v. FBI, 722 F.2d 554, 556 (9th Cir. 1983); Keys v. United States Dep't of Justice, No. 85-2588, slip op. at 3 (D.D.C. May 12, 1986), aff'd on other grounds, 830 F.2d at 337; see also CIA v. Sims, 471 U.S. 159, 179 (1985) ("the mere explanation of why information must be withheld can convey [harmful] information").

<sup>161</sup> See, e.g., Wolfe v. HHS, 839 F.2d 768, 771 n.3 (D.C. Cir. 1988) (en banc) ("Where the index itself would reveal significant aspects of the deliberative process, this court has not hesitated to limit consideration of the Vaughn index to in camera inspection.").

<sup>162</sup> See, e.g., Alyeska Pipeline Serv. Co. v. EPA, No. 86-2176, slip op. at 8 (D.D.C. Sept. 9, 1987) ("[R]equiring a Vaughn index in this matter will result in exactly the kind of harm to defendant's law enforcement proceedings which it is trying to avoid under exemption 7(A)."), aff'd on other grounds, 856 F.2d 309 (D.C. Cir. 1988); Dickerson v. Department of Justice, No. 90-60045, slip op. at 4-5 (E.D. Mich. July 31, 1991), aff'd, 992 F.2d 1426 (6th Cir. 1993).

<sup>163</sup> See, e.g., United States Dep't of Justice v. Landano, 113 S. Ct. at 2024 (government can meet its burden with in camera affidavits in order to avoid identification of sources in Exemption 7(D) withholdings); Keys v. United States Dep't of Justice, 830 F.2d at 349 (no requirement to produce Vaughn Index in "degree of detail that would reveal precisely the information that the agency claims it is entitled to withhold"); Doe v. United States Dep't of Justice, 790 F. Supp. 17, 21 (D.D.C. 1992) ("[A] meaningful description beyond that provided by the Vaughn code utilized in this case would probably lead to disclosure of the identity of sources.").

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some form of affidavit, declaration or index virtually always accompanies the defendant agency's motion for summary judgment.<sup>164</sup> Efforts to compel the preparation of Vaughn indices prior to the time of an agency's dispositive motion are typically denied as premature.<sup>165</sup>

### In Camera Inspection

In camera examination of documents is specifically authorized in the statutory language of the FOIA,<sup>166</sup> but it certainly is the exception and not the

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<sup>164</sup> See, e.g., Tannehill v. Department of the Air Force, No. 87-1335, slip op. at 1 (D.D.C. Aug. 20, 1987) (standard practice is to await filing of agency's dispositive motion before deciding whether additional indexes will be necessary); British Airports Auth. v. CAB, 2 Gov't Disclosure Serv. (P-H) ¶ 81,234, at 81,654 (D.D.C. June 25, 1981) ("standard practice which has developed is for the Court to commit the parties to a schedule for briefing summary judgment motions," with "defendant typically fil[ing] first and simultaneously with or in advance of filing submit[ting] supporting affidavits and indices").

<sup>165</sup> See, e.g., Miscavige v. IRS, slip op. at 3287 ("The plaintiff's early attempt in litigation of this kind to obtain a Vaughn Index . . . is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions."); Frankenberry v. United States Dep't of Justice, No. 87-3284, slip op. at 2 (D.D.C. Feb. 23, 1988) (motion to compel Vaughn Index prior to summary judgment motion denied as premature); Covington & Burling v. Farm Credit Admin., No. 87-2017, slip op. at 1 (D.D.C. Oct. 23, 1987) (whether case warrants Vaughn Index is "question of fact that can only be determined" after dispositive motion is filed); Stimac v. United States Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985) (motion to compel Vaughn Index denied as premature on ground that "filing of a dispositive motion, along with detailed affidavits, may obviate the need for indexing the withheld documents"); see also Government Accountability Project v. NRC, No. 87-2053, slip op. at 1 (D.D.C. Aug. 13, 1987) ("[U]ntil defendant files an answer this Court is unable to determine precisely what will be contested and whether a Vaughn Index is appropriate and proper."). But see also Rosenfeld v. United States Dep't of Justice, No. C-90-3576, slip op. at 18-19 (N.D. Cal. Feb. 18, 1992) (no "indication that the provision of material justifying claimed exemptions should be delayed until a dispositive motion has been filed by the government") (appeal pending); Providence Journal Co. v. United States Dep't of the Army, 769 F. Supp. 67, 69 (D.R.I. 1991) (contention that Vaughn Index must await dispositive motion found to be "insufficient and sterile" where agency "has not even indicated when it plans to file such a motion"); Hansen v. United States Dep't of the Air Force, No. 91-0099, slip op. at 3 (D.D.C. Apr. 15, 1991) (unfair to allow government months to prepare its case and then force plaintiff to formulate his entire case within two weeks).

<sup>166</sup> 5 U.S.C. § 552(a)(4)(B) (1988).

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rule.<sup>167</sup> Where an agency meets its burden by means of sufficiently detailed affidavits, in camera review may be deemed unnecessary and inappropriate.<sup>168</sup> It has been held that "when agency affidavits are insufficiently detailed to permit meaningful review of exemption claims, and when evidence of agency bad faith is before the court," in camera inspection may be appropriate.<sup>169</sup> Most appellate courts have applied the same, or a very similar, standard for evaluating the necessity of in camera submissions.<sup>170</sup>

At the broad discretion of the trial judge, in camera examination can be ordered even if a Vaughn Index is filed.<sup>171</sup> This may occur where the record

<sup>167</sup> See NLRB v. Robbins Tire & Rubber Co., 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 otherwise resolved . . . ."); Miscavige v. IRS, No. 92-8659, slip op. 3284, 3286 (11th Cir. Sept. 17, 1993) (in camera review "is discretionary and not required, absent an abuse of discretion") (to be published); Ingle v. Department of Justice, 698 F.2d 259, 266 (6th Cir. 1983); see also PHE, Inc. v. United States Dep't of Justice, 983 F.2d 248, 252-53 (D.C. Cir. 1993) (in camera review generally disfavored, but permissible on remand arising from inadequate affidavit); Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (in camera review, "though permitted under FOIA and sometimes necessary, is generally disfavored"); Lykins v. United States Dep't of Justice, 725 F.2d 1455, 1463 (D.C. Cir. 1984) (in camera examination not substitute for government's obligation to provide detailed indexes and justifications); Cooley v. Department of the Navy, No. 85-1045, slip op. at 4 (D.D.C. Dec. 30, 1985) ("Considerations other than efficiency alone must dictate whether the judge should undertake an in camera inspection.").

<sup>168</sup> See, e.g., Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992); Silets v. United States Dep't of Justice, 945 F.2d 227, 229-32 (7th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 2991 (1992); Vaughn v. United States, 936 F.2d 862, 869 (6th Cir. 1991) (in camera review "neither favored nor necessary where other evidence provides adequate detail and justification"); Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988); Brinton v. Department of State, 636 F.2d 600, 606 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981).

<sup>169</sup> Lam Lek Chong v. DEA, 929 F.2d 729 (D.C. Cir. 1991) (citing Carter v. United States Dep't of Commerce, 830 F.2d 388, 392 (D.C. Cir. 1987)); see, e.g., Dow Jones & Co. v. FBI, No. 85-0097, slip op. at 6-7 (D.D.C. Jan. 5, 1988) (in camera inspection ordered following submission of agency's second inadequate affidavit); cf. Silets v. United States Dep't of Justice, 945 F.2d at 231 (mere assertion, as opposed to actual evidence, of bad faith on part of agency found insufficient to warrant court's in camera review).

<sup>170</sup> See Silets v. United States Dep't of Justice, 945 F.2d at 229 (collecting cases).

<sup>171</sup> But see J.P. Stevens & Co. v. Perry, 710 F.2d 136, 142 (4th Cir. 1983) (district court's in camera inspection held to be error where Exemption 7(A) (continued...)



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in the case is too vague or the agency's claims of exemption are too sweeping.<sup>172</sup> In camera inspection is also appropriate where the description of withheld information in the Vaughn Index conflicts with other public agency statements regarding the nature of the material withheld.<sup>173</sup> However, an agency should first have an opportunity to submit its public affidavit.<sup>174</sup> Nevertheless, by conducting in camera inspection, a district court necessarily establishes an adequate factual basis for determining the applicability of the claimed exemptions, regardless of the adequacy of an agency's affidavit.<sup>175</sup>

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<sup>171</sup>(...continued)

Vaughn affidavit was sufficient to show "interference" category-by-category); Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 87-88 (2d Cir. 1979) (in camera inspection order found to be abuse of discretion); Norwood v. FAA, No. 83-2315, slip op. at 15-16 (W.D. Tenn. Dec. 11, 1991) (proffered in camera inspection rejected where "extensive declarations submitted . . . provide sufficient information to enable the Court to rule on the application of the asserted FOIA exemptions"), aff'd in part, rev'd in part on other grounds, 993 F.2d 570 (6th Cir. 1993).

<sup>172</sup> King v. United States Dep't of Justice, 830 F.2d 210, 225 (D.C. Cir. 1987); see, e.g., Weissman v. CIA, 565 F.2d 692, 697-98 (D.C. Cir. 1977); Miscavige v. IRS, No. CV-91-3721, slip op. at 8-9 (C.D. Cal. Dec. 9, 1992); Dow Jones & Co. v. FBI, slip op. at 6-7; Struth v. FBI, 673 F. Supp. 949, 956 (E.D. Wis. 1987).

<sup>173</sup> See, e.g., Mehl v. EPA, No. 90-1377, slip op. at 9-10 (D.D.C. Aug. 26, 1992).

<sup>174</sup> See Ingle v. Department of Justice, 698 F.2d at 264 ("In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt'." (quoting Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978))); Hoch v. CIA, 593 F. Supp. 675, 680 (D.D.C. 1984) ("In camera proceedings are a last resort . . . particularly in national security situations."), aff'd, 907 F.2d 1227 (D.C. Cir. 1990) (table cite); Schlesinger v. CIA, 591 F. Supp. 60, 67-68 (D.D.C. 1984) (selective in camera review undertaken in Exemption 1 case to determine whether classification and agency justifications for withholding were proper where public disclosure would compromise national security); see also Meeropol v. Meese, 790 F.2d 942, 958-59 (D.C. Cir. 1986) (upholding district court decision to sample only one percent of voluminous documents).

<sup>175</sup> National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988); see City of Va. Beach v. United States Dep't of Commerce, 995 F.2d 1247, 1252 n.12 (4th Cir. 1993) ("By conducting in camera review, the district court established an adequate basis for its decision."); Contra Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991) ("In camera review of the withheld documents by the court is not an acceptable substitute for an adequate Vaughn index."), cert. denied, 112 S. Ct. 3013 (1992).

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Although there is no per se rule requiring in camera inspection,<sup>176</sup> it has been found to be appropriate where only a small volume of records is involved,<sup>177</sup> and where it is the only method by which the district court could properly review a privacy claim under Exemption 6.<sup>178</sup> Similarly, where a discrepancy exists between representations in the Vaughn Index and other material that the agency has publicly disclosed, in camera inspection has been held to be an appropriate method by which to resolve that inconsistency.<sup>179</sup> Additionally, an in camera description of a sample of a larger number of documents has been found appropriate where national security concerns make detailed, public affidavits impracticable.<sup>180</sup> On the other hand, it has been held that in camera review is not a procedure to be employed as a means of determining whether a requester should be charged duplication fees.<sup>181</sup>

In limited circumstances, in camera, ex parte, oral testimony may be

<sup>176</sup> See Young v. CIA, 972 F.2d at 539 ("this rule would eviscerate the discretion Congress gave district courts in section 552(a)(4)(B)"); Vaughn v. United States, 936 F.2d at 868-69; Center for Auto Safety v. EPA, 731 F.2d 16, 20 (D.C. Cir. 1984) (in camera inspection not required under Exemption 5).

<sup>177</sup> See Maynard v. CIA, 986 F.2d 547, 558 (1st Cir. 1993); Carter v. United States Dep't of Commerce, 830 F.2d at 393; Currie v. IRS, 704 F.2d 523, 531 (11th Cir. 1983); Allen v. CIA, 636 F.2d 1287, 1291-92 (D.C. Cir. 1980); Simon v. United States Dep't of Justice, No. 89-2117, slip op. at 4 (D.D.C. Sept. 14, 1990); see also Agee v. CIA, 517 F. Supp. 1335, 1336 (D.D.C. 1981) (selective in camera review). But see Young v. CIA, 972 F.2d at 549 (rejecting per se rule which would require in camera review "whenever the examination could be completed quickly").

<sup>178</sup> See Public Citizen Health Research Group v. United States Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978); see also Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) (in camera inspection of classified affidavit appropriate where "[d]isclosure of the details . . . might result in serious consequences to the nation's security"). But see Landfair v. United States Dep't of the Army, No. 85-1421, slip op. at 9-10 (D.D.C. Mar. 27, 1986) (no in camera inspection necessary "irrespective of the number of documents involved" where affidavits appear adequate).

<sup>179</sup> See Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992).

<sup>180</sup> See, e.g., Wilson v. CIA, No. 89-3356, slip op. at 5-6 (D.D.C. Oct. 15, 1991) (50-document sample of approximately 1000 pages withheld in whole or in part, selected equally by parties, for in camera explanation); Wilson v. Department of Justice, No. 87-2415, slip op. at 4 (D.D.C. June 13, 1991) (sample of eight of approximately 80 withheld documents, to be selected equally by each side, for detailed in camera description). But cf. Lame v. United States Dep't of Justice, 654 F.2d 917, 927 (3d Cir. 1981) (in camera sampling of criminal law enforcement documents held insufficient).

<sup>181</sup> See Larson v. United States Dep't of Justice, No. 85-2991, slip op. at 2 (D.D.C. Sept. 30, 1986).

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permitted, particularly in cases where documents contain national security information, because providing a more informative public description of the documents would risk revealing the very information the agency states is exempt from disclosure under the FOIA.<sup>182</sup> When in camera testimony is taken, however, it should be transcribed and maintained under seal.<sup>183</sup>

### Summary Judgment

Summary judgment is the procedural vehicle by which virtually all FOIA cases are resolved.<sup>184</sup> Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which provides, in part, that the "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact."<sup>185</sup> As long as there are no material facts at issue and no facts "susceptible to divergent inferences bearing upon an issue critical to disposition of the case," summary judgment is appropriate.<sup>186</sup> The Court of Appeals for the District of Columbia Circuit has held that "a motion for summary judgment adequately underpinned is not defeated simply by bare opinion or an unaided claim that a factual controversy persists."<sup>187</sup> In addition, "summary judgment need not be denied

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<sup>182</sup> See, e.g., Stein v. Department of Justice, 662 F.2d 1245, 1255 (7th Cir. 1981); Agee v. CIA, 517 F. Supp. at 1338; see also Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1469-71 (D.C. Cir. 1983); North Am. Man/Boy Love Ass'n v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,094, at 83,639 (S.D.N.Y. July 9, 1982), aff'd, 718 F.2d 1086 (2d Cir. 1983) (table cite).

<sup>183</sup> See Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983); Physicians for Social Responsibility v. United States Dep't of Justice, No. 85-0169, slip op. at 3-4 (D.D.C. Aug. 23, 1985); cf. Martin v. United States Dep't of Justice, No. 85-3091, slip op. at 3 (3d Cir. July 2, 1986) (nonexempt portion of in camera transcript ordered disclosed).

<sup>184</sup> See Struth v. FBI, 673 F. Supp. 949, 953 (E.D. Wis. 1987) ("Summary judgment is commonly used to adjudicate FOIA cases.").

<sup>185</sup> Fed. R. Civ. P. 56(c).

<sup>186</sup> Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 314 (D.C. Cir. 1988); see, e.g., Patterson v. IRS, No. 90-1941, slip op. at 3 (S.D. Ind. Nov. 3, 1992) ("[T]he disputed fact must be outcome determinative."); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 3-4 (D.D.C. Sept. 29, 1987); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405, 409-11 (D.D.C. 1983).

<sup>187</sup> Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d at 314 (footnote omitted); see also Duckworth v. Department of Navy, No. 91-15921, slip op. at 2 (9th Cir. Sept. 10, 1992) ("Conclusory allegations unsupported by factual data will not create a triable issue of fact." (quoting Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978))); Gale v. FBI, 141 F.R.D. 94, 96 (N.D. Ill. 1992)

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automatically in the face of non-substantive factual disputes, such as those that are . . . 'metaphysical' in nature."<sup>188</sup>

In a FOIA case, the agency has the burden of justifying nondisclosure,<sup>189</sup> and it must sustain its burden through the submission of detailed affidavits which identify the documents at issue and explain why they fall under the claimed exemptions.<sup>190</sup> The widespread use of Vaughn Indexes, of course, means that affidavits, in the form of Vaughn Indexes, will nearly always be submitted in FOIA lawsuits, notwithstanding Rule 56's language making affidavits optional in general.

As one court has put it, "[s]ummary judgment is available to the defendant in a FOIA case when the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester."<sup>191</sup> Summary judgment may be granted solely on the basis of agency affidavits if they are clear, specific and reasonably detailed, if they describe the

<sup>187</sup>(...continued)

(plaintiff's "own self-serving statements [alone] are insufficient to create a genuine issue of material fact barring summary judgment"); Lawyers Alliance for Nuclear Arms Control v. Department of Energy, No. 88-CV-7635, slip op. at 3-5 (E.D. Pa. Dec. 17, 1991) (plaintiff's reliance on "inadmissible hearsay" statements insufficient to preclude summary judgment where rebutted by government's "highly persuasive" sworn statements). But see Washington Post Co. v. HHS, 865 F.2d 320, 325-26 (D.C. Cir. 1989) (summary judgment found to be inappropriate, in Exemption 4 case, where affidavits conflicted on "critical factual issue" of whether government's information-gathering ability would be impaired by disclosure); Washington Post Co. v. United States Dep't of State, 840 F.2d 26, 29 (D.C. Cir. 1988) (summary judgment found to be inappropriate "when litigants quarrel over key factual premises"), vacated on petition for reh'g en banc, 898 F.2d 793 (D.C. Cir. 1989).

<sup>188</sup> Lombardo v. United States Dep't of Justice, No. 87-2652, slip op. at 2 (D.D.C. June 22, 1988); see In re Wade, 969 F.2d 241, 249 n.11 (7th Cir. 1992) ("speculation would not defeat the summary judgment motion"); Trenerry v. IRS, No. 90-C-444, slip op. at 3 (N.D. Okla. Jan. 7, 1992) ("plaintiff must do more than vituperatively hypothesize"), aff'd in pertinent part, rev'd in part & remanded in part sub nom. Trenerry v. Department of the Treasury, No. 92-5053, slip op. at 3-4 (10th Cir. Feb. 5, 1993).

<sup>189</sup> See, e.g., United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 789 (D.D.C. 1992).

<sup>190</sup> See King v. United States Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987); Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

<sup>191</sup> Miller v. United States Dep't of State, 779 F.2d 1378, 1382 (8th Cir. 1985).

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withheld information in a factual and nonconclusory manner, and if there is no contradictory evidence on the record or evidence of agency bad faith.<sup>192</sup> If all of these requisites are met, such affidavits are usually accorded substantial weight by the courts.<sup>193</sup>

However, in a controversial two-to-one panel opinion, the D.C. Circuit indicated that, at least in the Exemption 4 context, it would give great weight to the rebuttal evidence of the requester and therefore require particular specificity in the affidavit of a company that submitted information to the FDA that both the agency and the company argued was protectible pursuant to Exemption 4.<sup>194</sup> In the event of a trial on a contested issue of fact, it will be decided by a judge alone because a FOIA requester is "not entitled to a jury trial."<sup>195</sup>

In certain circumstances, opinions or conclusions may be asserted in agency affidavits, especially in cases in which disclosure would compromise national security.<sup>196</sup> On the other hand, "[c]ourts have consistently held that a

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<sup>192</sup> See, e.g., Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); Hemenway v. Hughes, 601 F. Supp. 1002, 1004 (D.D.C. 1985) (in FOIA cases, summary judgment does not hinge on existence of genuine issue of material fact, but rather on basis of agency affidavits if they are reasonably specific, demonstrate logical use of exemptions and are not controverted by evidence in record or by bad faith) (applying standard developed in national security context to Exemption 6); see also In re Wade, 969 F.2d at 246 ("Without evidence of bad faith, the veracity of the government's submissions regarding reasons for withholding the documents should not be questioned.").

<sup>193</sup> See, e.g., Gardels v. CIA, 689 F.2d 1100, 1104 (D.C. Cir. 1982); Taylor v. Department of the Army, 684 F.2d 99, 106-07 (D.C. Cir. 1982); Schreibman v. United States Dep't of Commerce, 785 F. Supp. 164, 165 (D.D.C. 1991).

<sup>194</sup> See Greenberg v. FDA, 803 F.2d 1213, 1217-18 (D.C. Cir. 1986) (plaintiff "introduced evidence that placed material issues of fact in dispute"); see also Washington Post Co. v. HHS, 865 F.2d at 325-26 ("competing experts' affidavits as to the effect of disclosure" held to constitute "genuinely controverted factual issue" under Exemption 4); MCI Telecommunications Corp. v. GSA, No. 89-746, slip op. at 15-16 (D.D.C. Mar. 25, 1992) ("fact-intensive question" under Exemption 4 as to whether disclosure will cause submitter competitive harm precludes summary judgment).

<sup>195</sup> Clarkson v. IRS, No. 8:88-3036, slip op. at 8 (D.S.C. May 10, 1990).

<sup>196</sup> See Gardels v. CIA, 689 F.2d at 1106 (there is "necessarily a region for forecasts in which informed judgment as to potential harm should be respected"); Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980) ("courts must take into account . . . that any affidavit of threatened harm to national security will always be speculative"); Hoch v. CIA, 593 F. Supp. 675, 683-84 (D.D.C. 1984), aff'd, 807 F.2d 1227 (D.C. Cir. 1990) (table cite); see also Moore v. FBI, No. 83-1541, slip op. at 2 (D.D.C. Aug. 30, 1984) (FBI sufficiently identified "particular incident" given national security nature of documents), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite).

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requester's opinion disputing the risk created by disclosure is not sufficient to preclude summary judgment for the agency when the agency possessing the relevant expertise has provided sufficiently detailed affidavits."<sup>197</sup>

Rule 56(e) of the Federal Rules of Civil Procedure provides that the affidavit must be based upon the personal knowledge of the affiant, must demonstrate the affiant's competency to testify as to matters stated, and must set forth only facts which would be admissible in evidence. (A federal statute specifically permits unsworn declarations (i.e., without notarizations) to be utilized in all cases in which affidavits otherwise would be required.<sup>198</sup>) "Gratuitous recitations of the affiant's own interpretation of the law," however, are inappropriate.<sup>199</sup>

In FOIA cases, the affidavit of an agency official who is knowledgeable about the way in which information is processed should satisfy the personal knowledge requirement.<sup>200</sup> Similarly, in instances in which an agency's search is questioned, an affidavit of an agency employee responsible for coordinating the search efforts should be sufficient to fulfill the personal knowledge

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<sup>197</sup> Struth v. FBI, 673 F. Supp. at 954; see, e.g., Goldberg v. United States Dep't of State, 818 F.2d 71, 78-79 (D.C. Cir. 1987) (under Exemption 1), cert. denied, 485 U.S. 904 (1988); Spannaus v. United States Dep't of Justice, 813 F.2d 1285, 1289 (4th Cir. 1987) (under Exemption 7(A)); Curran v. Department of Justice, 813 F.2d 473, 477 (1st Cir. 1987) (under Exemption 7(A)); Gardels v. CIA, 689 F.2d at 1106 n.5 (under Exemptions 1 and 3); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. at 410-11 (under Exemptions 2 and 7(E)); see also Lindsey v. NSC, No. 84-3897, slip op. at 3 (D.D.C. July 12, 1985) (plaintiff cannot defeat summary judgment by saying that he will raise genuine issue "at a time of his own choosing").

<sup>198</sup> 28 U.S.C. § 1746 (1988); see Summers v. United States Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993).

<sup>199</sup> Alamo Aircraft Supply, Inc. v. Weinberger, No. 85-1291, slip op. at 3 (D.D.C. Feb. 21, 1986).

<sup>200</sup> See, e.g., Spannaus v. United States Dep't of Justice, 813 F.2d at 1289 (declarant's attestation "to his personal knowledge of the procedures used in handling [the] request and his familiarity with the documents in question" held sufficient); Coleman v. FBI, No. 89-2773, slip op. at 8-9 (D.D.C. Dec. 10, 1991) ("The law does not require the affiant preparing a Vaughn Index to be personally familiar with more than the procedures used in processing the particular request."), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992); United States Student Ass'n v. CIA, 620 F. Supp. 565, 567-68 (D.D.C. 1985); Laborers' Int'l Union v. United States Dep't of Justice, 578 F. Supp. 52, 55-56 (D.D.C. 1983) (affiant competent where observations based on review of investigative report and upon general familiarity with the nature of investigations similar to that documented in requested report), aff'd, 772 F.2d 919 (D.C. Cir. 1984); Founding Church of Scientology v. Levi, 579 F. Supp. 1060, 1064 (D.D.C. 1982); Ramo v. Department of the Navy, 487 F. Supp. 127, 130 (N.D. Cal. 1979), aff'd, 692 F.2d 765 (9th Cir. 1982) (table cite).

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requirement.<sup>201</sup> Likewise, in justifying the withholding of classified information under Exemption 1, the affiant is required only to possess document-classification authority for the records in question, not personal knowledge of the particular substantive area that is the subject of the request.<sup>202</sup> However, affiants must establish that they are personally familiar with all of the withheld records,<sup>203</sup> and should not be selected merely because they occupy a particular position in the agency.<sup>204</sup>

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<sup>201</sup> See, e.g., Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) ("[A]n agency need not submit an affidavit from the employee who actually conducted the search. Instead, an agency may rely on an affidavit of an agency employee responsible for supervising the search."); SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1202 (D.C. Cir. 1991) (employee "in charge of coordinating the [agency's] search and recovery efforts [is] most appropriate person to provide a comprehensive affidavit"); Meeropol v. Meese, 790 F.2d 942, 951 (D.C. Cir. 1986) (supervisor/affiant properly relied on information provided by personnel who actually performed search); Carney v. United States Dep't of Justice, No. 92-CV-6204, slip op. at 12 (W.D.N.Y. Apr. 27, 1993) ("There is no basis in either the statute or the relevant caselaw to require that an agency effectively establish by a series of sworn affidavits a 'chain of custody' over its search process. The format of the proof submitted by defendant--declarations of supervisory employees, signed under penalty of perjury--is sufficient for purposes of both the statute and Fed.R.Civ.P. 56.") (appeal pending); Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992) (where third party claimed to have knowledge of additional documents, affidavit of agency employee who contacted that party found sufficient); Pennsylvania Dep't of Pub. Welfare v. HHS, No. 84-690, slip op. at 3-4 (M.D. Pa. Nov. 10, 1985) (affidavits of supervisory officials who directed search held adequate); cf. Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (while agency employee with "firsthand knowledge" of relevant files was appropriate person to supervise search undertaken by contractor, affidavit must specifically describe search).

<sup>202</sup> Holland v. CIA, No. 91-1233, slip op. at 15-16 (D.D.C. Aug. 31, 1992); McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 8-9 (D.D.C. Dec. 3, 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987).

<sup>203</sup> See Sellar v. FBI, No. 84-1611, slip op. at 3 (D.D.C. July 22, 1988).

<sup>204</sup> See Timken Co. v. United States Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,975 n.9 (D.D.C. June 24, 1983) (affiant merely sampled documents that staff had reviewed for him).

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### Discovery

Discovery is greatly restricted in FOIA actions.<sup>205</sup> It is generally limited to the scope of an agency's search,<sup>206</sup> its indexing and classification procedures, and similar factual matters.<sup>207</sup> Discovery may also be appropriate when the plaintiff can raise sufficient question as to the agency's good faith in processing or in its search.<sup>208</sup> However, in all cases, determinations of wheth-

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<sup>205</sup> Center for Nat'l Sec. Studies v. Office of Indep. Counsel, No. 91-1691, slip op. at 3 (D.D.C. Mar. 2, 1993) ("In the context of FOIA cases, discovery is generally inappropriate."); see In re Shackelford, No. 93-25, slip op. at 1 (D.D.C. Feb. 19, 1993) ("plaintiff's effort to depose two former FBI agents, now retired, concerning the purpose and conduct of the investigation of John Lennon over 20 years ago, is beyond the scope of allowable discovery in a [FOIA] action").

<sup>206</sup> Weisberg v. United States Dep't of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980) (discovery appropriate to inquire into adequacy of document search); Exxon Corp. v. FTC, 384 F. Supp. 755, 760 (D.D.C. 1974) (discovery limited to adequacy of search for identifiable records).

<sup>207</sup> Church of Scientology v. IRS, 137 F.R.D. 201, 202 (D. Mass. 1991); Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980); see Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 1-2 (D.D.C. Aug. 2, 1990) (permitting discovery, in Exemption 7(B) case, on issue of whether it is more probable than not that disclosure would seriously interfere with fairness of pending or "truly imminent" trial or adjudication); Silverberg v. HHS, No. 89-2743, slip op. at 2-3 (D.D.C. June 26, 1990) (permitting discovery, in Exemption 4 case, of responses by private drug-testing laboratories to agency's inquiry concerning whether their "performance test results" are customarily released to public); ABC v. USIA, 599 F. Supp. 765, 768-70 (D.D.C. 1984) (agency head ordered to submit to deposition on issue of whether transcripts of tape-recorded telephone calls constitute "personal records" or "agency records"). But see also Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988) (discovery may be permitted to determine whether complete disclosure was made and whether exemptions properly applied).

<sup>208</sup> See, e.g., Church of Scientology v. IRS, 991 F.2d 560, 563 (9th Cir. 1992) (finding abuse of discretion in district court's denial of discovery in light of "the special disadvantages facing this FOIA plaintiff," including "the questionable sufficiency of the Vaughn Index, the apparent evasiveness of the IRS responses [and] the slim showing of a need for as extensive a cloak of secrecy as the Government claimed"); Armstrong v. Bush, 139 F.R.D. 547, 553 (D.D.C. 1991) (discovery permitted to test government's claim that request for electronically stored records "would place an unreasonable burden on the agency"); Van Strum v. EPA, 680 F. Supp. 349, 350-51 (D. Or. 1987) (discovery appropriate where documents received by anonymous source raise "valid concerns" of affiant's credibility and good faith of search); cf. Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992)

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er discovery should be permitted--and, if so, the type and extent of such discovery--are vested in the sound discretion of the district court.<sup>209</sup>

Such factual issues can properly arise, if at all, only after the government moves for summary judgment and submits its supporting affidavits and memorandum of law.<sup>210</sup> For example, one court entered a protective order barring discovery until the defendant had an opportunity to submit a second Vaughn affidavit, even after the court had found that the agency's affidavit was insufficient to establish the adequacy of the agency's search.<sup>211</sup> At least one court

<sup>208</sup>(...continued)

(discovery denied where "[p]laintiff has not offered any evidence to rebut the presumption of good faith that is accorded to [defendant's affidavit detailing its search]").

<sup>209</sup> North Carolina Network for Animals, Inc. v. United States Dep't of Agric., No. 90-1443, slip op. at 12 (4th Cir. Feb. 5, 1991) ("The district court should exercise its discretion to limit discovery in this as in all FOIA cases, and may enter summary judgment on the basis of agency affidavits when they are sufficient to resolve issues . . . ."); see, e.g., Trenerry v. United States Dep't of Treasury, No. 92-5053, slip op. at 10 (10th Cir. Feb. 5, 1993); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993); Gillin v. IRS, 980 F.2d 819, 823 (1st Cir. 1992) (per curiam); Nolan v. United States Dep't of Justice, 973 F.2d 843, 849 (10th Cir. 1992); Meeropol v. Meese, 790 F.2d 942, 960-61 (D.C. Cir. 1986); Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

<sup>210</sup> See, e.g., Miscavige v. IRS, No. 92-8659, slip op. 3284, 3287 (11th Cir. Sept. 17, 1993) ("The plaintiff's early attempt in litigation of this kind . . . to take discovery depositions is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions.") (to be published); Farese v. United States Dep't of Justice, No. 83-938, slip op. at 6 (D.C. Cir. Aug. 12, 1987) (affirming denial of discovery filed prior to affidavits because discovery "sought to short-circuit the agencies' review of the voluminous amount of documentation requested"); Simmons v. United States Dep't of Justice, 796 F.2d 709, 711-12 (4th Cir. 1986); Military Audit Project v. Casey, 656 F.2d 724, 750 (D.C. Cir. 1981); Church of Scientology v. IRS, 137 F.R.D. at 202; Stone v. FBI, No. 87-1346, slip op. at 2 (D.D.C. Jan. 19, 1988); Ferri v. Department of Justice, No. 86-1279, slip op. at 2 (D.D.C. Oct. 3, 1986); Citizens for Envtl. Quality, Inc. v. United States Dep't of Agric., No. 83-3763, slip op. at 2 (D.D.C. May 24, 1984), summary judgment granted, 602 F. Supp. 534 (D.D.C. 1984); Murphy v. FBI, 490 F. Supp. at 1137; Diamond v. FBI, 487 F. Supp. 774, 777-78 (S.D.N.Y. 1979), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984).

<sup>211</sup> Founding Church of Scientology v. United States Marshals Serv., 516 F. Supp. 151, 156 (D.D.C. 1980). But see Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 2 (D.D.C. July 27, 1988) (plaintiff permitted discovery on issue of due diligence even prior to filing of government's affidavits);

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has afforded a higher standard for Exemption 1 cases, stating the "[i]t would be inappropriate to open this up to inadvertent statements by . . . a deponent in a national security area."<sup>212</sup> In any event, the "trial court has broad discretion . . . to stay discovery until preliminary questions that may dispose of the case are determined."<sup>213</sup>

A FOIA plaintiff should not in any case be permitted to extend his discovery efforts into the agency's thought processes for claiming particular exemptions.<sup>214</sup> Moreover, discovery should not be permitted where a plaintiff seeks thereby to obtain the contents of withheld documents, the issue that lies at the very heart of a FOIA case.<sup>215</sup> Nevertheless, in one Exemption 4 case the court permitted the plaintiff's counsel to review an in camera submission, sub-

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<sup>211</sup>(...continued)

Shurberg Broadcasting of Hartford, Inc. v. FCC, 617 F. Supp. 825, 832 (D.D.C. 1985) (court permitted discovery after receiving Vaughn affidavit and determining that there was a genuine issue as to thoroughness of agency's search); Exxon Corp. v. FTC, 384 F. Supp. 755, 758-60 (D.D.C. 1974) (court permitted discovery by interrogatories when affidavits raised questions regarding adequacy of search, but denied further discovery after answers to interrogatories, together with entire record in case, resolved such questions), remanded, 527 F.2d 1386 (D.C. Cir. 1976) (table cite).

<sup>212</sup> McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 8 (D.D.C. Dec. 3, 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987) (table cite).

<sup>213</sup> Petrus v. Brown, 833 F.2d 581, 583 (5th Cir. 1987) (granting stay of discovery pending determination of proper party defendant).

<sup>214</sup> See Pearson v. Bureau of Alcohol, Tobacco & Firearms, No. 85-3079, slip op. at 1-2 (D.D.C. Sept. 22, 1986); Murphy v. FBI, 490 F. Supp. at 1136 (citing United States v. Morgan, 313 U.S. 409, 422 (1941)).

<sup>215</sup> See, e.g., Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d at 1179 (plaintiff not entitled to discovery which would be tantamount to disclosure of contents of exempt documents); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (discovery denied where directed to substance of withheld documents at issue); Curcio v. FBI, No. 89-941, slip op. at 3-4 (D.D.C. Mar. 6, 1990) (same); Moore v. FBI, No. 83-1541, slip op. at 6 (D.D.C. Mar. 9, 1984) (court denied discovery requests which "would have to go to the substance of the classified materials" at issue, noting that "[t]his is precisely the case when the court can and should exercise its discretion to deny that discovery"), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite); Laborers' Int'l Union v. United States Dep't of Justice, 578 F. Supp. 52, 56 (D.D.C. 1983) (objections to interrogatories sustained where answers would "serve to confirm or deny the authenticity of the document held by plaintiff"), aff'd, 772 F.2d 919 (D.C. Cir. 1984); cf. Indiana Coal Council v. Hodel, 118 F.R.D. 264, 265-66 (D.D.C. 1988) (discovery of legal research system barred as a request for law, not factual information). But cf. Public Citizen v. EPA, No. 86-0316, slip op. at 7 (D.D.C. Oct. 16, 1986) ("While plaintiff has no right to material about deliberative processes, it at the least has a right . . . to know if the material it seeks justifies a deliberative process privilege.").

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ject to the terms of a restrictive protective order.<sup>216</sup>

Discovery also should not be permitted where the plaintiff is plainly using the FOIA lawsuit as a means of questioning investigatory action taken by the agency or the underlying reasons for undertaking such investigations.<sup>217</sup> Courts will refuse to "allow [a] plaintiff to use this limited discovery opportunity as a fishing expedition [for] investigating matters related to separate lawsuits."<sup>218</sup>

Discovery should be denied altogether if the court is satisfied from the agency's affidavits that no factual dispute remains,<sup>219</sup> and where the affidavits are "relatively detailed" and submitted in good faith.<sup>220</sup> Consequently, discovery should routinely be denied when the plaintiff's "efforts are made with [nothing] more than a 'bare hope of falling upon something that might impugn the affidavits'" submitted by the defendant agency.<sup>221</sup> In any event, curtailment of discovery is particularly appropriate where the court takes in camera inspection

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<sup>216</sup> Lederle Lab. v. HHS, No. 88-249, slip op. at 1 (D.D.C. May 2, 1988).

<sup>217</sup> See Williams v. FBI, No. 90-2299, slip op. at 7-8 (D.D.C. Aug. 6, 1991); Donohue v. United States Dep't of Justice, No. 84-3451, slip op. at 4 (D.D.C. May 16, 1986); see also Frydman v. Department of Justice, No. 78-4257, slip op. at 3-4 (D. Kan. Jan. 3, 1990) (discovery concerning electronic surveillance investigative practices denied).

<sup>218</sup> Tannehill v. Department of the Air Force, No. 87-1335, slip op. at 4 (D.D.C. Nov. 12, 1987) (discovery limited to determination of FOIA issues, not to underlying personnel decision); see also Morrison v. United States Dep't of Justice, No. 87-3394, slip op. at 4 (D.D.C. Apr. 29, 1988) (denying depositions and refusing to "sanction a fishing expedition" where plaintiff argued newspaper article evidenced waiver of Exemption 5, but article actually "raise[d] precisely the opposite inference").

<sup>219</sup> Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), vacated in part & reh'g denied, 607 F.2d 367 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980); see also Stone v. FBI, slip op. at 2.

<sup>220</sup> See SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200-02 (D.C. Cir. 1991) (affirming decision to deny discovery as to adequacy of search on ground that agency's affidavits were sufficiently detailed); Military Audit Project v. Casey, 656 F.2d at 751 (affirming trial court's refusal to permit discovery where plaintiffs had failed to raise "substantial questions concerning the substantive content of the [defendants'] affidavits"); Freeman v. United States Dep't of Justice, No. 90-2754, slip op. at 3 n.3 (D.D.C. July 12, 1991) (plaintiff's "conjecture and unsupported allegation" that agency has "motive" to prevent release of responsive records held insufficient basis for discovery concerning adequacy of search); see also Gardels v. CIA, 689 F.2d 1100, 1106 & n.5 (D.C. Cir. 1982); Murphy v. FBI, 490 F. Supp. at 1136-37.

<sup>221</sup> Center for Nat'l Sec. Studies v. Office of Indep. Counsel, slip op. at 5 (quoting Founding Church of Scientology v. NSA, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979)); see Military Audit Project v. Casey, 656 F.2d at 751-52.

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inspection.<sup>222</sup>

Finally, it should be noted that in appropriate cases, the government can conduct discovery against the requester,<sup>223</sup> but there is no jurisdiction under the FOIA to permit either party to take discovery against a private citizen.<sup>224</sup>

### Waiver of Exemptions in Litigation

As noted above, the FOIA directs district courts to review agency actions de novo.<sup>225</sup> Thus, an agency is not barred from invoking a particular exemption in litigation merely because that exemption was not cited in responding to the request at the administrative level.<sup>226</sup>

Failure to raise an exemption in a timely fashion in litigation at the district court level, however, may result in a waiver. Although an agency should not be required to plead its exemptions in its answer,<sup>227</sup> it has been held that

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<sup>222</sup> See Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (in camera review, rather than discovery, employed to resolve inconsistency between representations in Vaughn Index and agency's prior public statements); Laborers' Int'l Union v. United States Dep't of Justice, 772 F.2d at 921.

<sup>223</sup> See In re Engram, No. 91-1722, slip op. at 6-7 (4th Cir. June 2, 1992) (per curiam) (discovery regarding how plaintiff obtained defendant's document permitted as relevant to issue of waiver under Exemption 5); Weisberg v. United States Dep't of Justice, 749 F.2d 864, 868 (D.C. Cir. 1984).

<sup>224</sup> See Kurz-Kasch, Inc. v. DOD, 113 F.R.D. 147, 148 (S.D. Ohio 1986).

<sup>225</sup> 5 U.S.C. § 552(a)(4)(B) (1988).

<sup>226</sup> See, e.g., Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992); Gula v. Meese, 699 F. Supp. 956, 959 n.2 (D.D.C. 1988); Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1370-71 (E.D.N.C. 1986); Illinois Inst. for Continuing Legal Educ. v. United States Dep't of Labor, 545 F. Supp. 1229, 1236 (N.D. Ill. 1982); Dubin v. Department of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981), aff'd, 697 F.2d 1093 (11th Cir. 1983) (table cite); see also Conoco Inc. v. United States Dep't of Justice, 521 F. Supp. 1301, 1306 (D. Del. 1981) (agency is not barred from asserting work-product claim under Exemption 5 merely because it had not acceded to plaintiff's demand for Vaughn Index at administrative level), aff'd in part, rev'd in part & remanded, 687 F.2d 724 (3d Cir. 1982). But cf. AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (in "reverse" FOIA context--where standard of review is "arbitrary [and] capricious" based upon "whole" administrative record--agency may not initially offer at litigation stage its reasons for refusal to withhold material); Gilday v. United States Dep't of Justice, No. 85-292, slip op. at 5 (D.D.C. July 22, 1985) (agency rationale asserted in litigation over denial of fee waiver cannot correct shortcomings of administrative record).

<sup>227</sup> See, e.g., Johnson v. Federal Bureau of Prisons, No. 90-H-645-E, slip  
(continued...)

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"agencies [may] not make new exemption claims to a district court after the judge has ruled in the other party's favor,' nor may they 'wait until appeal to raise additional claims of exemption or additional rationales for the same claim.'" <sup>228</sup> Thus, an agency's failure to preserve its exemption claims can lead to serious waiver consequences as FOIA litigation progresses, not only during the initial district court proceedings, <sup>229</sup> but also at the appellate level, <sup>230</sup> and even following a remand. <sup>231</sup>

<sup>227</sup>(...continued)

op. at 4-5 (N.D. Ala. Nov. 1, 1990); Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. at 1371; Berry v. Department of Justice, 612 F. Supp. 45, 47 (D. Ariz. 1985); see also American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d 203, 206-07 (D.C. Cir. 1990). But see Ray v. United States Dep't of Justice, 908 F.2d 1549, 1557 (11th Cir. 1990) (going so far as to suggest that all exemptions must be raised by defendant agency "in a responsive pleading" (quoting Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982))), rev'd on other grounds sub nom. United States Dep't of State v. Ray, 112 S. Ct. 541 (1991).

<sup>228</sup> Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting Holy Spirit Ass'n v. CIA, 636 F.2d 838, 846 (D.C. Cir. 1980), vacated in part as moot, 455 U.S. 997 (1982)).

<sup>229</sup> See, e.g., Ray v. United States Dep't of Justice, 908 F.2d at 1551 (new exemption claims waived when raised for first time after district court ruled against government on its motion for summary judgment); Miller v. Sessions, No. 77-C-3331, slip op. at 2 (N.D. Ill. May 2, 1988) ("misunderstanding" on part of government counsel of court's order to submit additional affidavits held insufficient to overcome waiver; motion for reconsideration denied); Nishnic v. United States Dep't of Justice, No. 86-2802, slip op. at 2-3 (D.D.C. Oct. 20, 1987) (defendant's motion for reconsideration to present additional affidavits, exemptions and evidence under seal denied as defendant had "ample opportunity" to present all FOIA defenses at earlier stage of litigation); Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 4 (N.D. Cal. June 14, 1985) (government may not raise Exemption 7(D) for documents declassified during pendency of case when only Exemption 1 raised at outset).

<sup>230</sup> See, e.g., Jordan v. United States Dep't of Justice, 591 F.2d 753, 779-80 (D.C. Cir. 1978) (en banc) (refusing to consider government's Exemption 7 claim first raised in a "supplemental memorandum" filed one month prior to appellate oral argument).

<sup>231</sup> See, e.g., Fendler v. Parole Comm'n, 774 F.2d 975, 978 (9th Cir. 1985) (government barred from raising Exemption 5 on remand to protect pre-sentence report because it was raised for first time on appeal); Ryan v. Department of Justice, 617 F.2d 781, 792 & n.38a (D.C. Cir. 1980) (government barred from invoking Exemption 6 on remand because it was raised for first time on appeal); see also Benavides v. United States Bureau of Prisons, 995 F.2d 269, 273 (D.C. Cir. 1993) ("[T]he government is not entitled to raise defenses to requests for information seriatim until it finds a theory that the court will accept, but must bring all its defenses at once before the district court.")

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The effect of these holdings is somewhat mitigated by the Court of Appeals for the District of Columbia Circuit's observation in Jordan v. United States Department of Justice that if the government "through pure mistake" failed to assert the proper exemption in district court and the information involved was of a very sensitive nature and was "highly likely" to be protected by an exemption, then the appellate court would have discretion under 28 U.S.C. § 2106 to remand the case for such further proceedings "as may be just under the circumstances."<sup>232</sup>

Sometimes, changes in factual circumstances may dictate revisions of an agency's exemption position--for example, where an agency's Exemption 7(A) withholding is rendered moot by intervening factual developments.<sup>233</sup> Simi-

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<sup>231</sup>(...continued)

(Privacy Act access case). Compare Washington Post Co. v. HHS, 795 F.2d 205, 208-09 (D.C. Cir. 1986) ("privilege" prong of Exemption 4 may not be raised for first time on remand--even though "confidential" prong was previously raised--absent sufficient extenuating circumstances) and Washington Post Co. v. HHS, 865 F.2d 320, 327 (D.C. Cir. 1989) (agency prohibited from raising new aspect of previously raised prong of Exemption 4) with Lame v. United States Dep't of Justice, 767 F.2d 66, 71 n.7 (3d Cir. 1985) (new exemptions may be raised first on remand, as compared to raising new exemptions on appeal).

<sup>232</sup> 591 F.2d at 780; see Ryan v. Department of Justice, 617 F.2d 781, 792 (D.C. Cir. 1980) (following Jordan, rejects exemption not raised at district court; no "extraordinary circumstances" to warrant relief under 28 U.S.C. § 2106); see also Oklahoma Publishing Co. v. HUD, No. 87-1935-P, slip op. at 4 (W.D. Okla. June 17, 1988) (because Exemption 6 found applicable to material originally ordered disclosed, court held exemption not waived--to protect subject--but imposed sanctions on defendant and counsel); Washington Post Co. v. DOD, No. 84-2402, slip op. at 5 (D.D.C. Apr. 11, 1988) (permitting agency to raise new Exemption 1 claim for records previously found not protected by Exemption 5, where disclosure "could compromise the nation's foreign relations or national security" (citing Jordan v. United States Dep't of Justice, 591 F.2d at 780)). But cf. Schanen v. United States Dep't of Justice, 798 F.2d 348, 349-50 (9th Cir. 1986) (although government's Rule 60(b) motion, based on procedural errors, was properly denied, government may withhold identities of informers and DEA agents due to possibility of imminent harm to those individuals; government subject to attorney fees, however).

<sup>233</sup> See, e.g., Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982) (government not barred from invoking other exemptions after reliance on Exemption 7(A) rendered untenable by conclusion of underlying law enforcement proceeding); Donovan v. FBI, 625 F. Supp. 808, 809 (S.D.N.Y. 1986) (same); accord Senate of P.R. v. United States Dep't of Justice, 823 F.2d at 581 (making no "broad pronouncement" on whether conclusion of law enforcement proceedings used to justify Exemption 7(A) claim will always be sufficient factual change, court found, based upon showing of good faith by agency, that trial judge did not abuse discretion in allowing agency to advance other exemptions); see also

(continued...)

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larly, an agency should be able to belatedly assert new defenses if there is "an interim development in applicable legal doctrine."<sup>234</sup>

In the district court, exemption claims should, of course, be substantiated by adequate Vaughn submissions. (See discussion of "Vaughn Index," above.) Failure to submit an adequate Vaughn affidavit, however, should not result in a waiver of exemptions and justify the granting of summary judgment against an agency.<sup>235</sup> The most prudent practice for agency defendants, though, is to ensure that their initial Vaughn affidavits contain detailed justifications of every

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<sup>233</sup>(...continued)

Church of Scientology v. IRS, 816 F. Supp. 1138, 1157 (W.D. Tex. 1993) ("If the investigation is open . . . at the time of the request, the documents are exempt. Furthermore, the agency is not required to monitor the investigation and release the documents once the investigation is closed and there is no reasonable possibility of future proceedings." (citing Bonner v. United States Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991))). But see Curcio v. FBI, No. 89-941, slip op. at 10-11 (D.D.C. Nov. 2, 1990) (government barred from raising new exemptions where it originally relied entirely upon Exemption 7(A)) (motion for reconsideration pending); cf. Washington Post Co. v. HHS, 795 F.2d at 208 (fact that court recommended in previous decision, in dicta, that HHS raise new argument could not be considered "extraordinary circumstance" that would justify actually raising argument on remand).

<sup>234</sup> Jordan v. United States Dep't of Justice, 591 F.2d at 780; see also Cotner v. United States Parole Comm'n, 747 F.2d 1016, 1018-19 (5th Cir. 1984) (new exemptions may be asserted when remand due to "fundamental" change in government's position "not calculated to gain any tactical advantage in this particular case"); Carson v. United States Dep't of Justice, 631 F.2d 1008, 1015 n.29 (D.C. Cir. 1980) (declining to preclude consideration of particular FOIA exemptions on remand where, in holding that presentence report was agency record of Parole Commission for purposes of FOIA, court was "embark[ing] upon previously uncharted territory"). But see Lykins v. Rose, 608 F. Supp. 693, 695 (D.D.C. 1984) ("interim developments" justification for new exemptions does not include losses in instant case or rejection of alternative defense).

<sup>235</sup> See Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969, 982 (3d Cir. 1981) (abuse of discretion to refuse to consider revised index and instead award "partial judgment" to plaintiff, even though corrected index was submitted one day before oral argument on plaintiff's "partial judgment" motion); cf. Wilkinson v. FBI, No. 80-1048, slip op. at 3 (C.D. Cal. June 17, 1987) (after providing government 30 days to further justify exemptions, and after reviewing those subsequent declarations, court found same faults with new declarations as with original ones and ordered in camera review). But see Carroll v. IRS, No. 82-3524, slip op. at 28 (D.D.C. Jan. 31, 1986) (holding affidavits insufficient and affording agencies no further opportunities to re-assert their claims; "[a]fter years of litigation, the suit must be resolved").

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exemption planned to be asserted on the basis of all known facts.<sup>236</sup> By the same token, courts also have held that they will not consider issues raised for the first time on appeal by FOIA plaintiffs.<sup>237</sup>

### Attorney Fees and Litigation Costs

The FOIA is one of more than 100 different federal statutes which contains a "fee-shifting" provision permitting the trial court to award reasonable attorney fees and litigation costs if the plaintiff has "substantially prevailed" in litigation.<sup>238</sup> This provision, added as part of the 1974 FOIA amendments, requires courts to engage in a two-step substantive inquiry: (1) Is the plaintiff eligible for an award of fees and/or costs? (2) If so, is the plaintiff entitled to it?<sup>239</sup> The award of fees is discretionary with the court, once the threshold of eligibility has been crossed.<sup>240</sup>

As a preliminary matter, it should be noted that 5 U.S.C. § 552(a)(4)(E)

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<sup>236</sup> See Coastal States Gas Corp. v. Department of Energy, 644 F.2d at 981 (suggesting that agencies might be restricted to one index); see also ABC v. USIA, 599 F. Supp. 765, 768 (D.D.C. 1984) (flatly denying government's request to first litigate "agency record" issue and to raise other exemptions only if threshold defense fails).

<sup>237</sup> See, e.g., Curran v. Department of Justice, 813 F.2d 473, 477 (1st Cir. 1987) (in camera inspection of records not considered when raised for first time on appeal); Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 983 (1st Cir. 1985) (appointment of counsel not considered when raised for first time on appeal); Bush v. Webster, No. 85-4262, slip op. at 2-3 (5th Cir. Feb. 10, 1986) (government's lack of expeditious handling of case raised for first time on appeal); Kimberlin v. United States Dep't of the Treasury, 774 F.2d 204, 207 (7th Cir. 1985) (issue of deletions taken pursuant to FOIA exemptions raised for first time on appeal). But see Carter v. United States Dep't of Commerce, 830 F.2d 388, 390 n.8 (D.C. Cir. 1987) (appellate court sua sponte considered new theories of public interest in its Exemption 6 balancing not raised by plaintiff at district court); Farese v. United States Dep't of Justice, No. 86-5528, slip op. at 9-10 (D.C. Cir. Aug. 12, 1987) (plaintiff not estopped from challenging use of specific exemptions at appellate stage where he merely argued at trial level that agency failed to meet its burden of establishing documents exempt).

<sup>238</sup> 5 U.S.C. § 552(a)(4)(E) (1988).

<sup>239</sup> See Tax Analysts v. United States Dep't of Justice, 965 F.2d 1092, 1093 (D.C. Cir. 1992); Church of Scientology v. United States Postal Serv., 700 F.2d 486, 489 (9th Cir. 1983).

<sup>240</sup> See, e.g., Young v. Director, CIA, No. 92-2561, slip op. at 4 (4th Cir. Aug. 10, 1993); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993); Tax Analysts v. United States Dep't of Justice, 965 F.2d at 1094 ("sifting of [fee] criteria over the facts of a case is a matter of district court discretion"); Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1495 (D.C. Cir. 1984); Church of Scientology v. United States Postal Serv., 700 F.2d at 489.



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provides for the assessment of fees and costs reasonably incurred in litigating an action under the FOIA. Accordingly, fees and other costs may not be awarded for services rendered at the administrative level.<sup>241</sup> Similarly, fees are not recoverable for services rendered in related rulemaking proceedings.<sup>242</sup>

The vast majority of courts have held that 5 U.S.C. § 552(a)(4)(E) does not authorize the award of fees to a pro se nonattorney.<sup>243</sup> Previously, only the Court of Appeals for the District of Columbia Circuit had unqualifiedly approved the award of fees to pro se nonattorney litigants.<sup>244</sup> Following the Supreme Court's decision in Kay v. Ehrler,<sup>245</sup> however, the D.C. Circuit concluded in Benavides v. Bureau of Prisons, that it was "constrained" to reverse its position.<sup>246</sup> It observed that "absent congressional intent to the contrary, the Supreme Court believes that the word 'attorney,' when used in the context of a fee-shifting statute, does not encompass a layperson proceeding on his own behalf."<sup>247</sup> In rejecting the plaintiff's contention that the "the fee provision in

<sup>241</sup> See Newport Aeronautical Sales v. Department of the Navy, No. 84-120, slip op. at 8 (D.D.C. Apr. 17, 1985); Associated Gen. Contractors v. EPA, 488 F. Supp. 861, 864 (D. Nev. 1980); cf. Kennedy v. Andrus, 459 F. Supp. 240, 244 (D.D.C. 1978) (no fees for services rendered at administrative level under Privacy Act of 1974), aff'd, 612 F.2d 586 (D.C. Cir. 1980) (table cite). But see Mahler v. IRS, No. 79-3238, slip op. at 1 (D.D.C. Mar. 28, 1980) (one-page order granting pro se plaintiff's unopposed motion for attorney fees for work done at administrative level).

<sup>242</sup> See Newport Aeronautical Sales v. Department of the Navy, slip op. at 8; see also Nichols v. Pierce, 740 F.2d 1249, 1252-54 (D.C. Cir. 1984) (no fees awarded where plaintiff was successful in APA rulemaking action in which FOIA had not been referenced or primarily relied upon).

<sup>243</sup> See, e.g., Carter v. VA, 780 F.2d 1479, 1481 (9th Cir. 1986); DeBold v. Stimson, 735 F.2d 1037, 1041-43 (7th Cir. 1984); Wolfel v. United States, 711 F.2d 66, 68 (6th Cir. 1983); Clarkson v. IRS, 678 F.2d 1368, 1371 (11th Cir. 1982); Cunningham v. FBI, 664 F.2d 383, 384-88 (3d Cir. 1981); Barrett v. Bureau of Customs, 651 F.2d 1087, 1089 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982); Crooker v. United States Dep't of Justice, 632 F.2d 916, 920-21 (1st Cir. 1980); Burke v. Department of Justice, 432 F. Supp. 251, 253 (D. Kan. 1976), aff'd, 559 F.2d 1182 (10th Cir. 1977); cf. Crooker v. EPA, 763 F.2d 16, 17 (1st Cir. 1985) (pro se FOIA plaintiff may not collect fees under Equal Access to Justice Act).

<sup>244</sup> See Cox v. United States Dep't of Justice, 601 F.2d 1, 5-6 (D.C. Cir. 1979); Holly v. Acree, 72 F.R.D. 115, 116 (D.D.C. 1976), aff'd sub nom. Holly v. Chasen, 569 F.2d 160 (D.C. Cir. 1977) (table cite).

<sup>245</sup> 111 S. Ct. 1435, 1436-37 (1991) (holding that 42 U.S.C. § 1988 (1988), a fee-shifting statute similar to FOIA, does not authorize payment of fees to pro se attorney litigants).

<sup>246</sup> 993 F.2d 257, 259 (D.C. Cir. 1993).

<sup>247</sup> Id.

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FOIA is designed principally to deter government noncompliance,<sup>248</sup> the D.C. Circuit declared: "To the extent that the fee-shifting provision in FOIA helps deter violations of the law, that result is only a serendipitous by-product of encouraging aggrieved individuals to obtain an attorney."<sup>249</sup>

In the wake of Kay and Benavides, the scant residual authority approving attorney fees awards to a pro se plaintiff may be regarded as tenuous, at best. An earlier decision of the Court of Appeals for the Second Circuit implicitly held open the possibility of an award of attorney fees to a pro se litigant, although affirming the district court's denial of fees in that particular case.<sup>250</sup> In a subsequent decision, however, the Second Circuit appeared to retreat from even this equivocal position.<sup>251</sup>

Although in its decision in Benavides the D.C. Circuit specifically refused to comment on the availability of fees to pro se plaintiffs who are attorneys,<sup>252</sup> it should be noted that in Kay v. Ehrler, the Supreme Court specifically ruled that even a pro se attorney is ineligible for a fee award under 42 U.S.C. § 1988,<sup>253</sup> implicitly endorsing a line of cases that had reached the same conclusion under the FOIA.<sup>254</sup> It is significant that in Kay v. Ehrler, the Supreme Court employed reasoning virtually identical to that of Falcone v. IRS,<sup>255</sup> a FOIA decision upon which the district court in Kay v. Ehrler had

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<sup>248</sup> Id.; see also Sellers v. Bureau of Prisons, No. 93-5090, slip op. at 1 (D.C. Cir. July 27, 1993) (applying principle of Kay and Benavides to deny fees to prevailing pro se plaintiff in Privacy Act litigation).

<sup>249</sup> 993 F.2d at 260.

<sup>250</sup> Crooker v. United States Dep't of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980).

<sup>251</sup> See Kuzma v. United States Postal Serv., 725 F.2d 16, 17 (2d Cir.) (emphasizing that Crooker was limited decision in which court had merely "held out the possibility that a pro se litigant might be entitled to some fee award if he could show that he had foregone an opportunity to earn 'regular income for a day or more in order to prepare and pursue a pro se suit'" (quoting Crooker, 634 F.2d at 49)), cert. denied, 469 U.S. 831 (1984).

<sup>252</sup> 993 F.2d at 260.

<sup>253</sup> 111 S. Ct. at 1436-39.

<sup>254</sup> See, e.g., Aronson v. HUD, 866 F.2d 1, 4-6 (1st Cir. 1989) (denying fee awards for pro se attorney); Rotondo v. FBI, No. 88-3035, slip. op. at 2 (6th Cir. Aug. 24, 1988) (same); Falcone v. IRS, 714 F.2d 646, 647-48 (6th Cir. 1983) (same), cert. denied, 466 U.S. 908 (1984). But see Cazalas v. United States Dep't of Justice, 709 F.2d 1051, 1055-57 (5th Cir. 1983) (granting fee awards for pro se attorney); Cuneo v. Rumsfeld, 553 F.2d 1360, 1366 (D.C. Cir. 1977) (same).

<sup>255</sup> 714 F.2d at 647-48.

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relied in originally denying pro se attorney fees.<sup>256</sup>

Under the circumstances, it appears reasonable to conclude that the Supreme Court's rationale in Kay v. Ehrler would preclude an award of fees to any pro se FOIA litigant.<sup>257</sup> In the only post-Kay decision to address this issue thus far, the court reasoned: "Because substantially similar policies underlie the attorneys' fees provisions of FOIA and section 1988, Kay strongly supports a denial of fees under FOIA to pro se attorney plaintiffs."<sup>258</sup> The applicability of these principles to the FOIA is further buttressed by the Supreme Court's practice of construing similarly worded fee-shifting statutes "uniformly."<sup>259</sup> In contrast to the apparent prohibition against pro se fees, however, it has been firmly held that a state is eligible to recover attorney fees under the FOIA.<sup>260</sup>

Unlike with attorney fees, the law is settled that costs of litigation can be reasonably incurred by, and awarded to, even a pro se litigant who is not an attorney.<sup>261</sup> As the D.C. Circuit has noted, "[t]he fixing of costs, if any, is handled routinely under 28 U.S.C. § 1920."<sup>262</sup> More recently, "costs" in a

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<sup>256</sup> 111 S. Ct. at 1436-38 & n.4; see Benavides, 993 F.2d at 260 ("In discussing Falcone, the Supreme Court in Kay says absolutely nothing to suggest that . . . considerations affecting the disposition of fee claims under FOIA and section 1988 should be viewed differently.").

<sup>257</sup> See 111 S. Ct. at 1438 (observing that "awards of counsel fees to pro se litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel" and that "policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case").

<sup>258</sup> Manos v. United States Dep't of the Air Force, No. 92-3986, slip op. at 5-6 (N.D. Cal. Aug. 13, 1993) (recognizing prior split in circuits and even between district courts within Ninth Circuit regarding pro se attorney fee awards, but adopting blanket prohibition against such awards in light of Kay).

<sup>259</sup> City of Burlington v. Dague, 112 S. Ct. 2638, 2641 (1992) ("[O]ur case law construing what is a 'reasonable' fee applies uniformly to all [similar fee statutes].").

<sup>260</sup> See, e.g., Texas v. ICC, 935 F.2d 728, 734 (5th Cir. 1991); Assembly of Cal. v. United States Dep't of Commerce, No. Civ-S-91-990, slip op. at 13-14 (E.D. Cal. May 28, 1993) ("Although the Assembly may have more resources than some private citizens, this does not mean the Assembly is any less restricted with respect to allocating its resources.")

<sup>261</sup> See Carter v. VA, 780 F.2d at 1481-82; DeBold v. Stimson, 735 F.2d at 1043; Clarkson v. IRS, 678 F.2d at 1371; Crooker v. United States Dep't of Justice, 632 F.2d at 921-22; see also Trenerry v. United States Dep't of Treasury, No. 92-5053, slip op. at 10-12 (10th Cir. Feb. 5, 1993).

<sup>262</sup> Gregory v. FDIC, 631 F.2d 896, 900 n.8 (D.C. Cir. 1980); see also  
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FOIA case have been interpreted to include the fees paid to a special master appointed by the court to review documents on its behalf.<sup>263</sup> Of course, if it prevails, even the government may recover its costs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.<sup>264</sup>

To be eligible for a fee award, the plaintiff must "substantially prevail" within the meaning of 5 U.S.C. § 552(a)(4)(E). The determination of whether the plaintiff has substantially prevailed is "largely a question of causation."<sup>265</sup> Though a court order compelling disclosure is not a condition precedent to an award of fees, the plaintiff must prove that prosecution of the suit was reasonably necessary to obtain the requested records and that a causal nexus existed between the suit and the agency's disclosure of the records.<sup>266</sup> The mere filing of the lawsuit and the subsequent release of records does not necessarily mean that the plaintiff substantially prevailed.<sup>267</sup> Indeed, eligibility for a fee

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<sup>262</sup>(...continued)

Kuzma v. IRS, 821 F.2d 930, 931-34 (2d Cir. 1987) (finding that reimbursable costs included photocopying, postage, typing, parking and transportation expenses, in addition to filing costs and marshal's fees awarded at trial level).

<sup>263</sup> See Washington Post v. DOD, 789 F. Supp. 423, 424 (D.D.C. 1992) (apportioning master's fees equally between plaintiff and government).

<sup>264</sup> See, e.g., Donohue v. United States Dep't of Justice, No. 84-3451, slip op. at 1-2 (D.D.C. Mar. 7, 1988) (granting government's bill of costs for reimbursement of reporter, witness and deposition expenses); see also Baez v. United States Dep't of Justice, 684 F.2d 999, 1005-06 (D.C. Cir. 1982) (en banc) (assessing costs of appeal against unsuccessful plaintiff).

<sup>265</sup> Weisberg v. United States Dep't of Justice, 745 F.2d at 1496; Church of Scientology v. Harris, 653 F.2d 584, 587 (D.C. Cir. 1981).

<sup>266</sup> See, e.g., Maynard v. CIA, 986 F.2d at 568; Cox v. United States Dep't of Justice, 601 F.2d at 6 (citing Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 513 (2d Cir. 1976)); Cuneo v. Rumsfeld, 553 F.2d at 1366; cf. Transit Performance Eng'g v. Department of Transp., No. 92-722, slip op. at 4 (D.D.C. June 26, 1992) (no causation where "undisputed evidence [showed] that the officials who decided to release the documents were not even aware that a lawsuit had been filed until after the requested documents were released"); National Wildlife Fed'n v. Department of the Interior, No. 83-3586, slip op. at 9-12 (D.D.C. Aug. 19, 1988) (fees denied where plaintiffs failed to prove that suit played "catalytic role" in prompting Congress to amend FOIA fee waiver provision).

<sup>267</sup> See Maynard v. CIA, 986 F.2d at 568 (production of documents by two agencies after suit filed held "not determinative" as to causation); Weisberg v. United States Dep't of Justice, 745 F.2d at 1496; Frye v. EPA, No. 90-3041, slip op. at 8 (D.D.C. Aug. 31, 1992) ("while plaintiff's lawsuit appears to have served as a catalyst for EPA's eventual disclosures, it is not at all clear that it was the cause" of EPA's voluntary disclosure); see also Gray v. United States Dep't of Agric., No. 91-1383, slip op. at 3 (D.D.C. Mar. 27, 1992) (agency's

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award may be lacking where the plaintiff could reasonably have obtained the same information through other means,<sup>268</sup> or where the release resulted from events independent of the lawsuit,<sup>269</sup> or where it was due to routine, though delayed, administrative processing.<sup>270</sup> Of course, if a requester unconditional-

<sup>267</sup>(...continued)

granting of fee waiver on administrative appeal after plaintiff "precipitously filed" court complaint--involving "new and time-consuming issue" in context of "blunderbuss request"--held insufficient to establish plaintiff as prevailing party).

<sup>268</sup> See, e.g., Murty v. OPM, 707 F.2d 815, 816 (4th Cir. 1983) ("telephone call of inquiry as to what had happened to his request . . . would have produced the same result as the law suit"); Palmer v. Sullivan, No. H-C-91-13, slip op. at 3 (E.D. Ark. July 8, 1991) (fees denied where "telephone call or follow-up letter could easily have avoided this lawsuit"); Mendez-Suarez v. Veles, 698 F. Supp. 905, 907 (N.D. Ga. 1988) (fees denied where "the pendency of the discovery requests conclusively demonstrates that the information sought was available through means other than the filing of a FOIA claim"); see also Nicolau v. United States Dep't of Justice, 699 F. Supp. 1063, 1066 (S.D.N.Y. 1988) (fees denied where "no reason to believe that the suit was necessary for the actions of the [agency] . . . [i]ndeed, it is not even clear that those individuals in the [agency] were aware of the suit at the time the documents were turned over").

<sup>269</sup> See, e.g., Ostrer v. FBI, No. 83-0328, slip op. at 12 (D.C. Cir. Jan. 19, 1988) (no causation where release of records was due to change in factual circumstances during course of litigation); Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Justice, 750 F.2d 117, 119-21 (D.C. Cir. 1984) (release by senator of his letter to Attorney General held not caused by filing of FOIA suit); Public Law Educ. Inst. v. United States Dep't of Justice, 744 F.2d 181, 183-84 (D.C. Cir. 1984) (no causation where government exercised its discretion to release requested document in unrelated, non-FOIA suit); Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 712 n.34 (D.C. Cir. 1977) ("[W]here the government can show that information disclosed after initial resistance was nonetheless exempt from the FOIA a plaintiff should not be awarded attorney fees."); Pfeiffer v. CIA, No. 87-1279, slip op. at 2-3 (D.D.C. Oct. 23, 1991) ("[P]ermittting attorneys' fees for the voluntary release of exempt material would have a chilling effect."). But see Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 4-5 (D. Ariz. Dec. 12, 1987) (fact that plaintiffs acquired documents independently does not preclude them from substantially prevailing; a "contrary determination is inconceivable as the government would be able to foreclose the recovery of attorney's fees whenever it chose to moot an action" by releasing records after having denied disclosure at administrative level).

<sup>270</sup> See, e.g., Van Strum v. EPA, No. 91-35404, slip op. at 5 (9th Cir. Aug. 17, 1992) (no causation where, in litigation, agency disclosed 18,000 pages within two months after narrowing of request); Weisberg v. United States Dep't of Justice, 848 F.2d 1265, 1268-71 (D.C. Cir. 1988) (no causation where  
(continued...))

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ly waives his right to fees as part of a settlement, he cannot go back on his agreement.<sup>271</sup>

<sup>270</sup>(...continued)

majority of records were released as result of administrative processing and not suits); Varelli v. FBI, No. 88-1865, slip op. at 3-4 (D.D.C. July 13, 1992) (fees denied where disclosures resulted from "[t]he lengthy and thorough review of plaintiff's request [which] was initiated by the FBI well before the filing of this suit and proceeded throughout the pendency of the normal administrative process"); Arevalo-Franco v. INS, 772 F. Supp. 959, 961 (W.D. Tex. 1991) (requesters "generally" held not to have substantially prevailed when they "know that administrative problems are causing the delay . . . and file lawsuits anyway"); Alliance for Responsible CFC Policy, Inc. v. Costle, 631 F. Supp. 1469, 1470 (D.D.C. 1986) (fees denied where agency's "failure to disclose in timely fashion appears to be 'an unavoidable delay accompanied by due diligence in the administrative processes' and not the result of agency intransigence" (quoting Cox v. United States Dep't of Justice, 601 F.2d at 6)); Lovell v. Department of Justice, 589 F. Supp. 150, 153-54 (D.D.C. 1984) (fees denied even though plaintiff waited three years before filing suit and records were released only several months thereafter); Simon v. United States, 587 F. Supp. 1029, 1032 (D.D.C. 1984) (fees denied where "routine administrative inertia or unavoidable delay in identifying and assembling the information requested was the reason for defendants' belated compliance"); Bubar v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,218, at 83,930 (D.D.C. June 13, 1983) (fees denied even though over 5,400 pages of records released pursuant to revised processing procedures after suit filed, because plaintiff "failed to meet his burden of showing that the filing of this lawsuit caused the release of the additional documents"); Liechty v. CIA, 3 Gov't Disclosure Serv. (P-H) ¶ 82,482, at 83,193 (D.D.C. Sept. 16, 1982) (fees denied where plaintiff "offer[ed] no evidence other than his conclusory allegations that the filing of this suit 'actually provoked' the release of the 424 documents provided by the CIA without an order of the court"). But see Northwest Coalition for Alternatives to Pesticides v. Reilly, No. 90-707, slip op. at 2-4 (D.D.C. May 28, 1992) (government's claim that disclosure was made in course of "administrative processing" rejected where agency failed to respond to plaintiff's letters of administrative appeal); Church of Scientology v. IRS, 769 F. Supp. 328, 330 (C.D. Cal. 1991) (notwithstanding agency appeal backlog, plaintiff eligible where government denied documents initially, had yet to respond to administrative appeal, and released documents only following order to produce Vaughn Index); Muffoletto v. Sessions, 760 F. Supp. 268, 274 (E.D.N.Y. 1991) (lawsuit provided "impetus" for FBI to act, "even if simply to negotiate . . . in a more expeditious manner"); Harrison Bros. Meat Packing Co. v. United States Dep't of Agric., 640 F. Supp. 402, 405-06 (M.D. Pa. 1986) (holding it "ludicrous" for government, after "suddenly and inexplicably" releasing records, to assert mootness to avoid paying fees after having denied disclosure at administrative level); Des Moines Register & Tribune Co. v. United States Dep't of Justice, 563 F. Supp. 82, 85 (D.D.C. 1983) (delay of over three years from submission of request to date records were released held not reasonable).

<sup>271</sup> See National Senior Citizens Law Ctr. v. Social Sec. Admin., 849 F.2d (continued...)

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A requester may also be deemed not to have substantially prevailed where the records disclosed were "not significant in terms of the overall FOIA request."<sup>272</sup> Considering a contention that an agency's release of documents was so de minimis as to preclude an award of attorney fees, the D.C. Circuit has stated that the "sheer volume of [a] release is not determinative," and remanded the case for the trial court to "explain why it believes the release of eleven pages [out of the 1,500 pages at issue] is of such substance and quality as to make [plaintiff] eligible for an attorney's fee award."<sup>273</sup>

On the other hand, in some instances, a plaintiff might be deemed to have substantially prevailed even if no records are released. For example, if the lawsuit results in a fee waiver,<sup>274</sup> expedited processing,<sup>275</sup> or a significant change in the agency's FOIA policies,<sup>276</sup> the plaintiff may be eligible for a fee

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<sup>271</sup>(...continued)

401, 402-03 (9th Cir. 1988). But see also Fitzgibbon v. Agency for Int'l Dev., No. 87-1548, slip op. at 2-3 (D.D.C. Mar. 26, 1992) (in FOIA context, stipulation in which plaintiff renounces any claim for "costs or fees" precludes claims for court costs only and does not waive plaintiff's right to seek attorney's fees).

<sup>272</sup> Weisberg v. United States Dep't of Justice, 848 F.2d at 1270-71; see Maynard v. CIA, 986 F.2d at 568 (court-ordered "disclosure of a single name was of minimal importance when compared with plaintiff's overall FOIA request"); Wayland v. NLRB, No. 3-85-553, slip op. at 3 (M.D. Tenn. May 19, 1986); Nuclear Control Inst. v. NRC, 595 F. Supp. 923, 926 (D.D.C. 1984); Braintree Elec. Light Dep't v. Department of Energy, 494 F. Supp. 287, 291 (D.D.C. 1980). But see also Church of Scientology v. Harris, 653 F.2d at 589 ("no reason in law or logic to discount significance of" 108 envelopes and transmittal slips).

<sup>273</sup> Union of Concerned Scientists v. NRC, 824 F.2d 1219, 1226 (D.C. Cir. 1987); see also McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 5 (D.D.C. Aug. 20, 1987) ("While it is true that a court must assess the quality of information released as well as the volume, the information obtained in this action was scant under either standard.") (citation omitted).

<sup>274</sup> See, e.g., Wilson v. United States Dep't of Justice, No. 87-2415, slip op. at 2 (D.D.C. Sept. 12, 1989), appeal dismissed, No. 89-5206 (D.C. Cir. Mar. 9, 1990); Ettlinger v. FBI, 596 F. Supp. 867, 879-82 (D. Mass. 1984).

<sup>275</sup> See Exner v. FBI, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978) (primary basis for awarding fees was plaintiff's success in obtaining court-ordered expedited processing), aff'd, 612 F.2d 1202 (9th Cir. 1980).

<sup>276</sup> See, e.g., Halperin v. Department of State, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977) (suit caused agency to revise its manner of recording "off-the-record" briefings, even though litigation caused no records to be disclosed); Washington Post v. DOD, 789 F. Supp. at 425 (plaintiff "substantially prevailed" where government produced several key documents and "has undertaken to reexamine 2,000 more that had been previously withheld"); Birkland v. Ro-  
(continued...)

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award.

Even if a plaintiff satisfies the eligibility test, a court still must exercise its equitable discretion in separately determining whether that plaintiff is entitled to an award.<sup>277</sup> This discretion is guided by four criteria: (1) the public benefit derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding had a reasonable basis in law.<sup>278</sup> "Because these factors are intended to foster multiple congressional goals, no single factor is dispositive."<sup>279</sup> It should be noted that these four entitlement factors have nothing to do with determining an appropriate fee amount and, as such, they cannot be considered in that entirely separate analysis.<sup>280</sup>

The "public benefit" factor "speaks for an award [of attorney fees] where the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices."<sup>281</sup> Accordingly, a perti-

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<sup>276</sup>(...continued)

tary Plaza, Inc., 643 F. Supp. 223, 225-26 (N.D. Cal. 1986) (suit necessary to force agency to comply with FOIA's subsection (a)(1) requirements); Bollen v. Smith, No. 82-2424, slip op. at 3-4 (W.D. Pa. May 27, 1983) (suit was found necessary to force FBI to admit it had no records; during administrative process it had refused to confirm or deny the existence of the requested records); see also Crooker v. United States Parole Comm'n, 776 F.2d 366, 367 (1st Cir. 1985) (suit ultimately resulted in disclosure of records by causing Solicitor General to abandon prior position that presentence reports were not "agency records" subject to FOIA). But cf. Hendricks v. United States Dep't of Justice, No. 92-5621, slip op. at 2 (E.D. Pa. July 29, 1993) (in absence of agency bad faith, plaintiff did not "substantially prevail" where filing suit clarified that records that agency previously "withheld" did not, in fact, exist).

<sup>277</sup> See Young v. Director, CIA, slip op. at 4 ("Even if a plaintiff substantially prevails, however, a district court may nevertheless, in its discretion, deny the fees."); Texas v. ICC, 935 F.2d at 733 ("The district court did not specify which of the criteria [plaintiff] failed to satisfy. But so long as the record supports the court's exercise of discretion, the decision will stand.").

<sup>278</sup> Tax Analysts v. United States Dep't of Justice, 965 F.2d at 1093; Church of Scientology v. United States Postal Serv., 700 F.2d at 492; Fenster v. Brown, 617 F.2d 740, 742-45 (D.C. Cir. 1979); Cuneo v. Rumsfeld, 553 F.2d at 1364-66.

<sup>279</sup> Republic of New Afrika v. FBI, No. 78-1721, slip op. at 2 (D.D.C. Apr. 29, 1987) (denying plaintiff's motion for reconsideration); see, e.g., Weisker v. United States Dep't of Justice, No. S-89-543, slip op. at 11-17 (E.D. Cal. Mar. 7, 1990) ("balancing" all four factors held to be proper approach).

<sup>280</sup> See Long v. IRS, 932 F.2d 1309, 1315-16 (9th Cir. 1991).

<sup>281</sup> Fenster v. Brown, 617 F.2d at 744 (quoting Blue v. Bureau of Prisons, 570 F.2d 529, 534 (5th Cir. 1978)); see Texas v. ICC, 935 F.2d at 733-34

(continued...)



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ment consideration is "the degree of dissemination and likely public impact that might be expected from a particular disclosure."<sup>282</sup> Where the information released is already in the public domain, this factor does not weigh in favor of a fee award.<sup>283</sup>

The second factor requires an examination of whether the plaintiff had an adequate private commercial incentive to litigate its FOIA demand even in the absence of an award of attorney fees.<sup>284</sup> The third factor, often evaluated in

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<sup>281</sup>(...continued)

("little public benefit" in disclosure of documents that fail to reflect agency wrongdoing; "Texas went fishing for bass and landed an old shoe. Under the circumstances, we decline to require the federal government to pay the cost of tackle."); Muffoletto v. Sessions, 760 F. Supp. at 277 (public benefit in compelling FBI to act more expeditiously is "remote and of little consequence"); Mendez-Suarez v. Veles, 698 F. Supp. at 908 ("[Though] the treatment of Cubans at the Atlanta penitentiary is a matter of public concern [it] is by no means certain . . . that significant public benefit inures from disclosure of information concerning an incident between inmates at the penitentiary."); Brainerd v. Department of the Navy, No. 87-C-4057, slip op. at 6 (N.D. Ill. Apr. 21, 1988) ("[Though] disclosure of the requested information could conceivably benefit the plaintiff's co-workers . . . , this does not strike the Court as the kind of disclosure which FOIA was intended to facilitate."); Sage v. NLRB, No. 85-943-CV-W-6, slip op. at 6 (W.D. Mo. Nov. 4, 1987) (finding insufficient public benefit where suit "was essentially one to assist a private litigant with discovery problems in a related [unfair labor practices] suit for damages"); Guam Contractors Ass'n v. United States Dep't of Labor, 570 F. Supp. 163, 168 (N.D. Cal. 1983) ("[m]erely incidental or inevitable public benefits of disclosure from a FOIA suit . . . will not automatically satisfy [the requirement of subsection (a)(4)(E)]"). But see Aronson v. HUD, 866 F.2d at 3 (public interest served by disclosure to "private tracer" of information concerning mortgagors who were owed "distributive share" refunds).

<sup>282</sup> Blue v. Bureau of Prisons, 570 F.2d at 533; Church of Scientology v. IRS, 769 F. Supp. at 331 (recognizing public interest in "the apparently improper designation of a religion as a 'tax shelter' project"); see Republic of New Afrika v. FBI, 645 F. Supp. 117, 121 (D.D.C. 1986).

<sup>283</sup> See, e.g., Tax Analysts v. United States Dep't of Justice, 965 F.2d at 1094 (district court did not abuse its discretion in finding that more prompt reporting by Tax Analysts of additional 25% of publicly available district court tax decisions was "less than overwhelming" contribution to public interest).

<sup>284</sup> See, e.g., Fenster v. Brown, 617 F.2d at 742-44 (fees denied to law firm which obtained disclosure of government auditor's manual used in reviewing contracts of the type entered into by firm's clients); Chamberlain v. Kurtz, 589 F.2d 827, 842-43 (5th Cir.) (plaintiff who faced a \$1.8 million deficiency claim for back taxes and penalties "needed no additional incentive" to bring FOIA suit against IRS for documents relevant to his defense), cert. denied, 444 U.S. 842 (1979); Frye v. EPA, slip op. at 9 (fees denied where "plaintiff does (continued...)

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tandem with the second factor, militates against awarding fees in cases where the plaintiff had an adequate personal incentive to seek judicial relief.<sup>285</sup> Indeed, it is "logical" to read the second and third factors together "where a private plaintiff has pursued a private interest."<sup>286</sup> To disqualify a fee applicant under the second and third factors, "a motive need not be strictly commer-

<sup>284</sup>(...continued)

not effectively dispute that the prime beneficiaries of the information requested will be commercial entities with commercial interests that either are, or might become, his clients"); Lyons v. OSHA, No. 88-1562, slip op. at 5 (D. Mass. Dec. 2, 1991) ("As a general rule, courts should not award fees if the requester is a large corporate interest."); Hill Tower, Inc. v. Department of the Navy, 718 F. Supp. 568, 572 (N.D. Tex. 1989) (plaintiff who had filed tort claims against government arising from aircraft crash "had a strong commercial interest in seeking [related] information [as] it was [its] antenna that was damaged by the crash"); Isometrics, Inc. v. Orr, No. 85-3066, slip op. at 9 (D.D.C. Feb. 27, 1987) (bidder's commercial benefit advanced considerably more than public interest when it received competitor's winning bid). But see Aronson v. HUD, 866 F.2d at 3 ("potential for commercial personal gain did not negate the public interest served" by private tracer's lawsuit since "failure of HUD to comply reasonably with its reimbursement duty would probably only be disclosed by someone with a specific interest in ferreting out unpaid recipients").

<sup>285</sup> See, e.g., Frye v. EPA, slip op. at 10 (where plaintiff was partner in environmental law firm, his "proffer that he frequently writes and lectures on environment[al] law without pay is insufficient to overshadow his obvious personal and pecuniary interest in his request"); Muffoletto v. Sessions, 760 F. Supp. at 275 (rejecting plaintiff's entitlement to fees on grounds that "[t]he plaintiff's sole motivation in seeking the requested information was for discovery purposes, namely, to assist him in the defense of a private civil action"); Adams v. United States, 673 F. Supp. 1249, 1259 (S.D.N.Y. 1987) (fees denied where "private self-interest motive" and "[potential] pecuniary benefit" to plaintiff were sufficient inducement to bring suit); Republic of New Afrika v. FBI, 645 F. Supp. at 121 (purely personal motives of plaintiff—to exonerate its members of criminal charges and to circumvent civil discovery—dictated against award of fees); Simon v. United States, 587 F. Supp. 1029, 1033 (D.D.C. 1984) (use of FOIA as substitute for civil discovery "is not proper and this court will not encourage it by awarding fees"); Guam Contractors Ass'n v. United States Dep't of Labor, 570 F. Supp. at 169 (fee award improper where plaintiff "used the FOIA as a 'headstart' for discovery"). But see Crooker v. United States Parole Comm'n, 776 F.2d at 368 (third factor found to favor plaintiff where "interest was neither commercial nor frivolous; instead his interest was to ensure that the Parole Commission relied on accurate information in making decisions affecting his liberty").

<sup>286</sup> Church of Scientology v. United States Postal Serv., 700 F.2d 486, 494 (9th Cir. 1983).

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cial; any private interest will do."<sup>287</sup>

The fourth factor counsels against a fee award where the agency "had a reasonable basis in law for concluding that the information in issue was exempt and that it had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior."<sup>288</sup> In general, an agency's legal basis for withholding is "reasonable" if any pertinent authority exists to support the claimed exemption.<sup>289</sup> Even in the absence of supporting authority, withholding may also be "reasonable" where no precedent directly contradicts the agency's position. In an illustrative example, the D.C. Circuit has upheld a district court's finding of reasonableness when there was "no clear precedent on the issue,"<sup>290</sup> even though the district court's decision in favor of the agency's withholding was reversed unanimously by the court of appeals, which decision, in turn, was affirmed by a near-unanimous decision of the United States Su-

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<sup>287</sup> Tax Analysts v. United States Dep't of Justice, 965 F.2d at 1095 ("[P]laintiff was not motivated simply by altruistic instincts, but rather by its desire for efficient, easy access to [tax] decisions." (quoting Tax Analysts v. United States Dep't of Justice, 759 F. Supp. 28, 31 (D.D.C. 1991))). But see Assembly of Cal. v. United States Dep't of Commerce, slip op. at 12 (where state legislature sought information to challenge federal census count, fees not precluded by fact that benefits may thereby accrue to state in that "plaintiffs did not stand to personally benefit but acted as public servants").

<sup>288</sup> Cuneo v. Rumsfeld, 553 F.2d at 1365-66; see LaSalle Extension Univ. v. FTC, 627 F.2d 481, 484-86 (D.C. Cir. 1980); Fenster v. Brown, 617 F.2d at 744; Frye v. EPA, slip op. at 11 ("[T]he district court may still deny fees and costs upon finding that the government had a colorable legal basis for concluding that the information in issue was exempt and that the government had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior."); Palmer v. Derwinski, No. 91-197, slip op. at 9-10 (E.D. Ky. June 10, 1992) ("[Agency] also exhibited good faith in providing substantially all of the requested documents, and in redacting only limited portions which were arguably subject to specific identifiable exemptions."); see also Blue v. Bureau of Prisons, 570 F.2d at 534 (factor points in favor of fee award "if an agency's nondisclosure was designed to avoid embarrassment or thwart the requester").

<sup>289</sup> See Adams v. United States, 673 F. Supp. at 1259-60; see also American Commercial Barge Lines Co. v. NLRB, 758 F.2d 1109, 1112-14 (6th Cir. 1985); Republic of New Afrika v. FBI, 645 F. Supp. at 122; cf. United Ass'n of Journeymen & Apprentices, Local 598 v. Department of the Army, 841 F.2d 1459, 1462-64 (9th Cir. 1988) (withholding held unreasonable where agency relied on one case that was "clearly distinguishable" and where "strong contrary authority [was] cited by the [plaintiff]"); Core v. United States Postal Serv., No. 82-280-A, slip op. at 7 (E.D. Va. May 2, 1984) (agency's refusal to disclose information, contravening Department of Justice disclosure guidelines published in FOIA Update, held to raise "a question as to the reasonable basis in law" for withholding).

<sup>290</sup> Tax Analysts v. United States Dep't of Justice, 965 F.2d at 1096-97.

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preme Court. It should also be noted that where the delay in releasing records, rather than the agency's substantive claim of exemption, is challenged, this factor does not favor a fee award so long as the agency has not engaged in "obdurate behavior or bad faith."<sup>291</sup>

If a court decides to make a fee award, its next task is to determine an appropriate fee amount. The starting point in this endeavor is to multiply the number of hours reasonably expended by a reasonable hourly rate--a calculation which yields what is termed the "lodestar" fee amount.<sup>292</sup> Not all hours expended will be deemed to have been "reasonably" expended. For example, courts have directed attorneys to subtract hours spent litigating claims upon which the party seeking the fee did not ultimately prevail.<sup>293</sup> In such a case, a distinction has been made between a loss on a legal theory where "the issue was all part and parcel of one [ultimately successful] matter,"<sup>294</sup> and a reject-

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<sup>291</sup> Republic of New Afrika v. FBI, 645 F. Supp. at 122; see Frye v. EPA, slip op. at 11-13 (although agency failed to adequately explain plaintiff's more than two-year wait for final response (delay previously found "unreasonable" by court), agency's voluntary disclosure of documents two days before Vaughn Index deadline did not warrant finding of "obdurate" behavior absent affirmative evidence of bad faith); Alliance for Responsible CFC Policy, Inc. v. Costle, 631 F. Supp. at 1471; Simon v. United States, 587 F. Supp. at 1032 ("[W]ithout evidence of bad faith, the court declines to impose a fee award to sanction sluggish agency response."); Guam Contractors Ass'n v. United States Dep't of Labor, 570 F. Supp. at 170; see also Ridley v. Director, Secret Serv., 2 Gov't Disclosure Serv. (P-H) ¶ 82,176, at 82,536 (D.D.C. Feb. 16, 1982) (mere inadvertent withholding of records should not be considered "unreasonable" for purposes of this factor), aff'd, 692 F.2d 150 (D.C. Cir. 1982) (table cite). But see Miller v. United States Dep't of State, 779 F.2d 1378, 1390 (8th Cir. 1985) ("While these reasons [for delay] are plausible, and we do not find them to be evidence of bad faith . . . they are practical explanations, not reasonable legal bases."); United Merchants & Mfrs. v. Meese, No. 87-3367, slip op. at 3 (D.D.C. Aug. 10, 1988) (unnecessary for plaintiff to show "that defendant was obdurate in order to prevail" where there was "no reasonable basis for defendant to have failed to process plaintiff's application for nearly a year").

<sup>292</sup> See Hensley v. Eckerhart, 461 U.S. 424, 433 (1982) (civil rights case); Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (Title VII case).

<sup>293</sup> See Hensley v. Eckerhart, 461 U.S. at 434-40; Copeland v. Marshall, 641 F.2d at 891-92.

<sup>294</sup> Copeland v. Marshall, 641 F.2d at 892 n.18; see National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 n.13 (D.C. Cir. 1982) (as modified); National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, No. 81-2662, slip op. at 7 (D.D.C. July 15, 1987) (because plaintiff "clearly prevailed" on its only claim for relief, it is "entitled to recover fees for time expended on the few motions upon which it did not prevail").

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ed claim that is "truly fractionable" from the successful claim.<sup>295</sup>

Additionally, prevailing plaintiffs are obligated to exercise sound billing judgment; the Supreme Court has emphasized that "[c]ounsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."<sup>296</sup> It should be remembered, however, that where attorney fees are awarded, the hours expended by the plaintiff pursuing the fee award also are ordinarily compensable.<sup>297</sup>

Courts will accept affidavits from local attorneys to support hourly rates, but they should be couched in terms of specific market rates for particular types of litigation and they must be well documented.<sup>298</sup> The most recent articulation of the proper rate standard, at least within the D.C. Circuit, was set forth in Save our Cumberland Mountains, Inc. v. Hodel,<sup>299</sup> which, in overruling Laffey v. Northwest Airlines, Inc.,<sup>300</sup> held that the "prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-

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<sup>295</sup> See, e.g., Weisberg v. Webster, No. 78-322, slip op. at 3 (D.D.C. June 13, 1985); Newport Aeronautical Sales v. Department of the Navy, slip op. at 10-11; see also Weisberg v. United States Dep't of Justice, 745 F.2d at 1499 (no award for issues in which plaintiff did "not ultimately prevail" and for "non-productive time"); Steenland v. CIA, 555 F. Supp. 907, 911 (W.D.N.Y. 1983) (award for work performed after release of records, where all claims of exemptions subsequently upheld, "would assess a penalty against defendants which is clearly unwarranted"); Agee v. CIA, No. 79-2788, slip op. at 1 (D.D.C. Nov. 3, 1982) ("plaintiff is not entitled to fees covering work where he did not substantially prevail"); Dubin v. Department of the Treasury, 555 F. Supp. 408, 413 (N.D. Ga. 1981) (fees awarded "should not include fees for plaintiffs' counsel for their efforts after the release of documents by the Government . . . since they failed to prevail on their claims at trial"), aff'd, 697 F.2d 1093 (11th Cir. 1983) (table cite). But see Badhwar v. United States Dep't of the Air Force, No. 84-154, slip op. at 3 (D.D.C. Dec. 11, 1986) ("[D]efendants' attempts to decrease [fees] on the grounds that the plaintiffs did not prevail as to all issues raised . . . are not persuasive. [The FOIA] requires only that the plaintiff should have 'substantially prevailed.'").

<sup>296</sup> Hensley v. Eckerhart, 461 U.S. at 434, quoted in Assembly of Cal. v. United States Dep't of Commerce, slip op. at 26.

<sup>297</sup> See Copeland v. Marshall, 641 F.2d at 896; see, e.g., Assembly of Cal. v. United States Dep't of Commerce, slip op. at 37-39; Katz v. Webster, No. 82-1092, slip op. at 4-5 (S.D.N.Y. Feb. 1, 1990).

<sup>298</sup> See National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d at 1325.

<sup>299</sup> 857 F.2d 1516 (D.C. Cir. 1988) (en banc) (Surface Mining Control and Reclamation Act case).

<sup>300</sup> 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985).

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economic goals."<sup>301</sup>

The lodestar calculation is strongly presumed to yield the reasonable fee.<sup>302</sup> Indeed, the Supreme Court has placed stringent limitations on the availability of any fee "enhancement" (sometimes termed a "multiplier") above the lodestar figure, based upon the quality of representation and the results obtained.<sup>303</sup> Except in Powell v. Department of Justice,<sup>304</sup> a quality enhancement has never been awarded in a FOIA case.<sup>305</sup>

Although it previously has been held that a fee enhancement as compensation for the risk in a contingency fee arrangement might be available in FOIA cases,<sup>306</sup> the Supreme Court has now clarified that such enhancements are not available under statutes authorizing an award of attorney fees to a "prevailing or substantially prevailing party," such as the FOIA.<sup>307</sup>

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<sup>301</sup> 857 F.2d at 1524.

<sup>302</sup> See Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 564-65 (1985) [hereinafter Delaware Valley I] (Clean Air Act case); Blum v. Stenson, 465 U.S. 886, 897 (1984) (civil rights case).

<sup>303</sup> See Delaware Valley I, 478 U.S. at 565 (quality enhancements appropriate "only in certain 'rare' and 'exceptional' cases, where supported by 'specific evidence' on the record and detailed findings by the lower courts" (quoting Blum v. Stenson, 465 U.S. at 898-901)).

<sup>304</sup> No. C-82-326, slip op. at 22-23 (N.D. Cal. Sept. 19, 1985) (pre-Delaware Valley I decision awarding fee enhancement based upon "superior representation").

<sup>305</sup> See, e.g., National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, slip op. at 12-13 (fee applicant bears "heavy burden of proof" to justify quality enhancement; court "not convinced that this is the 'rare or exceptional' case where an upward adjustment is appropriate" (quoting Murray v. Weinberger, 741 F.2d 1423, 1428 (D.C. Cir. 1984))); Newport Aeronautical Sales v. Department of the Navy, slip op. at 17 ("Blum v. Stenson makes clear that only the most exceptional cases will warrant an increase to the lodestar.").

<sup>306</sup> See, e.g., Weisberg v. United States Dep't of Justice, 848 F.2d at 1272 (ruling that two-part test fashioned in Justice O'Connor's concurring opinion in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 731-34 (1987), is applicable to FOIA cases); Allen v. FBI, 751 F. Supp. 255, 256 (D.D.C. 1990) (100% fee enhancement awarded in FOIA case); see also McKenzie v. Kennickell, 875 F.2d 330, 334 (D.C. Cir. 1989) (Title VII case).

<sup>307</sup> City of Burlington v. Dague, 112 S. Ct. at 2641 (prohibiting contingency enhancement in environmental fee-shifting statutes and noting that case law "construing what is a 'reasonable' fee applies uniformly to all [federal fee-shifting statutes]"); see also King v. Palmer, 950 F.2d 771, 775 (D.C. Cir. 1991) (en banc) (pre-City of Burlington Title VII contingency enhancement case (continued...))

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While "interim" attorney fees may be sought before the conclusion of a suit,<sup>308</sup> a majority of courts have declined to award them, absent extenuating circumstances, due to the inefficient and "piecemeal" nature of such relief.<sup>309</sup> Where interim fees are approved, however, payment of the fees need not await the final judgment in the action.<sup>310</sup> It should also be noted that where all substantive legal issues have been resolved by the district court, the mere pendency of an application for fees does not preclude appellate review of the district court's decision on the merits.<sup>311</sup>

<sup>307</sup>(...continued)

which anticipated result later reached by Supreme Court), cert. denied, 112 S. Ct. 3054 (1992).

<sup>308</sup> See Rosenfeld v. United States, 859 F.2d 717, 723-27 (9th Cir. 1988); Washington Post v. DOD, 789 F. Supp. at 424-25; Allen v. DOD, 713 F. Supp. 7, 11-12 (D.D.C. 1989).

<sup>309</sup> See, e.g., Irons v. FBI, No. 82-1143-G, slip op. at 9-10 (D. Mass. June 26, 1987) (no interim fees where government has not "resisted actively, or through egregious delay, compliance with a proper document request"); Shan-mugadhasan v. Arms Control & Disarmament Agency, No. 84-3033, slip op. at 2 (D.D.C. Aug. 9, 1985) (interim fees denied as "premature"); Hydron Lab., Inc. v. EPA, 560 F. Supp. 718, 722 (D.R.I. 1983) (refusing to deal "piecemeal" with questions concerning entitlement to attorney fees); Letelier v. United States Dep't of Justice, 1 Gov't Disclosure Serv. (P-H) ¶ 80,252, at 80,631 (D.D.C. Oct. 2, 1980) (interim award "would likely result in duplication of effort, as fees might be requested at successive stages"); Biberman v. FBI, 496 F. Supp. 263, 265 (S.D.N.Y. 1980) (interim fees are exceptional and "because of the inefficiency of such a procedure, such an award ought to be made only in those cases in which it is necessary to the continuance of the litigation which has proven to be meritorious at the time of the application"). But see Wilson v. United States Dep't of Justice, slip op. at 3 (interim fees awarded "for time spent addressing the fee waiver question" on which plaintiff prevailed); Allen v. FBI, 716 F. Supp. 667, 669-72 (D.D.C. 1989) (awarding interim fees for work leading toward "first phase" release of nonexempt documents, but declining to award them as to all such documents not yet released); Allen v. DOD, 713 F.2d at 12-13 (awarding interim fees, but only "for work leading toward the threshold release of non-exempt documents" and holding that "[a]ny claims for fees resulting from a dispute over the applicability of a particular exemption to specific documents (a phase two dispute) would only be cognizable at the end of the litigation"); Powell v. United States Dep't of Justice, 569 F. Supp. 1192, 1200 (N.D. Cal. 1983) (four factors to be considered, in court's discretion, for award of interim fees: degree of hardship on plaintiff and counsel; existence of unreasonable delay by government; length of time case already pending; and length of time required before litigation is concluded).

<sup>310</sup> Rosenfeld v. United States, 859 F.2d at 727; Washington Post v. DOD, 789 F. Supp. at 425.

<sup>311</sup> See McDonnell v. United States, No. 91-5916, slip op. at 9 (3d Cir. Sept. 21, 1993) ("Even if a motion for attorney's fees is still pending in the  
(continued...)

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Finally, it should be noted that in a case decided under Title VII, but logically applicable to the FOIA as well, the Supreme Court has held that, absent an express waiver, a private party cannot recover interest against the federal government.<sup>312</sup> Indeed, a fee enhancement to compensate counsel for delay in receiving fees was deemed "interest" and, accordingly, was denied in Weisberg v. Department of Justice.<sup>313</sup>

### Sanctions

Although the FOIA does not authorize any award of monetary damages to a requester, either for an agency's unjustified refusal to release records,<sup>314</sup> or for allegedly improper disclosure of information,<sup>315</sup> the Act does provide that, in certain narrowly prescribed circumstances, agency employees who act arbitrarily or capriciously in withholding information may be subject to disciplinary action. Subsection (a)(4)(F) of the FOIA, as amended, provides:

Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel [of the Merit Systems Protection Board] shall promptly initiate a proceeding to determine whether

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<sup>311</sup>(...continued)

district court, that motion does not constitute a bar to our exercise of jurisdiction under § 1291." (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198-202 (1988)) (to be published); see also Anderson v. HHS, No. 92-4125, slip op. at 4 (10th Cir. Aug. 27, 1993) ("We think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain." (citing Budinich, 486 U.S. at 200)) (to be published).

<sup>312</sup> Library of Congress v. Shaw, 478 U.S. 310, 314 (1986).

<sup>313</sup> 848 F.2d at 1272.

<sup>314</sup> Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993); Papich v. United States Parole Comm'n, No. 92-790, slip op. at 1 (D.D.C. June 23, 1993); Duffy v. United States, No. 87-C-10826, slip op. at 31-32 (N.D. Ill. May 29, 1991) ("money damages is not a remedy authorized in the FOIA"); Daniels v. St. Louis Veterans Admin. Regional Office, 561 F. Supp. 250, 251 (E.D. Mo. 1983); Diamond v. FBI, 532 F. Supp. 216, 233 (S.D.N.Y. 1981), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984).

<sup>315</sup> Sterling v. United States, 798 F. Supp. 47, 48 & n.2 (D.D.C. 1992) (neither FOIA nor Administrative Procedure Act authorize award of monetary damages for alleged improper disclosure) (appeal pending).



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disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding.<sup>316</sup>

Thus, there are three distinct jurisdictional prerequisites to the commencement of a Special Counsel investigation under the FOIA: (1) the court must order the production of agency records found to be improperly withheld; (2) it must award attorney fees and litigation costs; and (3) it must issue a specific "written finding" of suspected arbitrary or capricious conduct.<sup>317</sup> In one case, Miller v. Webster, it was found that the circumstances surrounding the withholding of small portions of three documents did "suggest that the agency decision was arbitrary and capricious."<sup>318</sup> Despite having ordered disclosure of this information and awarding attorney fees, the court refused to refer the "alleged violation" to the Merit Systems Protection Board, citing the common law maxim of "de minimis non curat lex" (the law takes no notice of trifling matters).<sup>319</sup> Nevertheless, the viability and importance of this sanction provision should not be overlooked by agency FOIA personnel.<sup>320</sup>

Additionally, the Special Counsel of the Merit Systems Protection Board is authorized by a provision of the Whistleblower Protection Act of 1989 to investigate certain allegations concerning arbitrary or capricious withholding of information requested under the FOIA.<sup>321</sup> A significant distinction between this provision and subsection (a)(4)(F) of the FOIA is that the former does not require a judicial finding--indeed, no lawsuit need even be filed to invoke this

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<sup>316</sup> 5 U.S.C. § 552(a)(4)(F) (1988).

<sup>317</sup> See, e.g., Simon v. United States Dep't of Labor, No. 83-3780, slip op. at 2-3 (D.D.C. Mar. 21, 1984) (court refused to issue "sanctions" finding where all requested records had been produced in their entireties, because it could not order production of any records); Emery v. Laise, 421 F. Supp. 91, 93 (D.D.C. 1976) (same), aff'd sub nom. Emery v. Reinhardt, No. 76-1973 (D.C. Cir. Oct. 26, 1977); see also Wilder v. IRS, 601 F. Supp. 241, 243 (M.D. Ala. 1984) (although disclosure delayed, no sanctions imposed because all material released); Idaho Wildlife Fed'n v. Forest Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,271, at 84,058 (D.D.C. July 21, 1983) (no sanctions where agency records not improperly withheld); Norwood v. FAA, No. 83-2315, slip op. at 20 (W.D. Tenn. Dec. 11, 1991) (where court denies fees on ground that plaintiff is pro se, "the issuance of written findings pursuant to 5 U.S.C. § 552(a)(4)(F) would be inappropriate since both prerequisites have not been met"), aff'd in part, rev'd in part on other grounds, 993 F.2d 570 (6th Cir. 1993). Contra Ray v. United States Dep't of Justice, 716 F. Supp. 1449, 1451-52 (S.D. Fla. 1989) ("court order" requirement satisfied even though no record found to be improperly withheld).

<sup>318</sup> No. 77-C-3331, slip op. at 4 (N.D. Ill. Oct. 27, 1983).

<sup>319</sup> Id.

<sup>320</sup> See FOIA Update, Summer 1983, at 5.

<sup>321</sup> 5 U.S.C. § 1216(a)(3) (Supp. IV 1992).

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other sanction procedure.<sup>322</sup>

Finally, as in all civil cases, courts may exercise their discretion to impose sanctions on FOIA litigants and government counsel who have violated court rules or shown disrespect for the judicial process.<sup>323</sup> In determining whether to impose sanctions on plaintiffs, district courts review the number and content of court filings and their effect on the courts as indicia of frivolousness or harassment.<sup>324</sup> "[M]ere litigiousness alone does not support the issuance of an injunction" against filing further lawsuits.<sup>325</sup> For example, as a sanction under Rule 11 of the Federal Rules of Civil Procedure, a frequent FOIA requester who filed more than forty-nine FOIA lawsuits over eight years and who routinely failed to oppose motions to dismiss, was ordered to justify in any subsequent lawsuits why the principle of res judicata did not bar the intended suit.<sup>326</sup>

### Considerations on Appeal

As a threshold matter, particularly in view of the exceptionally high percentage of FOIA cases decided by means of summary judgment, it should always be remembered that not all orders granting judgment to a party on a

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<sup>322</sup> See H.R. Rep. No. 1717, 95th Cong., 2d Sess. 137 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2870 ("[T]his provision is not intended to require that an administrative or court decision be rendered concerning withholding of information before the Special Counsel may investigate allegations of such a prohibited practice.").

<sup>323</sup> See, e.g., Schanen v. United States Dep't of Justice, 798 F.2d 348, 350 (9th Cir. 1986) (although exemption claims ultimately upheld, government ordered to pay plaintiff's attorney fees and costs due to government counsel's failure to competently defend claims); Oklahoma Publishing Co. v. HUD, No. 87-1935-P, slip op. at 7 (W.D. Okla. June 17, 1988) (attorney fees assessed against government when counsel failed to comply with scheduling and disclosure orders); Hill v. Department of the Air Force, No. 85-1485, slip op. at 7 (D.N.M. Sept. 4, 1987) (because of unreasonable delay in processing FOIA request, documents ordered processed at no further cost to plaintiff), aff'd on other grounds, No. 86-2418 (10th Cir. Mar. 30, 1988); see also Van Bourg, Allen, Weinberg & Roger v. NLRB, 762 F.2d 831, 833 (9th Cir. 1985) (warning that sanctions will be imposed if plaintiff's counsel again "fails to inform us about material facts or procrastinates in obeying our orders"); cf., Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 2 (D.D.C. July 27, 1988) (discovery ordered against government for failure to comply with previous estimates of processing time and to explain discrepancies in time estimates).

<sup>324</sup> See, e.g., In re Powell, 851 F.2d 427, 431-34 (D.C. Cir. 1988) (per curiam).

<sup>325</sup> Id. at 434.

<sup>326</sup> Crooker v. United States Marshals Serv., 641 F. Supp. 1141, 1143 (D.D.C. 1986).

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FOIA issue are immediately appealable.<sup>327</sup>

Once a case is on appeal, it is necessary for the government to obtain a stay of any trial court disclosure order. The government's motion for such a stay should be granted as a matter of course in FOIA cases, as denial would destroy the status quo and would cause irreparable harm to the government appellant by mooted the issue on appeal, whereas granting such a stay causes relatively minimal harm to the appellee.<sup>328</sup>

<sup>327</sup> See, e.g., Church of Scientology Int'l v. IRS, 995 F.2d 916, 921 (9th Cir. 1993) (court ruling that document is nonexempt, without accompanying disclosure order, held nonappealable); Ferguson v. FBI, 957 F.2d 1059, 1063-64 (2d Cir. 1992) (while "partial disclosure orders in FOIA cases are appealable," fact that district court may have erred in deciding question of law does not vest jurisdiction in appellate court where no disclosure order has yet been entered and, consequently, no irreparable harm would result); Center for Nat'l Sec. Studies v. CIA, 711 F.2d 409, 413-14 (D.C. Cir. 1983) (no appellate jurisdiction to review district court order granting summary judgment to defendant on only one of twelve counts in complaint because district court order did not affect "predominantly all" merits of case and plaintiffs did not establish that denial of relief under 28 U.S.C. § 1292(a)(1) (1988) would cause them irreparable injury); see also Summers v. United States Dep't of Justice, 925 F.2d 450, 453 (D.C. Cir. 1991) (grant of stay of proceedings under Open America not appealable "final decision"); Rosenfeld v. United States, 859 F.2d 717, 727 (9th Cir. 1988) (award of interim attorney fees not appealable); Hinton v. FBI, 844 F.2d 126, 129-33 (3d Cir. 1988) (form of Vaughn order not appealable); In re Motion to Compel filed by Steele, 799 F.2d 461, 464-65 (9th Cir. 1986); Metex Corp. v. ACS Indus., 748 F.2d 150, 153 (3d Cir. 1984); Green v. Department of Commerce, 618 F.2d 836, 839-41 (D.C. Cir. 1980). But see also John Doe Corp. v. John Doe Agency, 850 F.2d 105, 107-08 (2d Cir. 1988) (finding district court order denying motion for disclosure of documents, preparation of Vaughn Index and answers to interrogatories appealable, and reversing on merits), rev'd, 493 U.S. 146 (1989); Irons v. FBI, 811 F.2d 681, 683 (1st Cir. 1987) (allowing government to appeal motion for partial summary judgment for plaintiff, stating that appellate jurisdiction vests at time order is made for government to turn over records).

<sup>328</sup> See, e.g., Assembly of Cal. v. United States Dep't of Commerce, No. S91-990, slip op. at 3 (E.D. Cal. Aug. 20, 1991) (order granting preliminary injunction and refusing to stay disclosure), stay denied, No. 91-16266 (9th Cir. Aug. 30, 1991), stay granted, 112 S. Ct. 19 (1991); Rosenfeld v. United States Dep't of Justice, 111 S. Ct. 2864 (1991) (full stay pending appeal granted); John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1307 (Marshall, Circuit Justice 1989) (granting stay based upon "balance of the equities"); see also Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979); Antonelli v. FBI, 553 F. Supp. 19, 25 (N.D. Ill. 1982); see generally FOIA Update, Summer 1991, at 1-2. But see Manos v. United States Dep't of the Air Force, No. 93-15672, slip op. at 2 (9th Cir. Apr. 28, 1993) (stay of district court disclosure order denied where government "failed to demonstrate . . . any possibility of success on the merits of its appeal," despite appellate court's recognition that  
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In reviewing FOIA decisions, appellate courts most commonly determine (1) whether the district court had an adequate factual basis for its determination, and (2) assuming the existence of an adequate factual basis, whether the court's determination was clearly erroneous.<sup>329</sup> Arguably, however, the legal standard of review for cases in which the district court awarded summary judgment should be more akin to de novo review.<sup>330</sup> Nevertheless, a trial court decision refusing to allow discovery will be reversed only if the court abused its discretion.<sup>331</sup> Similarly, a "reverse" FOIA case--which is brought under the Administrative Procedure Act--is reviewed only with reference to whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," based upon the "whole [ad-

<sup>328</sup>(...continued)

such denial would render appeal moot); Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 5 (N.D. Cal. June 14, 1985) (denying stay of decision ordering release of, inter alia, classified information, because of governmental delay and "obfuscation"); stay denied, No. 85-1918 (9th Cir. July 18, 1985); stay denied, No. A-84 (Rehnquist, Circuit Justice July 31, 1985) (undocketed order).

<sup>329</sup> See, e.g., McDonnell v. United States, No. 91-5916, slip op. at 2 (3d Cir. Sept. 21, 1993) (to be published); Miscavige v. IRS, No. 92-8659, slip op. 3284, 3285 (11th Cir. Sept. 17, 1993) (to be published); Van Strum v. EPA, No. 91-35404, slip op. at 2 (9th Cir. Aug. 17, 1992); Silets v. United States Dep't of Justice, 945 F.2d 227, 232 n.2 (7th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 2991 (1992); National Wildlife Fed'n v. Forest Serv., 861 F.2d 1114, 1116 (9th Cir. 1988); Spannaus v. United States Dep't of Justice, 813 F.2d 1285, 1288 (4th Cir. 1987); Villanueva v. United States Dep't of Justice, 782 F.2d 528, 530 (5th Cir. 1986); International Bhd. of Elec. Workers v. HUD, 763 F.2d 435, 435-36 (D.C. Cir. 1985); see also Payne Enters. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988) (abuse of discretion standard); DeBold v. Stimson, 735 F.2d 1037, 1040 (7th Cir. 1984) (trial court's factual finding that all requested records had been produced was not clearly erroneous and would therefore not be reversed on appeal).

<sup>330</sup> See Anderson v. HHS, 907 F.2d 936, 942 (10th Cir. 1990) ("[W]e must review de novo the district court's legal conclusions that the requested materials are covered by the relevant FOIA exemptions."); Aronson v. HUD, 822 F.2d 182, 188 (1st Cir. 1987); 10 Charles A. Wright et al., Federal Practice and Procedure § 2716 (1983); see also Bowers v. United States Dep't of Justice, 930 F.2d 350, 353 (4th Cir.) (appellate review de novo on question of law), cert. denied, 112 S. Ct. 308 (1991); Kaganove v. EPA, 856 F.2d 884, 886 (7th Cir. 1988) (same), cert. denied, 488 U.S. 1011 (1989).

<sup>331</sup> See Church of Scientology v. IRS, 991 F.2d 560, 562 (9th Cir. 1993); Meeropol v. Meese, 790 F.2d 942, 960 (D.C. Cir. 1986); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1988).

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ministrative] record."<sup>332</sup>

It is noteworthy that in routine FOIA cases where the merits and law of a case are so clear as to justify summary disposition, summary affirmance or reversal may be appropriate.<sup>333</sup> Other procedures are available for discharging the appellate court's functions in unusual procedural circumstances.<sup>334</sup>

Lastly, Rule 39(a) of the Federal Rules of Appellate Procedure is applied to award costs to the government when it is successful in the FOIA appeal; the Court of Appeals for the District of Columbia Circuit has held that the presumption in Rule 39(a) favoring such awards of costs is fully applicable in FOIA cases.<sup>335</sup>

### "REVERSE" FOIA

A "reverse" FOIA action is one in which the submitter of information--usually a corporation or other business entity that has supplied an agency with data on its policies, operations or products--seeks to prevent the agency from releasing the information to a third party in response to a FOIA request.<sup>1</sup> The agency's decision to release the information will ordinarily "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the information falls within one or more of the statutory

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<sup>332</sup> AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987); see Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991).

<sup>333</sup> See, e.g., Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

<sup>334</sup> See, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 842 (6th Cir. 1988) (inappropriate to vacate district court order, after fully complied with, when attorney fees issue pending; proper procedure is to dismiss appeal); Larson v. Executive Office for United States Attorneys, No. 85-6226, slip op. at 4 (D.C. Cir. Apr. 6, 1988) (when only issue on appeal is mooted, initial lower court order should be vacated without prejudice and case remanded).

<sup>335</sup> See Baez v. United States Dep't of Justice, 684 F.2d 999, 1005-07 (D.C. Cir. 1982) (en banc).

<sup>1</sup> See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988); cf. Gulf Oil Corp. v. Brock, 778 F.2d 834, 838 (D.C. Cir. 1985) (when FOIA request withdrawn while case on appeal, dispute that was once before court became moot); Sterling v. United States, 798 F. Supp. 47, 48 (D.D.C. 1992) (once record has been released, "there are no plausible factual grounds for a 'reverse FOIA' claim") (appeal pending).

exemptions."<sup>2</sup>

The landmark case in the reverse FOIA area is Chrysler Corp. v. Brown,<sup>3</sup> in which the Supreme Court held that jurisdiction for a reverse FOIA action cannot be based on the FOIA or the Trade Secrets Act<sup>4</sup> (a broadly worded criminal statute prohibiting disclosure of "practically any commercial or financial data collected by any federal employee from any source"<sup>5</sup>), but that such actions can be brought under the Administrative Procedure Act (APA).<sup>6</sup> Accordingly, reverse FOIA plaintiffs ordinarily argue that an agency's contemplated release would violate the Trade Secrets Act and thus would "not be in accordance with law" or would be "arbitrary and capricious" within the meaning of the APA.<sup>7</sup>

In Chrysler, the Supreme Court specifically did not address the "relative ambits" of Exemption 4 and the Trade Secrets Act, nor did it determine whether the Trade Secrets Act qualified as an Exemption 3 statute.<sup>8</sup> Almost a decade later, the Court of Appeals for the District of Columbia Circuit, after repeatedly skirting these difficult issues, "definitively" resolved them.<sup>9</sup> With re-

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<sup>2</sup> CNA, 830 F.2d at 1134 n.1.

<sup>3</sup> 441 U.S. 281, 292-317 (1979).

<sup>4</sup> 18 U.S.C. § 1905 (1988).

<sup>5</sup> CNA, 830 F.2d at 1140.

<sup>6</sup> 5 U.S.C. §§ 701-706 (1988); see, e.g., Kansas Gas & Elec. Co. v. NRC, No. 87-2748, slip op. at 3 (D.D.C. July 2, 1993) ("party seeking to prevent disclosure . . . must rely on other sources of law, independent of FOIA, to justify enjoining disclosure"); Environmental Technology, Inc. v. EPA, 822 F. Supp. 1226, 1228 (E.D. Va. 1993); see also McDonnell Douglas Corp. v. Rice, No. 92-2211, transcript at 32 (D.D.C. Sept. 30, 1992) (bench order) (submitter sought injunction under APA to prevent agency from making public announcement of exercised option price in government contract awarded to submitter) (motion for reconsideration pending).

<sup>7</sup> See, e.g., Acumenics Research & Technology v. Department of Justice, 843 F.2d 800, 804 (4th Cir. 1988); General Elec. Co. v. NRC, 750 F.2d 1394, 1398 (7th Cir. 1984); Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 5 (D.D.C. Sept. 2, 1993); General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. 804, 806 (D.D.C. 1992) (appeal pending); McDonnell Douglas Corp. v. NASA, No. 91-3134, transcript at 6 (D.D.C. Jan. 24, 1992) (bench order) (appeal pending); Raytheon Co. v. Department of the Navy, No. 89-2481, slip op. at 4 (D.D.C. Dec. 22, 1989); cf. Kansas Gas & Elec. Co. v. NRC, slip op. at 4 (holding that submitter's "unsuccessful earlier attempt" to suppress disclosure in state court "effectively restrains it" from raising same arguments again in reverse FOIA action).

<sup>8</sup> 441 U.S. at 319 n.49.

<sup>9</sup> See CNA, 830 F.2d at 1134.

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gard to the Trade Secrets Act and Exemption 3, the D.C. Circuit held that the Trade Secrets Act does not qualify as an Exemption 3 statute under either of that exemption's subparts, particularly as it acts only as a prohibition against "unauthorized" disclosures.<sup>10</sup> Indeed, because "agencies conceivably could control the frequency and scope of its application through regulations adopted on the strength of statutory withholding authorizations which do not themselves survive the rigors of Exemption 3," the D.C. Circuit found it inappropriate to classify the Trade Secrets Act as an Exemption 3 statute.<sup>11</sup> (For a further discussion of this point, see Exemption 3, above.)

In addition, the D.C. Circuit ruled that the scope of the Trade Secrets Act is not narrowly limited to that of its three predecessor statutes, and that instead, its scope is "at least co-extensive with that of Exemption 4."<sup>12</sup> Thus, information falling within the ambit of Exemption 4 would also fall within the scope of the Trade Secrets Act.<sup>13</sup> Accordingly, in the absence of a regulation authorizing disclosure--which would remove the Trade Secrets Act's disclosure prohibition<sup>14</sup>--a determination that requested material falls within Exemption 4 is tantamount to a determination that the material cannot be released, because to do so would violate the Trade Secrets Act.<sup>15</sup> To the extent information falls outside the scope of Exemption 4, the D.C. Circuit found that there was no need to determine whether it nonetheless still fits within the outer boundaries of the Trade Secrets Act.<sup>16</sup> Such a ruling was unnecessary because the FOIA itself would provide the necessary authorization to release any information not

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<sup>10</sup> Id. at 1141.

<sup>11</sup> Id. at 1139-40.

<sup>12</sup> Id. at 1151; accord McDonnell Douglas Corp. v. Rice, transcript at 35; General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 806.

<sup>13</sup> See, e.g., Raytheon Co. v. Department of the Navy, slip op. at 4.

<sup>14</sup> See, e.g., St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 409-10 (5th Cir. 1979); Jackson v. First Fed. Sav., 709 F. Supp. 887, 890-94 (E.D. Ark. 1989); cf. South Hills Health Sys. v. Bowen, 864 F.2d 1084, 1093 (3d Cir. 1988) (rejecting challenge to validity of Trade Secrets Act disclosure regulation as unripe).

<sup>15</sup> CNA, 830 F.2d at 1151-52; accord Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (where release of requested information is barred by the Trade Secrets Act, agency "does not have discretion to release it"); Environmental Technology, Inc. v. EPA, 822 F. Supp. at 1228 (Trade Secrets Act "bars disclosure of information that falls within Exemption 4"); General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 806 (finding that Trade Secrets Act "is an independent prohibition on the disclosure of information within its scope"); see also FOIA Update, Summer 1985, at 3 (discussing Trade Secrets Act bar to discretionary disclosure under Exemption 4).

<sup>16</sup> CNA, 830 F.2d at 1152 n.139.

falling within one of its exemptions.<sup>17</sup>

In Chrysler, the Supreme Court held that the APA's predominant scope and standard of judicial review--review on the administrative record according to an arbitrary and capricious standard--should "ordinarily" apply to reverse FOIA actions.<sup>18</sup> Indeed, the D.C. Circuit has strongly emphasized that judicial review in reverse FOIA cases should be based on the administrative record, with de novo review reserved for only those cases where an agency's administrative procedures were "severely defective."<sup>19</sup>

More recently, the D.C. Circuit reaffirmed its position on the appropriate scope of judicial review in reverse FOIA cases, holding that the district court "behaved entirely correctly" when it rejected the argument advanced by the submitter--that it was entitled to de novo review because the agency's factfinding procedures were inadequate--and instead confined its review to an examination of the administrative record.<sup>20</sup> The Court of Appeals for the Ninth Circuit, likewise rejecting a submitter's challenge to an agency's factfinding procedures, recently held that judicial review based on the administrative record was appropriate in a reverse FOIA suit.<sup>21</sup>

Because judicial review in reverse FOIA cases is ordinarily based on a review of an agency's administrative record, it is vitally important that agencies

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<sup>17</sup> Id.

<sup>18</sup> 441 U.S. at 318; accord Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d 274, 277 (D.C. Cir. 1991).

<sup>19</sup> National Org. for Women v. Social Sec. Admin., 736 F.2d 727, 745 (D.C. Cir. 1984) (per curiam) (McGowan & Mikva, JJ., concurring in result); accord Acumenics Research & Technology v. United States Dep't of Justice, 843 F.2d at 804-05; Burnside-Ott Aviation Training Ctr., Inc. v. United States, 617 F. Supp. 279, 282-84 (S.D. Fla. 1985); cf. Alcolac, Inc. v. Wagoner, 610 F. Supp. 745, 749 (W.D. Mo. 1985) (agency confidentiality determination upheld as "rational"). But see Carolina Biological Supply Co. v. United States Dep't of Agric., No. 93CV00113, slip op. at 4 & n.2 (M.D.N.C. Aug. 2, 1993) (applying de novo review after observing that standard of review issue presented close "judgment call"); Artesian Indus. v. HHS, 646 F. Supp. 1004, 1005-06 (D.D.C. 1986) (court flatly rejected position advanced by both parties that it base its decision on agency record according to arbitrary and capricious standard).

<sup>20</sup> CNA, 830 F.2d at 1162; see, e.g., General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 806-07; McDonnell Douglas Corp. v. NASA, transcript at 6 (recognizing that court has "very limited scope of review"); International Computaprint Corp. v. United States Dep't of Commerce, No. 87-1848, slip op. at 12-13 (D.D.C. Aug. 16, 1988); Davis Corp. v. United States, No. 87-3365, slip op. at 5 (D.D.C. Jan. 19, 1988).

<sup>21</sup> Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d at 1348.



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take care to develop a comprehensive one.<sup>22</sup> Indeed, the Court of Appeals for the Seventh Circuit once chastised an agency for failing to develop an adequate record in a reverse FOIA action. Although recognizing that procedures designed to determine the confidentiality of requested records need not be "as elaborate as a licensing," it found that the agency's one-line decision rejecting the submitter's position "validates congressional criticisms of the excessive casualness displayed by some agencies in resolving disputes over the application of exemption 4."<sup>23</sup>

Likewise, two other reverse FOIA cases had to be remanded back to the agency for development of a more complete administrative record before the court could conduct its review. In one, the D.C. Circuit reversed the decision of the district court, which had permitted an inadequate record to be supplemented in court by an agency affidavit, holding that because the agency had failed at the administrative level to give a reason for its refusal to withhold certain price information, it was precluded from offering a "post-hoc rationalization" for the first time in court.<sup>24</sup> The D.C. Circuit emphasized that judicial review in reverse FOIA cases must be conducted on the basis of the "administrative record compiled by the agency in advance of litigation."<sup>25</sup> Of course, agency affidavits that do "no more than summarize the administrative record" are permissible.<sup>26</sup>

In another case, the D.C. Circuit affirmed the decision of the district court to remand the case back to the SEC for further proceedings because the court was unable to perform its "reviewing function" in the absence of a com-

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<sup>22</sup> See Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d at 277 (court "cannot properly perform" its reviewing function "unless the agency has explained the reasons for its decision"). Compare McDonnell Douglas Corp. v. NASA, transcript at 6 (agency's action found arbitrary and capricious based on insufficient agency record) with General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 806 (agency's action found not to be arbitrary and capricious based upon "lengthy and thorough" administrative record).

<sup>23</sup> General Elec. Co. v. NRC, 750 F.2d at 1403 (case remanded for elaboration of basis for agency's decision).

<sup>24</sup> AT&T Info. Sys. v. GSA, 810 F.2d 1233, 1236 (D.C. Cir. 1987).

<sup>25</sup> Id.; see also General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 805 n.1 (refusing to allow submitter to supplement record).

<sup>26</sup> Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988); accord Lykes Bros. S.S. Co. v. Pena, slip op. at 16 (agency affidavit that "merely elaborates" on basis for agency decision and "provides a background for understanding the redactions" proposed, found permissible); see also, e.g., International Computaprint Corp. v. United States Dep't of Commerce, slip op. at 12 n.36.

plete administrative record.<sup>27</sup> In that decision, the D.C. Circuit also rejected the SEC's argument that a reverse-FOIA plaintiff bears the burden of proving the nonpublic availability of information, finding that it is "far more efficient, and obviously fairer" for the burden to be placed on the party who claims that the information is public.<sup>28</sup> It also upheld the district court's requirement that the SEC prepare a document-by-document explanation for its denial of confidential treatment.<sup>29</sup> Specifically, the D.C. Circuit found that the agency's burden of justifying its decision "cannot be shirked or shifted to others simply because the decision was taken in a reverse-FOIA rather than a direct FOIA context."<sup>30</sup> Moreover, it observed, in cases where the public availability of information is the basis for an agency's decision to disclose, the justification of that position is "inevitably document-specific."<sup>31</sup>

Rather than order a remand, the District Court for the District of Columbia has recently ruled against an agency--even going so far as to permanently enjoin it from releasing the requested information--on the basis of a record that it found insufficient under the standards of the APA.<sup>32</sup> Specifically, the court noted that the agency "did not rebut any of the evidence produced" by the submitter, "did not seek or place in the record any contrary evidence, and simply ha[d] determined" that the evidence offered by the submitter was "insufficient or not credible."<sup>33</sup> This, the court found, "is classic arbitrary and capricious action by a government agency."<sup>34</sup>

Conversely, this same court upheld an agency's disclosure determination on the basis of an administrative record that demonstrated that the agency "specifically considered" and "understood" the arguments of the submitter and "provided reasons for rejecting them."<sup>35</sup> In so ruling, the court took note of the "lengthy and thorough" administrative process, during which the agency

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<sup>27</sup> Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 346 (D.C. Cir. 1989); see also Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, 924 F.2d at 278-81 (remanding case due to inadequacy of agency's administrative record).

<sup>28</sup> Occidental Petroleum Corp. v. SEC, 873 F.2d at 342.

<sup>29</sup> Id. at 343-44.

<sup>30</sup> Id. at 344.

<sup>31</sup> Id.

<sup>32</sup> McDonnell Douglas Corp. v. NASA, transcript at 5-6, 10; see also Environmental Technology, Inc. v. EPA, 822 F. Supp. at 1230 (without even addressing adequacy of agency record, court perfunctorily granted submitter's motion for permanent injunction).

<sup>33</sup> McDonnell Douglas Corp. v. NASA, transcript at 6.

<sup>34</sup> Id.

<sup>35</sup> General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. at 807.

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"repeatedly solicited and welcomed" the submitter's views on the applicability of a FOIA exemption.<sup>36</sup> This record demonstrated that the agency's action was not arbitrary or capricious.<sup>37</sup>

Administrative practice in potential reverse FOIA situations is generally governed by an executive order issued six years ago. Executive Order No. 12,600 requires federal agencies to establish certain predisclosure notification procedures which will assist agencies in developing adequate administrative records.<sup>38</sup> The executive order recognizes that submitters of proprietary information have certain procedural rights and it therefore mandates that notice be given to submitters of confidential commercial information whenever the agency "determines that it may be required to disclose" the requested data.<sup>39</sup>

Once submitters are notified under this procedure, they must be given a reasonable period of time within which to object to disclosure of any of the requested material.<sup>40</sup> If that objection is not sustained by the agency, the submitter must be notified in writing and given a brief explanation of the agency's decision.<sup>41</sup> Such a notification must be provided a reasonable number of days prior to a specified disclosure date, which gives the submitter an opportunity to seek judicial relief.<sup>42</sup> This executive order mirrors in many ways the policy guidance issued by the Department of Justice in June 1982,<sup>43</sup> and for most federal agencies it reflects what already was existing practice.<sup>44</sup>

This executive order predates the decision of the D.C. Circuit in Critical Mass Energy Project v. NRC,<sup>45</sup> and thus does not contain any procedures for notifying submitters of voluntarily provided information in order to determine if

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<sup>36</sup> Id. at 806.

<sup>37</sup> Id. at 807; accord Lykes Bros. S.S. Co. v. Pena, slip op. at 15 (agency "provided considerable opportunity" for submitters to "contest the proposed disclosures, and provided sufficient reasons on the record for rejecting" submitters' arguments).

<sup>38</sup> 3 C.F.R. 235 (1988) (applicable to all executive branch departments and agencies), reprinted in 5 U.S.C. § 552 note (1988) and in FOIA Update, Summer 1987, at 2-3.

<sup>39</sup> Exec. Order No. 12,600, § 1.

<sup>40</sup> Id. § 4.

<sup>41</sup> Id. § 5.

<sup>42</sup> Id.

<sup>43</sup> See FOIA Update, June 1982, at 3.

<sup>44</sup> See FOIA Update, Fall 1983, at 1; see also FOIA Update, Summer 1987, at 1.

<sup>45</sup> 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993).

that information is "of a kind that would customarily not be released to the public by the person from whom it was obtained."<sup>46</sup> (For a further discussion of this new "customary treatment" standard, see the Applying Critical Mass subsection of Exemption 4, above.) As a matter of sound administrative practice, however, agencies should employ procedures analogous to those set forth in Executive Order No. 12,600 when making determinations under this "customary treatment" standard.<sup>47</sup> Accordingly, if an agency is uncertain of the submitter's customary treatment of information, the submitter should be notified and given an opportunity to provide the agency with a description of its treatment—including any disclosures that are customarily made and the conditions under which such disclosures occur.<sup>48</sup> The agency should then make an objective determination as to whether or not the "customary treatment" standard is satisfied.<sup>49</sup>

The procedures set forth in Executive Order No. 12,600 do not provide a submitter with a formal evidentiary hearing. This is entirely consistent with what has now become well-established law, i.e., that an agency's procedures for resolving a submitter's claim of confidentiality are not inadequate simply because they do not afford the submitter a right to an evidentiary hearing.<sup>50</sup> Agencies should be aware, though, that confusion and litigation can result from using telephone conversations as a short-cut method of avoiding scrupulous adherence to these submitter-notice procedures.<sup>51</sup>

Similarly, the procedures in the executive order do not provide for an administrative appeal of an adverse decision on a submitter's claim for confidentiality. The lack of such an appeal right has not been specifically considered by the D.C. Circuit, but it was recently addressed by the District Court for the District of Columbia, which flatly rejected a submitter's contention that an agency's decision to disclose information "must" be subject to an administrative appeal.<sup>52</sup>

The Court of Appeals for the Fourth Circuit had an opportunity to confront this issue in Acumenics Research & Technology v. Department of Jus-

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<sup>46</sup> 975 F.2d at 879.

<sup>47</sup> See FOIA Update, Spring 1993, at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking"); see also id. at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4").

<sup>48</sup> See id. at 7.

<sup>49</sup> Id.

<sup>50</sup> See National Org. for Women v. Social Sec. Admin., 736 F.2d at 746; accord CNA, 830 F.2d at 1159.

<sup>51</sup> See, e.g., Federal Elec. Corp. v. Carlucci, 866 F.2d 1530, 1531-33 (D.C. Cir. 1989).

<sup>52</sup> Lykes Bros. S.S. Co. v. Pena, slip op. at 6.

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tice.<sup>53</sup> There, in analyzing Department of Justice regulations which do not provide for an administrative appeal, the Fourth Circuit found that the procedures provided for in the regulations--namely, notice of the request, an opportunity to submit objections to disclosure, careful consideration of those objections by the agency, and issuance of a written statement describing the reasons why any objections were not sustained--in combination with a "face-to-face meeting that, in essence, amounted to an opportunity to appeal [the agency's] tentative decision in favor of disclosure," were adequate.<sup>54</sup> The Fourth Circuit, however, expressly declined to render an opinion as to whether the procedures implemented by the regulations alone would have been adequate.<sup>55</sup>

Likewise, the Court of Appeals for the Ninth Circuit has upheld the adequacy of an agency's factfinding procedures that did not provide for an administrative appeal per se.<sup>56</sup> In that case, the agency's procedures provided for notice and an opportunity to object to the request, for consideration of the objection by the agency followed by a written explanation as to why the objection was not sustained, and then for another opportunity for the submitter to provide information in support of its objection.<sup>57</sup> After independently reviewing the record, the Ninth Circuit found that such procedures were adequate.<sup>58</sup> Accordingly, it held that the agency's decision to disclose the information did not require review in a trial de novo.<sup>59</sup>

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<sup>53</sup> 843 F.2d at 805.

<sup>54</sup> Id.

<sup>55</sup> Id. at 805 n.4.

<sup>56</sup> Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d at 1348.

<sup>57</sup> Id.

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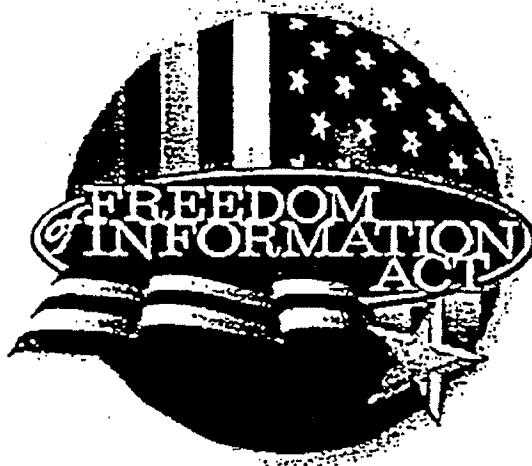
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FEDERAL BUREAU OF INVESTIGATION

**FREEDOM OF  
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PRIVACY ACTS  
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**F O I P A**

**M A N U A L**

# MEMO 1

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Abstracts  
**Date:** March 31, 1998

## Description of Abstracts

Abstracts are 3x5 inch forms (**Attachment 1**) which were designed to summarize in one or two sentences the content of any serialized or recorded document and to facilitate the filing, accountability and location of all important mail placed in a file. Abstracts were previously prepared in duplicate except for communications in personnel matters wherein a single abstract was required. The preparation of abstracts was discontinued on 10/16/79 for investigative files and on 4/11/89 for personnel and applicant matters.

Abstracts of mail were previously filed in two ways:

(1) Numerical Order by file and serial number.

(These abstracts were maintained in the Numbering Unit where they were filed by the Bureau file number. They have since been boxed and sent to an off-site location and are not available for use.)

(2) Alphabetical by their origin

(These abstracts, which cover approximately 1959-1979, are still being utilized and are maintained at Pickett Street in file cabinets. Abstracts of mail originating prior to 1959 may be found on microfilm.)

The Alphabetical abstracts were broken down into several categories with the mail being filed alphabetically under its respective category (incoming mail was filed alphabetically by source and outgoing by addressee):

- (a) Field Offices
- (b) Special Agent reports (filed by Agent's name)
- (c) U.S. Government Agency
- (d) Local and State (filed by State - usually police reports)
- (e) Foreign Governments (filed by country)
- (f) Private citizens (filed by last name first, e.g., Smith, John)

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**Abstracts**

The personnel and applicant matter abstracts are maintained at an off-site location and are not available for use.

In 1979, the Automated Incoming Mail Serialization (AIMS) System became operational. This system provides computerized positive accountability for each serial placed on record in FBI files. Information maintained in AIMS includes the date, subject, type of communication, status of the case, file classification, source and destination of every document. AIMS provides virtually all of the data describing a document which is contained on abstracts with the exception of the narrative portion. Therefore, mail generated after 1979 and entered into the AIMS system is accessible through the Automated Case Support (ACS) System.

**Purpose and Procedures for Abstract Checks**

The purpose of an Abstract check is to ascertain the specific file and serial number(s) of documents located within Bureau files. This is an extremely useful means of locating FBI documents that have been referred from other government agencies to the FBI for processing under the FOIPA.

For Abstract checks to be conducted at Pickett Street on mail dated 1959-1979, Form 4-860 (currently referred to as OPCA-13), Attachment 2, to this memorandum must be completed and contain the following information:

- (1) The origin of the document
- (2) The date of the document
- (3) The subject matter
- (4) Indicate whether the mail is incoming to FBIHQ or outgoing and the type of mail (e.g., Airtel, teletype, Special Agent report, etc.)

b2 For Abstract checks on mail prior to 1959, the same Form 4-860 (OPCA-13) should be completed and searched in the Micrographics Unit, Room [REDACTED] extension [REDACTED] by the LT/PLS. Currently, this unit is in the process of destroying the older abstracts.

b2 Mail generated after 1979 can be reviewed on the computer through the ACS System. If the LT/PLS does not have access to a computer to search the ACS System, he/she may submit Form 4-860 (OPCA-13) to the Service Unit located in the Special File Room, Room [REDACTED], and they will conduct the search and advise the LT/PLS of the file number(s) on the records.



## Sample of an Abstract

<u>BUREAU FILE NUMBER</u>	<u>TYPIST</u>	<u>DATE OF COMMUNICATION</u>	
25-16350-10	10	11/28/79	
SAC, DN		ROBERT SMITH	<u>SUBJECT MATTER</u>
Subject born 1/26/49 at NYC, NY. Subject resides at 3186 New Haven St. NYC, NY. Subject was apprehended without incident.			<u>SUMMARIZATION OF CASE</u>
C			

STATUS OF CASE

# **FOIPA SECTION REQUEST FOR ABSTRACT CHECK**

Date: \_\_\_\_\_

☐ To: Service Unit  
Room 5991

☐ Return to: Name: \_\_\_\_\_ Ext. \_\_\_\_\_  
 Room ☐ 6361 ☐ 6362 ☐ 4356  
 Room ☐ 4362 ☐ 4366 ☐ \_\_\_\_\_

Type of Communication	Date	Subject or Title	Results of Search: File Where Located
<input type="checkbox"/> Airtel From: _____			
<input type="checkbox"/> Letter _____			
<input type="checkbox"/> LHM _____			
<input type="checkbox"/> Memo To: _____			
<input type="checkbox"/> Teletype _____			
<input type="checkbox"/> Report of: _____			
<input type="checkbox"/> Airtel From: _____			
<input type="checkbox"/> Letter _____			
<input type="checkbox"/> LHM _____			
<input type="checkbox"/> Memo To: _____			
<input type="checkbox"/> Teletype _____			
<input type="checkbox"/> Report of: _____			
<input type="checkbox"/> Airtel From: _____			
<input type="checkbox"/> Letter _____			
<input type="checkbox"/> LHM _____			
<input type="checkbox"/> Memo To: _____			
<input type="checkbox"/> Teletype _____			
<input type="checkbox"/> Report of: _____			

MEMO 1 - ATTACHMENT 2

FBI/DOJ

**F O I P A**  
**M A N U A L**

# MEMO 2

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Accelerated Processing  
**Date:** March 31, 1998

## Accelerated Processing

Individuals seeking accelerated processing of their requests should be advised that the established policy of the FBI is to process requests based upon the approximate order of receipt, to the extent consistent with sound administrative practices. Use of the chronological order system is an equitable procedure; however, exceptions may arise and must be recognized. See, Open America v. Watergate Special Prosecutor's Office, et al., 547 F. 2d 605 (D.C. Cir. 1976).

Priority processing will only be considered where there is some demonstrated exceptional need or urgency. These exceptional needs and urgencies are outlined below and are also addressed in the attached reprints of the Attorney General's press release "*Attorney General Reno Moves to Expedite Exceptional FOIA Requests*" (Attachment 1) and the FOIA Update from September, 1983, (Attachment 2) which should be included in the response to a request for accelerated processing.

- 1.) A loss to life or safety
- 2.) Loss of substantial due process rights
- 3.) Widespread and exceptional media interest in the requested information
- 4.) Involves possible questions about the government's integrity which affects public confidence

Where such factors have been presented, the decision to grant or deny the request for accelerated processing will be made by the FOIPA Section Chief or the DOJ Director of Public Affairs.

## Death Row Inmates FOIPA Requests to be Expedited

Effective October 13, 1994, all requests from death row inmates will be expedited. Such requests will be identified by the Initial Processing Unit and immediately sent to the Request Management Unit (RMU) for preparation of the case for assignment to a Disclosure Unit. These requests will then be assigned to the Disclosure Units on a rotational basis for immediate processing.



## Department of Justice

### ATTORNEY GENERAL RENO MOVES TO EXPEDITE EXCEPTIONAL FOIA REQUESTS

WASHINGTON, D.C. -- Attorney General Janet Reno said today that she has authorized a change in Justice Department procedures to expedite the handling of Freedom of Information Act requests in certain cases of extraordinary interest to the news media.

Current law permits only two exceptions to normal first-in, first out processing: when information is needed to prevent a threat to life or safety, or when a delay would result in the loss of substantial due process rights such as the chance to file a claim.

The Justice Department's Office of Information and Privacy began studying whether a third category could be added after the Attorney General in December and January inquired why it was taking so long to process FOIA requests for the U.S. Park Service and FBI reports on the death of Vincent Foster? The reports were completed in August.

Under the new procedure, approved on February 1, <sup>1994</sup> FOIA requests can be moved to the head of the line whenever the Justice Department's Director of Public Affairs expressly finds two things:

- there exists widespread and exceptional media interest in the requested information; and
- expedited processing is warranted because the information sought involves possible questions about the government's integrity which affect public confidence.

A memorandum communicating the Attorney General's new policy said "The goal of such expedited processing is to permit the public to make a prompt and informed assessment of the propriety of the government's actions in exceptional cases." However, it also cautioned that in some situations, especially involving active law enforcement investigations, the law may still prevent immediate disclosure no matter how quickly the request is processed.

The policy was implemented by a directive to Justice Department FOIA and Privacy Act coordinators from Richard L. Huff and Daniel J. Metcalfe, Co-Directors of the Office of Information and Privacy. They were assisted by Peggy Irving.

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U.S. Department of Justice  
Office of Information and Privacy

# FOIA UPDATE

## OIP Guidance

# When to Expedite FOIA Requests

An issue bound to be confronted sooner or later by all federal agencies is whether to give certain requesters expedited treatment under the Freedom of Information Act. Because the granting of a request for expedition necessarily works to the direct disadvantage of other FOIA requesters, the merits of such requests should be assessed carefully.

The FOIA requires that federal agencies determine whether to release requested records within 10 working days, but that period may be extended for an additional 10 working days whenever any of three statutorily defined "unusual circumstances" exist. 5 U.S.C. §552(a)(6)(B). Many agencies are often unable to meet these deadlines due to such factors as the number of requests received, the volume of records sought, decentralized recordkeeping procedures, and limitations on resources—often coupled with the need for a line-by-line review of sensitive documents. The U.S. Court of Appeals for the D.C. Circuit has recognized this problem and has specifically approved the equitable practice of handling requests on a "first-in, first-out" basis. See *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-16 (D.C. Cir. 1976), citing 5 U.S.C. §552(a)(6)(C).

At the same time, however, the D.C. Circuit in *Open America* recognized that some FOIA requests necessarily involve a far greater degree of urgency than others and that when a requester can show "exceptional need or urgency," his request should be processed out of turn. 547 F.2d at 616. The *Open America* decision did not specify any particular circumstance which might constitute "exceptional need or urgency," so decisions on whether to grant expedition have been left for agency FOIA officers to make on a case-by-case basis. Several years of administrative practice in this area, though, together with at least some specific judicial precedents, have served to develop the following guidelines and considerations.

### Threat to Life or Safety

First, FOIA processing should be expedited whenever it is demonstrated that an individual's life or personal safety would be jeopardized by the failure to process a request immediately. Of the handful of court decisions to have ordered expedited processing, almost all have fallen into this category. See, e.g., *Exner v. FBI*, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978) (plaintiff obtained expedited treatment after leak of information exposed her to harm by organized crime figures), *aff'd*, 612 F.2d 1202 (9th Cir. 1980); *Cleaver v. Kelley*, 427 F. Supp. 80, 81 (D.D.C. 1976) (plaintiff faced multiple criminal charges carrying possible death penalty in state court). At the administrative level, the Department of Justice has expedited a request to facilitate disclosure of medical information about a child's father vital to the child's emergency medical treatment. Another agency agreed to process immediately a request from the parents of a young woman believed to be facing a serious threat to her life in the custody of a cult. To be sure, FOIA requests involving substantiated "life-or-death" matters are rare, but no more

compelling justification can exist for special FOIA treatment.

### Loss of Substantial Due Process Rights

As a general rule, a request also should be expedited if it is shown that substantial due process rights of the requester would be impaired by the failure to process immediately and that the information sought is not otherwise available. Indeed, the practices of many federal agencies reflect such concern for the due process rights of requesters. At the Justice Department's Drug Enforcement Administration, for example, the portion of a drug offender's file that is relevant to an upcoming parole hearing is routinely processed for release out of turn under the FOIA. Similarly, other agencies regularly expedite FOIA requests for information needed in contract award protests so that filing deadlines can be met.

It is not sufficient, however, for a requester merely to allege that requested records are "needed" in connection with some judicial or administrative proceeding; rather, the immediate use of the FOIA must be shown to be critical to the preservation of a substantial right. See *Rivera v. DEA*, 2 GDS ¶81,365 at 81,953 (D.D.C. 1981) ("A pending civil suit does not generally qualify a FOIA demand for expedited processing."). Indeed, in *Mitsubishi Electric Corp. v. Department of Justice*, 39 A.L.Rep.2d (P&F) 1133, 1140-42 (D.D.C. 1976), the court pointedly refused to order expedited processing where a requester had not availed itself of existing civil discovery mechanisms for obtaining the records sought. In connection with criminal proceedings, weak "due process" claims have likewise been found inadequate. See, e.g., *Gonzalez v. DEA*, 2 GDS ¶81,016 at 81,069 (D.D.C. 1980) (use of FOIA as discovery tool to aid standard post-judgment attack on criminal conviction held insufficient); *Bubar v. United States Department of Justice*, 3 GDS ¶83,227 (D.D.C. 1981) (need for documents for preparation as witness in criminal trial held insufficient).

### Other Considerations

Beyond these two narrow categories, it is unclear to what extent agencies have the discretion to grant requests for expedition under any other circumstances. Only one judicial decision has ventured beyond these categories—*Schacter v. IRS*, 3 GDS ¶82,515 at 83,302-03 (D.D.C. 1982), where a court somewhat perfunctorily ordered immediate disclosure of a record related to imminent action by Congress. Moreover, agencies should not forget the interests of all requesters in having their requests treated equitably, as well as the public interest in the integrity of FOIA processing. See *Mitsubishi Electric Corp. v. Department of Justice*, *supra*, 39 A.L.Rep.2d (P&F) at 1142 (Expedited processing, "if granted, will adversely impact upon the conflicting interest of numerous individuals whose requests and appeals were filed [earlier]."). Because a decision to take a FOIA request out of turn necessarily entails further delay for other requesters waiting patiently in line, simple fairness demand that it be made only upon careful scrutiny of truly exceptional circumstances.

F O I P A

M A N U A L

# MEMO 3

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Appeals, Administrative  
Date: March 31, 1998

## Appeals to be Filed Within 60 Days from the Release Date

DOJ regulations state that "the requester may appeal the denial of the request to the Attorney General within 60 days of his receipt of a notice denying his request." (28 C.F.R. § 16.8) The Office of Information and Privacy (OIP), previously accepted and adjudicated appeals filed late, but now enforces the 60-day time limit. Since OIP cannot determine the date the requester actually received notice of the denial (unless the requester tells OIP), in fairness to requesters they have adopted a rule that an administrative appeal received 60 days or more after the date of the final release and notice of denial will be deemed to be filed late, and will be dismissed.

In those cases where OIP can determine the date of the release from readily available information (i.e., where the requester mentions it in his appeal letter to OIP), OIP will apply this rule and not send late filed appeals to the FBI. All other appeals from FBI cases will still be sent to the FBI in the normal course of business.

Therefore, in order to avoid needless work by LTs/PLSs in gathering files and preparing for appeal adjudication, only to find out that the appeal was filed 60 or more days after the release, and OIP is willing to dismiss the appeal, the LT/PLS, who handled the request will take the following initial step:

Unless it is clear on the appeal correspondence that it was timely filed, the LT/PLS will review their case folder or the FOIPA computer to determine the date of the release/denial. If this search reveals the appeal was filed 60 or more days after the final release, the LT/PLS will return the appeal correspondence to OIP with a notation of the date of release and that the appeal was filed 60 days or more after the release. OIP will then advise the requester that his appeal will not be considered.

If the search reveals that the appeal was filed prior to 60 days of the date of the release letter, the appeal will be handled and adjudicated in the usual manner.

### **General Procedures for Handling Appeals**

When an appeal has been submitted by a requester to OIP, the Field Coordination Team (FCT) will be notified of the appeal. The FCT will then identify the LT/PLS who is handling or handled the case and will forward a copy of the appeal letter to the LT/PLS. FCT will document this information in the appeal folder, including the date the LT/PLS was notified of the appeal. It is encouraged and recommended that the appeal review be handled by the PLS within ten working days from notification of the appeal. However, an appeal should not be scheduled until all files, processed documents, and any other pertinent materials have been located. Once all of the material is available, the LT/PLS is to schedule the appeal in the appointment book maintained in FCT by providing their name, extension, appeal number, and the approximate number of pages for review. On the date that the appeal has been scheduled, a DOJ appeals attorney will contact the LT/PLS for the material to be reviewed.

If during the appeal review, a determination is made to release additional material, that release may be made by either the PLS or the DOJ Attorney. If the release is to be made by the PLS, the additional release should not be made until a copy of the DOJ's adjudication letter has been received. Regardless of who makes the release, the PLS should ensure a copy of the final DOJ letter and the additional release is retained in the 190 file.

In addition to the above procedures, when an appeal involves classified information where (b)(1) was cited to the requester, that information must be further reviewed during the appeal stage by the Departmental Review Committee (DRC). OPCA-33 form (formerly 4-809) must be completed by the PLS and submitted to DCU along with a copy of the original DCU addendum and all pertinent files containing the classified material. Following DRC's review, any information which is declassified must be reviewed by the PLS for possible release or application of other FOIA exemptions. If information has been declassified by DRC and is now being withheld from disclosure pursuant to an exemption other than (b)(1), the OIP attorney is to review these excisions for their appropriateness. Upon completion of the entire DRC process, the requester must be advised in writing of the outcome and provided with copies of documents that contain any changes in processing. A copy of OPCA-33 form is attached.

### **Information From Other Agencies**

For information which originated with another agency, notice to a requester of his right to appeal should advise him that any appeal concerning another agency's information should be sent to the appeal authority of that agency. The PLS should ensure throughout the appeal process that we are dealing only with information which originated with the FBI.

### Classification Appeals Involving Referrals

When conducting a classification review, DCU prepares an addendum noting the results of the review. If appropriate, instructions are given regarding the referral of FBI documents to other agencies. Disclosure PLSs are responsible for making such referrals promptly.

In those cases where a classification decision is appealed, the results of the referral must be recorded prior to presentation of the appeal to the DRC. If the referral has not been made, DRC will instruct that it be done promptly. The results of the referral and the original documents are to be sent to the DCU for presentation to the DRC. DCU will note the classification action taken by DRC on the original documents.

### Coordination of Headquarters/Field Office Appeals

If it is determined that a field office appeal involves an ongoing HQ request or appeal, the FCT Regional Program Manager, the PLS and his or her Team Captain will determine if the field office appeal should be assigned to the HQ PLS to ensure consistency in processing and coordination of the request and the appeal. Otherwise, if there are no apparent conflicts or problems, the FCT will routinely handle the field office appeal.

### Exemption (b)(7)(A) Appeals

If a (b)(7)(A) case has been appealed, and the case is now closed, the processing of the material should commence after consultation with the OIP attorney. The appeal should be closed on the appeals statistical sheet under the "reversed" category.

### Appeals Involving Preprocessed Cases

From time to time, a PLS may handle a request which was previously processed ("preprocessed") for another requester. Preprocessed cases are assigned to the Disclosure Units for prompt handling, since they do not require any processing, but rather, just duplicating the material for release. However, in several instances, the preprocessed cases were originally processed prior to the Landano/Reno guidelines. If requesters appeal any denials contained in the preprocessed material and DOJ/OIP remands the case for processing under the Landano/Reno guidelines, this action will involve reprocessing the case for any additional information to be released. It is the policy of the FOIPA Section to reopen the request and place it in the backlog based on the date of receipt of the initial request letter. These cases will then wait their turn in the queue along with those which require initial processing.



FOIPA Numbered Memo 3

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Appeals, Administrative

### **Appeals Involving the Cross-Reference Policy**

The FOIPA Section's policy for processing requests is to only process identifiable main files even though cross-references for the subject may exist. Requesters are advised of this policy, and occasionally, will appeal this procedure. If an appeal by a requester includes an appeal of the cross-reference policy, the PLS should process the cross-reference(s) at this time.

**F O I P A**  
**M A N U A L**

**MEMO 4**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Applicants  
**Date:** March 31, 1998

**Background Investigations for Unsuccessful Job Applicants**

When unsuccessful applicants for the FBI seek to determine why they were not hired, they are often told to submit FOIPA requests to the FBI for their background investigative file. This expedient response presents the following problems:

- 1) It takes much longer for the FOIPA Section to process a file than it would take a personnel officer or applicant coordinator to write a responsive letter;
- 2) Processing an entire file is much more expensive than drafting a letter; and
- 3) Records from the processed file may not inform the requester why he was not hired, especially in those cases where relevant information would be redacted or the applicant was just not as competitive a candidate as those hired.

This problem is being addressed by both the Special Agent Applicant Unit and the Bureau Support Applicant Unit, by advising field personnel who deal with applicant matters of the following:

- 1) If the applicant achieves an unsuccessful score in either an examination or interview, field applicant personnel will advise the applicant of the passing scores and the waiting period to be retested;
- 2) If the applicant was simply not as competitive a candidate as those hired, field applicant personnel will advise the applicant what must be done to become competitive; and
- 3) If the applicant was not hired due to derogatory information from the background investigation, the applicant's inquiry will be referred to the Personnel Resources Unit at FBIHQ. In those cases where the derogatory information came from credit, arrest, academic, or employment records, the Personnel Officer will advise the applicant of the specific reason he was not hired.

## FOIPA Numbered Memo 4

Page 2

### Applicants

Further, at FBIHQ, FOIPA letters from applicants denied employment will be sent to the Unit Chief of either the Special Agent Applicant Unit or the Bureau Support Applicant Unit if the requester is seeking the reason he or she was not hired. If the respective Unit cannot give the reason for denied employment (i.e., source giving derogatory information), then the letter will be returned to the FOIPA Section to be handled.

Periodically, we will receive FOIPA requests for records on FBI background investigations conducted on individuals applying or being appointed for other federal government positions (i.e., DOJ positions, DEA, Special Inquiries for White House appointments). If the requester, a non-FBI applicant, clearly indicates in the letter that he is primarily interested in determining why he was not hired for government employment, and the releasable records would not clearly indicate the reason for that decision, then a letter should be sent to the requester advising him of this and that an FOIPA release would not be very informative. The letter should explain that, although the FBI may conduct background investigations for another agency, the FBI does not make hiring decisions for that agency. The letter should suggest that the requester contact the official who made the hiring decision at the other agency and explain the situation to him or her. We cannot, of course, refuse to process an FOIPA request, so the requester must be asked if he would still like his request processed.

A final point concerns verification of the identity of the requester. If the requester's address in the request letter is identical to the address documented in the background investigative file, then it is not necessary to obtain a notarized signature or a certificate of identity from the requester.

### **Source Information in Applicant/Background Type Files - Confidentiality?**

In some instances, applicant files compiled after September 27, 1975, the effective date of the Privacy Act, will not indicate whether a source of information requested confidentiality. Often it is felt that many of these sources would want confidentiality because of the type of information (i.e., derogatory information) being provided to the FBI. Therefore, if this situation occurs and there is a concern in the release of the information, it is suggested that the PLS contact the field office Case Agent prior to releasing the material. If the field Agent indicates the source did request confidentiality and it was overlooked in documenting it on the typed interview statement, it should be made a matter of record in the applicant/background file. In processing this material, the identity of the source and any information which would tend to identify the source should be protected. If the field Agent is unable to articulate or provide proof that confidentiality was requested the information must be released.

**F O I P A**  
**M A N U A L**

**MEMO 5**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Autopsy Reports and Photographs  
**Date:** March 31, 1998

When processing FBI records pursuant to a third party request which contain autopsy reports and/or related photographs, initially deny those reports and/or photographs in order to protect the privacy interests of the heirs of the victim under Exemption (b)(6) and/or (b)(7)(C). Further, the PLS should identify to the requester on OPCA Form 20, the Deleted Page Sheet, an explanation under the "For your information" portion of the form, as to what the deleted material contains and the graphic nature of the material.

If the request is from the heirs' and/or family member of the victim, the requester should also be notified of what is contained in the material, such as any graphic photographs or summary autopsy reports. Once the heir and/or family member is fully advised of the contents and still requests a copy of the material, it will be forwarded to them.

One exception to the preceding paragraphs would be in those instances where the Coroner and/or Medical Examiner provided the autopsy reports and related photographs in confidence or there was a circumstance of foreseeable harm and implied confidentiality could be considered. In those situations, the autopsy reports and/or related photographs should be withheld pursuant to Exemption (b)(7)(D) in addition to the citing of (b)(6) and/or (b)(7)(C).

**F O I P A**  
**M A N U A L**

# MEMO 6

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Bureau Teletypes, Telegrams and Radiograms Originating Prior to 1955  
**Date:** March 31, 1998

**Handling of Bureau Teletypes, Telegrams and Radiograms**  
**Originating Prior to 1955**

Certain information contained in Bureau teletypes, telegrams and radiograms originating prior to 1955 requires special handling to insure sensitive information is deleted prior to release pursuant to an FOIPA request.

To insure proper handling, the above described communications should be reviewed by the DCU whether located in Security or Criminal files prior to release.

F O I P A

M A N U A L

# MEMO 7

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Caution Statements  
Date: March 31, 1998

When processing FBI documents pursuant to the FOIPA, caution statements may appear on the document such as "ARMED AND DANGEROUS." In most cases, these statements are typed with upper case letters and/or underlined and usually appear at the bottom portion of the document, however, they may be found elsewhere. When caution type statements appear on a document, the PLS should thoroughly research the file(s) before releasing any statement in order to determine whether or not the statement was obtained from a confidential source. If the source's identity is not recorded and the statement appears to be singular in nature, the PLS should consider protecting the statement under exemption (b)(7)(D).

The following is an example of where the caution statement was released to the requester without excision: "ARMED AND DANGEROUS, SUBJECT MAY TAKE RETALIATION AGAINST SENTENCING JUDGE." On appeal, a review of the HQ file failed to determine the source of the information and the field office was telephonically requested to search its file. Through the review of the field office file, it was determined the source was the subject's mother, who had received the information from the subject's brother, and had alerted the FBI on a very confidential basis. Had this been known prior to the release, the caution statement would not have been disclosed.

~~SECRET~~

F O I P A

M A N U A L

# MEMO 8

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Central Intelligence Agency (CIA)  
Date: May 15, 1998

## Referral of CIA Information (U)

The CIA has a representative currently assigned to the FBI's FOIPA Section, Litigation Unit, who can review CIA operational-type information in FBI files eliminating the need for the PLS to refer the information to the CIA. The CIA representative will make a release determination or classification/declassification decision only on documents or information that has never been reviewed or previously referred to the CIA. The procedures for directing all such referrals to the CIA representative are as follows: (U)

- 1) Provide the following information on a routing slip: (U)
  - a) FOIPA Number;
  - b) Subject of Request;
  - c) Name of PLS, Room Number and Extension. (U)
- 2) Mark or highlight the CIA information that requires review. (U)
- 3) Provide a photocopy of the referral document along with any background information necessary to determine the origin of the CIA information. (U)
- 4) Leave the referral package in the CIA incoming box in the Litigation Unit. (U)

5/15/98  
CLASSIFIED BY: SP7 ci  
REASON: 1.5 (C)  
DECLASSIFY ON: X 1

General Referral Policy (U)



ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
EXCEPT WHERE SHOWN  
OTHERWISE

~~SECRET~~

b1

~~SECRET~~

b1

[REDACTED] (C)

b2

[REDACTED] (U)

In an effort to satisfy CIA concerns and at the same time hopefully shorten the time it takes the CIA to respond to our referrals, the following agreement has been made with the CIA for their material that cannot be handled by the CIA representative in the Litigation Unit: (U)

The PLS will hold in abeyance each FOIA/PA response to the requester for a period of 60 days starting from the date of the referral to the CIA. A referral may encompass FBI documents containing CIA information sent to the CIA for coordination which are to be returned for our response to the requester, or documents referred for direct response. (U)

The PLS will provide two copies (one redacted copy, one clean copy) of the referred documents/pages. The PLS will attempt to furnish the CIA with enough information to help them locate the records and determine what the investigation is about. The PLS will either process the pertinent documents/pages to be referred as they plan to release them to the requester or advise the CIA what they plan to release and/or deny. This facilitates their review. (U)

The CIA, upon receipt of the referral, will review the material. If the CIA determines that the material warrants further treatment, the CIA Coordinator's office will notify the FBI within the 60-day period stipulated above. This notification will include an identification of the affected portions of the material, applicable exemptions and statutes and the responsible authority for the determination reached by the CIA. (U)

The absence of such CIA notice to the FBI within the stipulated time will indicate full CIA concurrence with the FBI's proposed action. (U)

b2

[REDACTED] (U)

~~SECRET~~



~~SECRET~~

CIA Name Check Information (U)

When the PLS locates information in an FBI document which indicates that a name check was made with the CIA, this fact may be released by the PLS without coordination with the CIA, provided the check reveals that the CIA has no record, no information or no trace. However, if this same name check shows that coordination was effected with a CIA person by name or with a CIA component, the document should be reviewed by the CIA representative currently assigned to the Litigation Unit prior to release. References to major CIA components, at the Directorate or Office level, or the titles of their Directors, may be released without referral or coordination.

b3  
per  
CIA

[REDACTED]  
(U)

b1

[REDACTED] (C)

b1

[REDACTED] (S)

b1

[REDACTED] (S)

If any such document is located during a review pursuant to an FOIPA request, it should be referred to the CIA in the normal manner. (U)

b1

[REDACTED] (C)

b2

Bureau Source [REDACTED] - Hunter Project (U)

b2

Bureau Source [REDACTED] (Hunter Project) was a CIA mail opening operation for foreign mail in New York City. When mail was opened which was of interest to the FBI, the content of the

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letter was furnished to the FBI. Such material was consistently stamped "Secret". Project Hunter has been discontinued by the CIA and both its existence and its nature publicly acknowledged by that agency. The CIA called this mail intercept program HTLINGUAL. (U)

On 5/13/98, Information and Privacy Office, CIA, advised they want the documents referred to the CIA. The agency indicated that in almost all instances the information would be declassified and released in its entirety. [REDACTED]

b5 [REDACTED] It is also not possible to rule out an item retaining classification for some reason other than the fact the item was acquired from interception of mail, [REDACTED] (U)

b3  
PDU  
CIA

### CIA Employee Names and Component Designations (U)

By letter dated 3/16/76, Mr. Gene F. Wilson, Information and Privacy Coordinator, CIA, requested we ensure that all CIA employee names and component designations are deleted from any CIA document, or from any other document containing CIA information, which is being released to a requester through the FBI, after such documents have been coordinated with the CIA. (U)

Such deletions are authorized under Exemptions (b)(3) of the FOIA, and (j)(1) of the PA. The (b)(3) exemption applies to the Director's statutory obligations to protect from disclosure intelligence sources and methods, as well as the organization, functions, names, official titles, salaries and number of personnel employed by the CIA, in accordance with subsection 102(d)(3) of the National Security Act of 1947 {Public Law 86-36 Section 6(a)}, and section six of the CIA Act of 1949 (50 U.S.C. Section 403), respectively. (U)

### CIA Operational Files (U)

Operational files of the CIA are exempt from the provisions of the FOIA which require publication or disclosure, or search or review in connection therewith (See 50 U.S.C. Section 431). The term "operational files" means: (U)

1) files of the Directorate of Operations which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services; (U)

2) files of the Directorate for Science and Technology which document the means by

~~SECRET~~

~~SECRET~~

which foreign intelligence or counterintelligence is collected through scientific and technical systems; and (U)

3) files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources; except that files which are the sole repository of disseminated intelligence are not operational files. This law applies to any FOIA request for records, even if made prior to the enactment of the aforementioned statute. (U)

CIA Presence Abroad (U)

b1

[REDACTED]  
(C)

[REDACTED]  
(C)

b1

b1

[REDACTED]  
(C)

~~SECRET~~

**F O I P A**

**M A N U A L**

# MEMO 9

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Classification Stamps, Use of  
**Date:** March 31, 1998

## Referral Form OPCA-6

When referring classified information to other agencies, OPCA-6 referral form letter must be properly marked to indicate the level of classification of the information contained in the referral document(s). If the referral document contains unredacted "classified" information, (i.e., "Confidential" information) then **all copies** of the referral form should be stamped to indicate the highest level of unredacted classified information. For example...**"Confidential" on both the front and back of the form at the top and bottom of the page, "Confidential Material Attached" and "This Communication Is Unclassified Upon the Removal of Classified Enclosures"** stamps are to be placed on the front of the form at the bottom. See Attachment 1.

If no exposed classified information is contained in the copy of a document being referred to the other agency, there is no reason to place the above stamps on the referral form letter. For example, an FBI document consisting of one page was surfaced during the processing of a request and the document contains one paragraph of other agency information. Lets assume that paragraph one of the referral document contains classified FBI information which has been deleted/blacked-out by the FBI, paragraph two is bracketed because it contains the other agency information which the FBI wants the other agency to review, and paragraph three is left in because it contains information being released to the requester, **do not send the document to the other agency with the classification stamps on the referral form since there is no classified material on the copy of the document being sent to the other agency.**

## Disclosure Form OPCA-16

When the **(b)(1) block is checked** on the OPCA-16 disclosure form, it will be necessary for **the tickler and the yellow copies only** to be properly marked to indicate the highest level of classification contained in the processed (red-out) documents. For example, if the highest level of classification indicated by the DCU addendum is "Secret," then the **"Secret" stamp should be placed on both the front and back and at the top and bottom of the page of the tickler and yellow copies.** The **"Secret Material Enclosed" and "This Communication Is**

**FOIPA Numbered Memo 9**  
**Page 2**  
**Classification Stamps, Use of**

**Is Unclassified Upon Removal of the Enclosures" stamps are to be placed on the bottom of the front of both copies. Do not place the classification stamps on the copy of the disclosure letter going to the requester. See Attachment 2.**

**Electronic Communications (EC)**

There will be times when classification stamps will be placed on ECs. For example, if the Electronic Surveillance (Elsur) Indices search slip is classified and the LT/PLS is enclosing the search slip to the EC going to the field office(s). The "\_\_\_\_\_ Material Attached" and "This Communication Is Unclassified Upon Removal of the Enclosures" stamps will need to be placed on all copies of the EC. The classification level will be indicated on the EC when it is prepared.

For information concerning the transmittal of classified material also review **Memo 10** concerning the "Handling and Transmittal of Classified Material."



# CONFIDENTIAL

U.S. Department of Justice

Federal Bureau of Investigation  
935 Pennsylvania Ave., N.W.

Washington, D.C. 20535-0001

To:

From: Chief  
Freedom of Information/Privacy Acts (FOIPA) Section  
Federal Bureau of Investigation

Subject: FOI/PA Request of \_\_\_\_\_  
FBI FOI/PA# \_\_\_\_\_ Re: \_\_\_\_\_

*In connection with review of FBI files responsive to the above request, the following was surfaced:*

- ☐ \_\_\_\_\_ unclassified document(s) which originated with your agency is/are being referred to you for direct response to the requester. We will advise the requester that your agency will correspond directly concerning this matter, and request that you furnish us a copy of your letter to the requester reflecting final determination regarding the document(s). (See index A).
- ☐ \_\_\_\_\_ FBI document(s) containing information furnished by or related to your agency. Please review this information (outlined in red) and return the document(s) to us, making any deletions you deem appropriate, and citing the exemption(s) claimed. (See index B).
- ☐ \_\_\_\_\_ classified document(s) which originated with your agency is/are being referred to you for direct response to the requester. We will advise the requester that your agency will correspond directly concerning this matter, and request that you furnish us a copy of your letter to the requester reflecting final determination regarding the document(s). Additionally, please advise us if the classification of the document(s) is changed so that we may amend our files. (See index C).
- ☐ \_\_\_\_\_ classified FBI document(s) containing information furnished by or related to your agency. Please review this information (outlined in red) and return the document(s) to us, making any deletions you deem appropriate, citing the exemption(s) claimed, and advising if the document(s) still warrant(s) classification. (See index D).
- ☐ Please note that some of the enclosed documents contain deletions made by this Bureau. The appropriate exemption appears next to the redacted information. Please advise the requester they may appeal these denials to the following address: Co-Director, Office of Information and Privacy, U.S. Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001.

A copy of the requester's initial letter and any other significant correspondence is enclosed for your convenience. If you have any questions concerning this referral, please contact \_\_\_\_\_ on (202) 324-\_\_\_\_\_. The FBI file number appearing on the lower right-hand corner of the enclosed document(s) as well as on the Index Listing (see reverse) should be utilized during any consultation with this Bureau concerning this referral.

Additional Remarks: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Enclosure(s) ( )

MEMO 9 - ATTACHMENT 1 (Index Listing on Reverse)  
(FRONT)

## CONFIDENTIAL

THIS COMMUNICATION IS UNCLASSIFIED  
UPON THE REMOVAL OF CLASSIFIED ENCLOSURES

### CONFIDENTIAL MATERIAL ENCLOSED

CONFIDENTIAL

Index A:

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Index B:

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Index C:

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Index D:

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MEMO 9 - ATTACHMENT 1  
(BACK)

CONFIDENTIAL

**SECRET**

U.S. Department of Justice

Federal Bureau of Investigation  
935 Pennsylvania Ave., N.W.

Washington, D.C. 20535-0001

Subject of Request: \_\_\_\_\_

FOIPA No. \_\_\_\_\_/190- \_\_\_\_\_

Dear Requester:

Enclosed are copies of documents from FBI records. Excisions have been made to protect information exempt from disclosure pursuant to Title 5, United States Code, Section 552 (Freedom of Information Act) and/or Section 552a (Privacy Act). In addition, where excisions were made, the appropriate exempting subsections have been cited opposite the deletions. Where pages have been withheld in their entirety, a deleted page information sheet has been substituted showing the reasons or basis for the deletion. The subsections cited for withholding information from the enclosed documents are marked below:

## Section 552

## Section 552a

- |  |                                    |                                 |
|--|------------------------------------|---------------------------------|
| <input checked="" type="checkbox"/> (b)(1) | <input type="checkbox"/> (b)(7)(A) | <input type="checkbox"/> (d)(5) |
| <input type="checkbox"/> (b)(2)            | <input type="checkbox"/> (b)(7)(B) | <input type="checkbox"/> (j)(2) |
| <input type="checkbox"/> (b)(3) _____      | <input type="checkbox"/> (b)(7)(C) | <input type="checkbox"/> (k)(1) |
| _____                                      | <input type="checkbox"/> (b)(7)(D) | <input type="checkbox"/> (k)(2) |
| _____                                      | <input type="checkbox"/> (b)(7)(E) | <input type="checkbox"/> (k)(3) |
| _____                                      | <input type="checkbox"/> (b)(7)(F) | <input type="checkbox"/> (k)(4) |
| <input type="checkbox"/> (b)(4)            | <input type="checkbox"/> (b)(8)    | <input type="checkbox"/> (k)(5) |
| <input type="checkbox"/> (b)(5)            | <input type="checkbox"/> (b)(9)    | <input type="checkbox"/> (k)(6) |
| <input type="checkbox"/> (b)(6)            |                                    | <input type="checkbox"/> (k)(7) |

(See Form OPCA-16a, enclosed, for an explanation of these exemptions.)

Pursuant to your request, \_\_\_\_\_ page(s) were reviewed and \_\_\_\_\_ page(s) are being released.

During the review of material pertinent to the subject of your request, documents were located which

- ☐ originated with another Government agency(ies).  
These documents were referred to that agency(ies) for review and direct response to you.
- ☐ contain information furnished by another Government agency(ies). You will be advised by the FBI as to the releasability of this information following our consultation with the other agency(ies).

MEMO 9 - ATTACHMENT 2  
(FRONT)**SECRET**THIS COMMUNICATION IS UNCLASSIFIED  
UPON THE REMOVAL OF CLASSIFIED ENCLOSURE

SECRET MATERIAL ENCLOSED



**SECRET**

- ☐ If you desire, you may appeal any denials contained herein. Appeals should be directed in writing to the Co-Director, Office of Information and Privacy, U.S. Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001 within thirty days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.
- ☐ The enclosed material is from the main investigative file(s) in which the subject of your request was the subject of the investigation. There are additional references to the subject(s) of your request in files relating to other individuals, organizations, events or activities. These additional mentions or references have not been reviewed to determine if, in fact, they are identifiable with the subject(s) of your request. Our experience has shown that such references are frequently similar to information contained in the processed main file(s). We will process these references if you now make a specific request for them. However, because of a significant increase in FOIPA requests and an expanding backlog, we have given priority to the processing of main investigative files and can only complete the processing of these additional references as time and resources permit.
- ☐ See additional information which follows.

Sincerely yours,

Chief  
Freedom of Information-  
Privacy Acts Section  
Office of Public and Congressional Affairs

Enclosures ( )

MEMO 9 - ATTACHMENT 2  
(BACK)

**SECRET**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Classified Material, Handling and Transmittal of  
**Date:** March 31, 1998

**Handling Top Secret/Sensitive Compartmented  
Information (TS/SCI) and Elsur Records**

**A. Information Upgraded by Document Classification Unit (DCU)**

1. When DCU reviews information in FBI Headquarters (FBIHQ) files which requires classification at the TS or SCI level and which has not been marked previously (such as documents dated prior to July 1, 1977), DCU will mark the information. DCU will also locate and mark any other FBIHQ files containing the same document, then hand carry these files to the Special File Room (SFR). (If there is outside agency information within the file or document, the information must be referred to the outside agency before being sent to the SFR.)
2. The SFR will remove the original TS/SCI document from the file for retention in the SFR and prepare a Custody Control Form, FD-501a, for each document. They will then stamp the file front "TOP SECRET FILE EXISTS."
3. When the LT/PLS is advised by DCU that a document is upgraded to TS, the LT/PLS will obtain a copy of the document from the SFR. (See the "Special File Room" numbered memorandum for procedures when the SFR advises the LT/PLS that he/she does not have the appropriate clearance to review the document.)

**B. Information Downgraded by DCU**

When DCU discovers that information in a document maintained by the SFR is no longer classified at the TS/SCI level, DCU will take the FD-501a and document to the SFR. The SFR will make a notation on the SFR copy of the FD-501a, remove the FD-501a form from the document and retain the FD-501a. The document will be returned to the PLS to complete the FOIPA processing.

Thereafter, the document will be routed to the SFR so that they can remove the serial charge-out and put the downgraded document in the proper investigative file.

**C. Referrals of TS/SCI Information**

b2. 1. When FBI information in other-agency documents is classified at the TS/SCI level, regardless of the date of the document, DCU will have the SFR remove the document from the file and stamp the file front **"TOP SECRET FILE EXISTS."** At the request of the Disclosure PLS, the SFR will copy the document. The PLS will prepare a referral to the other agency with directions to delete exempt FBI-originated information from its document. Once the referral has been finalized, the PLS will take all copies of the referral form (OPCA-6) and the enclosure(s) to the SFR where an FD-502a will be prepared. The SFR will place a note in the margin of the yellow copy to indicate that the originals of the enclosures are retained in the SFR. **Do not retain copies of the TS/SCI documents behind the yellow of the referral form.** The SFR will handle the delivery of other agency referrals with the exception of NSA. NSA referrals will be handled by the PLS who will hand deliver the material to the FBI's NSA Liaison Agent in Room [REDACTED] (See the "Special File Room" numbered memorandum for procedures when the SFR advises the LT/PLS that he/she does not have the appropriate clearance to review the document.)

2. When other-agency information in FBI documents is classified TS and/or contains SCI, DCU will not automatically act to have the TS/SCI information removed from the file, but will await notification from the other agency of its intent to retain the classification. Thus the FBI document will be retained in the file until after the PLS sends a referral to the other agency, and the other agency responds to the referral. The PLS will take all copies of the referral form (OPCA-6) and the enclosure(s) to the SFR where an FD-502a will be prepared by the SFR. **Do not retain copies of the TS/SCI documents behind the yellow of the referral form.**

a. If the other agency indicates that the information is to retain its classification, the PLS will hand carry the referral response along with the original FBI document to DCU. DCU will update the classification in the FBI document and hand carry the file to the SFR for filing in the SFR. The PLS will obtain a copy of the document from SFR in order to complete the processing of the FOIPA request. (See paragraph A.3.)

b. If the other-agency information is downgraded below the TS level or no longer considered SCI, DCU will handle the document as described in paragraph B above.

**D. Handling Disclosure Packages with TS/SCI**

When the red-outs of a disclosure package contains TS/SCI material, the TC will date stamp all copies of the disclosure form, place appropriate stamps on the original and the yellow file copy, but the TC will not package the material or send it to the Mail Services Unit (MSU). The PLS will hand carry all copies of the disclosure form (OPCA-16) and all enclosure(s), including the black-outs, to the SFR, who will then prepare an FD-501a. Once this has been handled the original disclosure form and the black-outs can be packaged for mailing.

**E. Transfer of TS/SCI Information**

b2 If a TS/SCI document (that is not filed in a TS folder or file maintained by the SFR) needs to be reviewed by another individual, it is the responsibility of the person who has the document to ensure that the person to whom the document is transferred has a "need to know" and, if it is SCI, the necessary SCI access. This can be accomplished by calling the Personnel Security Unit on extension [REDACTED]. To transfer the TS/SCI document, call the SFR on extension [REDACTED]. Any TS/SCI document must be hand carried to another individual. When not being used, the TS/SCI document must be maintained in a combination safe when it is outside of the SFR.

**F. Filing TS/SCI And Elsur Documents**

It is the policy of Information Resources Division that when any part of a document or enclosure to a document is TS, the entire serial is treated as TS. Therefore, when a TS document is in a FOIPA disclosure package (processed documents), the SFR considers the entire disclosure package as TS. The FOIPA disclosure form should be stamped "Top Secret" on the top and bottom and "Top Secret Material Attached" and "This Communication Is Unclassified Upon the Removal of Classified Enclosures" on the bottom by the PLS. Similar handling is given to Elsur records. The disclosure package should be hand carried to the SFR for filing in their portion of the 190 file. Be aware that any original document or yellow/white file copy that is stamped "Top Secret" or has "Top Secret" material attached must be filed in the SFR.

**Transmittal of Classified Materials Within FBIHQ**

All FBIHQ employees are reminded of the importance of properly handling classified information in order to prevent the loss or disclosure of that information. The following procedures should be adhered to in all cases involving the routing of classified information within FBIHQ:

**Top Secret (TS) Documents or documents containing Sensitive Compartmented Information (SCI)** must have an attached form FD-501a and be hand-carried in an envelope when being moved within FBIHQ. SCI documents must be hand-carried by an individual who has been cleared for SCI access. TS and SCI documents must never be placed in outgoing mailboxes or routed through MSU.

**Confidential and Secret documents** may be placed in outgoing mailboxes and be delivered by MSU, but must be inside a messenger envelope.

**Transmittal of Classified Materials Outside FBIHQ**

b2 TS and SCI documents being sent outside FBIHQ must have an attached form FD-502a and be hand-carried to the Special File Room (Room [REDACTED]) for recording and packaging. These documents will be delivered by a designated FBI courier or the Defense Courier Service. If the package is designated for the Washington Metropolitan area, delivery will be handled by the FBI courier. For this reason, there must be a point of contact listed on the address label. If the PLS does not know who the point of contact is for a particular agency, the PLS should contact the agency for this information. If the designated addressee is outside of the Washington Metropolitan area, delivery will be handled by the Defense Courier Service.

Confidential and Secret Documents being sent to FBI offices must be placed in a messenger envelope and then routed to MSU, Room 1B341. Confidential and Secret documents being sent to other government agencies (including DOJ) must be placed in a messenger envelope and routed to MSU, Room 1B341, for recording, receipting, and packaging. However, if the TC packages this material, the TC should place a sticky on the outside mailing envelope indicating whether there is "Confidential" or "Secret" material inside the package, and place in a messenger envelope or hand carry to the MSU.

b6  
b2  
1 Everyone has a responsibility to protect classified information. Additional information concerning the handling and marking of classified information can be found in the MIOG, Part II, Section 26, "Classified National Security Information and Material." Questions may be directed to [REDACTED], Information Systems Security Unit, National Security Division, extension [REDACTED]. Questions regarding mail room procedures may be directed to MSU, Information Resources Division, extension [REDACTED] Room 1B006.

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Closing a FOIPA Request  
Date: March 31, 1998

**Closing an FBIHQ FOIPA Request and  
Advising Field Offices of Final Disclosure**

A FOIPA request may be closed through processing when there is no further action to be taken by the PLS on the request. An example of this is when a final disclosure has been made, including responses to final determinations on any and all documents referred for consultation. A request may also be closed administratively in situations where the requester fails to respond within 60 days to an action sought by the LT/PLS. For example, if there is no response from the requester after asking for their willingness to pay for duplication fees prior to processing the material or if the requester provided his or her willingness to pay and then never responded to the "cost" or "money" letter. It is suggested that the LT/PLS maintain the case folder and all pertinent mail or files after closing a request for a minimum of 60 to 90 days. If after this time no further communication has been received, any original mail should be sent to the 190 file and all FBI files returned to the Filing Unit or the field office(s).

Furthermore, when a FBIHQ request is closed, wherein a release of information was made, an information copy of the final disclosure letter should be forwarded to the field office in which the greater portion of the investigation was conducted. The disclosure letter should contain a brief note to the field office identifying the Bureau file(s) processed and any details which may be relevant to the request, a requester or the files processed. There will be certain cases where it would not be necessary to notify the field office of a release, such as, third party historical interest cases, requests on deceased individuals or personnel files. If in doubt on whether to provide a copy of the letter to the field office, resolve the doubt in favor of furnishing the field with a copy.

**Closing Field Office FOIPA Requests When Referred to FBIHQ**

On many occasions, FOIPA requests are made directly to a field office for subject matters and records of interest. If the request is for records maintained in the field office only and the responsive file(s) contain 500 pages or less, that field office will process the file(s), make the release or denial of any material and close the case. Requests of 501 pages or more are to be referred to FBIHQ by Electronic Communication (EC) for handling. Upon referring these

**FOIPA Numbered Memo 11**

Page 2

**Closing a FOIPA Request**

requests to FBIHQ, the field office will no longer maintain their 190 file in a pending status as in the past, but rather, close the 190 field office file by the date of the EC. It is ultimately the responsibility of the FBIHQ PLS processing the case to ensure all issues in the request letter and further correspondence which pertain to your subject matter have been addressed. Once the processing of the case has been completed or if interim releases are made, the field office which originally referred the request should be provided with a copy of the disclosure letter(s) for their 190 file.

**Abandoned Cases - Use of Form OPCA-25**  
**(Transmitting Processed Documents to File)**

To close FOIPA requests when material has been prepared for release and the requester has abandoned fees, withdrawn the request, etc., OPCA-25 (previously referred to as Form 4-780) should be completed in order to document the reason for closing the case and to send the processed material to the 190 file. Attached is copy of OPCA-25 which should be utilized for this purpose.

**Closing of Multiple Requests from One Requester**  
**When Failure to Submit Fees**

Some requesters submit numerous requests (multiple requests) for information concerning various subject matters. When these requesters do not submit requested fees, no further processing of their requests should be done. Further, no releases should be made to these individuals until they pay the requested fees. A stop should be placed with RTSS to insure that the FBI's FOIPA Section does not accept further requests from the requester. If payment of fees is not made within 60 days from the date of the FBI's request for payment, all of this individual's requests should be closed for failure to pay requested fees.

**F O I P A**  
**M A N U A L**

**MEMO 12**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Congressional Documents  
**Date:** March 31, 1998

Occasionally FBI files contain documents which were generated by Congress such as transcripts of Congressional hearings which were held either in executive (closed to the public) or open sessions. The issue is whether those documents are "agency records" subject to access under the Freedom of Information Act (FOIA) or Privacy Act (PA).

The FOIA and PA only apply to records maintained by agencies within the Executive Branch of the Federal Government. Records maintained by Congress (the Legislative Branch) are not subject to FOIPA processing. The test which is used to determine whether a document is an agency record or a Congressional record was established in Paisley v. Central Intelligence Agency, 712 F.2d 686 (D.C. Cir. 1983). In that case, the court focused on the following factors: 1) whether at the time Congress created the document, it placed any indicia of control or confidentiality on the face of the document (a congressional document is one generated by any official body of Congress {i.e., a committee}, or by a member acting on behalf of an official body of Congress, but not a document generated by an individual Congressman on behalf of a constituent); 2) whether the hearing or activity which generated the document was conducted under any special conditions of secrecy (e.g., executive session documents); and, 3) whether the document was sent to the agency under contemporaneous and specific instructions from Congress limiting its use or disclosure. The Court further remarked that if Congress neither created the document nor physically possessed the document, it would be difficult to find the document a Congressional record.

If it is determine under this test that a document in an FBI file is a Congressional record, the requester should be advised of the existence of the document and it cannot be accessed under the FOIPA. If the document is an "agency record," it is subject to the provisions of the FOIPA and should be processed accordingly. See Department of Justice v. Tax Analysts, No. 88-782 (U.S.S. Ct. June 23, 1989).

Note that an FBI-originated document may contain Congressional or Judicial information such as direct quotes from an Executive Session hearing, which may not be accessible under the FOIPA. In making that determination, consideration should be given as to how the FBI acquired the information, whether any restrictions were placed on the derivative Congressional or Judicial material or if there would be a substantial harm in the disclosure of the information.



To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Coordination of FOIPA Releases  
Date: March 31, 1998

### Coordination of FOIPA Releases with Other Divisions

From time to time material proposed for release will have to be coordinated and reviewed by other investigative or administrative divisions at FBIHQ. This is particularly true in organized crime, sensitive FCI, and terrorist cases where the material being processed, even though a closed investigation, may relate to a pending matter on another individual or organization. The substantive division and/or field office must always be consulted when processing records which are part of an active investigation, even if the case has been ongoing for a number of years. It is also necessary to contact the Laboratory Division whenever the material being processed relates to a sophisticated scientific laboratory technique (especially those in support of FCI investigations), or the Finance Division on contract matters.

In addition, any material being processed which relates to a matter currently in litigation (197 classification), or which relates to an OPR inquiry (62 and 263 classifications) should be closely coordinated with and reviewed by personnel in the Office of General Counsel and/or OPR prior to release. (See Memo 39 for further information on processing 197 files for lawsuits involving civil actions or administrative claims.)

A note should be included on the file copy of the disclosure letter identifying the persons(s) consulted, the date, and whether or not they requested to review the material prior to release.

### Coordination of FOIPA Releases Between Paralegal Specialists

LTs and PLSs should be alert for documents/information which have been previously processed or are currently being processed, as well as, requests which are subject to aggregate fees. It is imperative that these requests be coordinated by all LTs and PLSs when necessary. This will enable the handling of the FOIPA releases, requests and/or requesters in a consistent and accurate manner.

F O I P A

M A N U A L

# MEMO 14

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Correction / Expungement of Information in FBI Files  
**Date:** March 31, 1998

b6 When an incoming letter requests a correction, change or destruction of information in FBI records, it should be referred on the same day to PLS [REDACTED] in the Field Coordination Team (FCT) who handles all correction and amendment requests. Every effort should be made to provided PLS [REDACTED] with the following:

- 1) all correspondence between the Bureau and the requester
- 2) the actual excised (processed) documents of the material released to the requester

PLSs are expected to cooperate in any way possible in locating the above material and resolving the request, as the Privacy Act requires a response and notification of the FBI's intentions within ten working days after the date of receipt of the request.

Furthermore, there are times when a citizen requests only an addition to his or her file clarifying material which was submitted to the FBI. In such cases, the PLS should follow the above procedures and promptly refer the request to the FCT.

The only person who can make a request for amendment/correction is the subject of the record. However, even improper requests, such as repeated submissions of written data from an organization for inclusion in the organizational file, should be coordinated with PLS [REDACTED]

b6

**F O I P A**  
**M A N U A L**

**MEMO 15**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Correspondence  
**Date:** March 31, 1998

**Annotating Correspondence by LTs/PLSs**

When action has been taken by the LT or PLS on correspondence from FOIPA requesters, a penciled notation should be made on the incoming communication showing the action taken, the date of the action, and the initials of the person who took the action. This notation should be made at the lower left margin of the document. If, after reviewing the correspondence, the supervisor determines no acknowledgment is necessary, this notation should also be documented on the mail and initialed for filing. Proper notations on the incoming communication will help the 190 Processing Subunit recognize that necessary action has been taken and that the correspondence is ready to be sent to the 190 file.

Also, insure that notations of any action taken in response to teletypes, radiograms, and other communications are recorded on the original communication since, in most cases, copies of these communications are destroyed. Copies with notations of action taken held for reference purposes by supervisory personnel should not be sent for filing, but destroyed, unless the copy is designated for a Bureau file other than the file where the original communication is maintained.

**Annotation of Incoming FOIPA Request Letters**  
**by the Request Tracking and Statistics Subunit (RTSS)**

When RTSS receives a request letter, the FOIPA database will be searched to determine if the requester has made a previous request and/or if the subject has been previously requested. The results of the search will be noted on the bottom left corner of the request as follows:

<b><u>NOTATION</u></b>	<b><u>MEANING</u></b>
NP	No previous request by requester and/or subject
PR	Previous requester (consider aggregate fees if multiple)
PS	Previous subject
Poss 190	Possible 190 file exists, however RTSS is unable to determine if same requester

## FOIPA Numbered Memo 15

Page 2

### Correspondence

If there is a previous history of either the requester or subject, RTSS will affix the appropriate computer printout(s) to the letter.

**Incoming mail** concerning requests which have been closed administratively will be handled by RTSS in one of two ways. If the request was closed for no notary, insufficient information, no fees guaranteed, or abandoned fees, RTSS will reopen the old request if warranted. If the request was closed administratively for any other reason, such as a no record or withdrawn, RTSS will open a new request. However, if a request was closed by a Disclosure PLS through processing and the same requester writes in about the same subject matter, if necessary, RTSS will confer with the Disclosure PLS and/or team captain for instructions on opening, reopening or assignment of the case.

When correspondence assigned to a LT in RMU is identified as a previous request on the same subject matter, they will indicate the name and team of the PLS who previously processed the request. If the processed material is maintained in the FOIPA Reading Room, RMU will handle the new request. If the previous request is still pending in Disclosure, the LT should consult with the PLS handling the prior request for a response to the new request. RMU will then direct the new request to the PLS handling the subject matter. If the previous request has been closed, RMU will consult with Disclosure to determine if fees are at issue. If there are no fees involved, RMU will designate the new request to the same PLS who previously processed the subject.

### Classification of Notes and Addenda

Classification regulations require that any notes or addenda which are added to a communication/correspondence, or to certain copies of it should be treated separately. In order to comply with these regulations, the following guidelines should be followed:

1. When classifiable national security information is set forth in a note or addendum to a communication, the note or addendum should be prepared on a separate page. This allows for independent classification marking of the note or addendum.
2. Top Secret or Sensitive Compartmentalized (SCI) Information should be avoided in a note or addendum. If possible, every effort should be made to exclude all classifiable information from the note or addenda.

**F O I P A**  
**M A N U A L**

**MEMO 16**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Court Orders Affecting FBI Processing of FOIPA Requests  
**Date:** March 31, 1998

**National Caucus of Labor Committees (NCLC)**  
**United States Labor Party (USLP)**  
**Fusion Energy Foundation (FEF)**

Since 1975, the NCLC has been involved in civil litigation with the FBI in the matter of Lyndon H. LaRouche, Jr. v. Clarence M. Kelley, Civil Action Number 75-CIV-6010, (S.D.N.Y. 1975). One of the issues in the litigation concerns accessibility, by parties other than plaintiffs, of investigative records maintained by the FBI regarding NCLC.

On March 5, 1979, the Court ordered that the FBI could not release to requesters under the FOIPA or make public generally any of the documents pertaining to the NCLC. This order includes documents pertaining to the USLP and the FEF, whether contained in NCLC main files or in other files such as SDS, SWP, or CPUSA. All employees should remain alert for any information pertaining to NCLC, USLP, and FEF so that releases of documents are not inadvertently made. See "Attachment 1" for a copy of the Court Order included for your review and assistance.

**National Lawyers Guild**

On 10/13/89, an Order of Settlement and Dismissal was entered in National Lawyers Guild v. Attorney General, 77 Civ. 999 (U.S.D.C., S.D.N.Y.). The settlement requires in part that the FBI's investigative files on the National Lawyers Guild (NLG) be maintained in secure storage at FBIHQ until they are transferred to the National Archives and Records Administration (NARA) in or after the year 2025. Covered are the following records:

- (1) all Headquarters, Field Office and Legat main files on the NLG and its projects (see Appendix A), including all enclosures behind the files (EBF's) and bulky exhibits;
- (2) electronic surveillance (ELSUR) logs contained in the Headquarters and Field Office main file of ROBERT SILBERSTEIN, including all EBFs;

**FOIPA Numbered Memo 16**

Page 2

**Court Orders**

- (3) reference cards and any similar computerized or non-computerized reference system capable of locating NLG-related information in files other than the NLG main file;
- (4) references to the NLG in the ELSUR Index and any informant file indices; and
- (5) any copies of the foregoing documents and any summaries thereof which may be included in the FBI litigation file (62-117572).

This portion of the Order, which is limited to documents created prior to 10/13/89, prohibits the FBI from using, or granting access to, these records prior to their transfer to NARA, subject to the following exceptions: (1) The records can be used by the government to defend itself in civil actions for activities prior to 10/13/89; and 2) The records can be used to respond to FOIA requests from the NLG submitted on or after 1/1/94. All other FOIA requests for these records should be denied.

Another portion of the Order covers records on an individual, created prior to 3/1/77, which reflect an affiliation with the NLG. Included are main files on the individual, cross-references to the NLG, and serials which are see-referenced to the individual and accessed through the name of the individual. (At this time these records are still being identified.) The FBI may not use, release, or disclose these records, within or outside the Government, except with the authorization of the individual mentioned in the records.

In order to clarify this Order, the following points should be noted: 1) The NLG may not receive information on one of its individual members; 2) An individual member may not receive information from an NLG file; 3) The NLG may not authorize release of information pertaining to it to a third party, and; 4) Cross-references to the NLG, as opposed to one of its members, are not protected by the Order. Only the reference cards, or equivalent finding aids, are protected.

Most of the records covered by this Order will be stored in the Special File Room (SFR). If you have any questions as to whether specific records are covered, please contact your Team Captain first, and then your Unit Chief, for guidance. If a determination cannot be made at that level, then the Civil Litigation Unit of the Office of General Counsel should be consulted.

Denial letters should cite the full caption of the NLG case and advise that the Order of Settlement and Dismissal dated 10/13/89 prohibits the FBI from releasing the requested records.

See Memorandum dated 8/9/90, designated as "Attachment 2," for a copy of the Court Order and a list of the National Projects and Committees, and individuals of the NLG protected under this Court Order. In addition, a memorandum dated 5/13/85 is attached for informational

**FOIPA Numbered Memo 16**

**Page 3**

**Court Orders**

purposes on handling NLG material and a list of NLG Organizations with the known file numbers which are protected under the Court Order is also included in this attachment..

**Spartacist League; Spartacus Youth League**

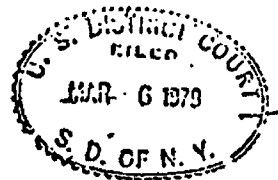
On 11/30/84, settlement was reached in a civil action against the Department of Justice and the FBI by referenced Leagues. (FBIHQ Airtel to All SACS, 12/18/84, Captioned "SPARTACIST LEAGUE; SPARTACUS YOUTH LEAGUE; JAMES M. ROBERTSON AND SUSAN ADAMS V. ATTORNEY GENERAL OF THE UNITED STATES, et al., (U.S.D.C., S.D.N.Y.) CIVIL ACTION NO. 83-CIV-7680.)

In the settlement agreement, the FBI agreed to change its characterization of the Spartacist League. The text of the new characterization is provided below. Effective 11/30/84, all PLSs are instructed to advise the requester that a new characterization exists and should include the court-approved characterization in the disclosure letter of any future FOIPA releases containing a prior Spartacist League characterization.

"The Spartacist League (SPL), a Marxist political organization, was founded in 1966. The historical and theoretical roots of the SPL derive from the early Communist Party, U.S.A. and the Socialist Workers Party. The immediate precursor of the SPL was the Revolutionary Tendency of the Socialist Workers Party. The SPL has an official youth section named the Spartacus Youth League."

" The SPL was once the subject of an FBI domestic security investigation. The investigation was closed in 1977, however, and it did not result in any criminal prosecution."

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



LYNDON H. LAROCHE JR.,  
et al.,

Plaintiffs,

- against -

CLARENCE M. KELLEY, et al.,

Defendants.

STIPULATION AND ORDER

75 Civ. 6010 (MJL)

MADE  
IN  
COURT  
OF  
SOUTHERN  
DISTRICT  
OF  
NEW YORK  
6/1/79 - CIV

IT IS HEREBY STIPULATED AND AGREED, by and  
between the above parties, as follows:

1. Defendants and the Federal Bureau of  
Investigation ("the FBI") are enjoined from releasing  
to requesters under the Freedom of Information Act or  
the Privacy Act, and from making available to the  
public generally, other than plaintiffs herein, any of  
the documents in their possession, custody or control  
production of which has been requested by plaintiff  
herein pursuant to the Freedom of Information Act, except  
as provided by all terms of the Privacy Act save 5 U.S.C.  
§ 552a(b)(2).

2. Any infra-governmental transfers of the  
subject documents or the information contained therein  
pursuant to the Privacy Act shall be accompanied and  
governed by this Stipulation and Order.

3. This Stipulation and Order shall remain in  
effect until the final disposition of this case, including  
the final determination of any appeals herein; and until  
the time for filing any such appeal has run.

Dated: New York, New York

February 23, 1979

*David S. Heller*  
DAVID S. HELLER, Esq.  
Attorney for Plaintiffs  
304 West 10th Street  
New York, New York 10019



ROBERT B. FISKE, JR.  
United States Attorney for the  
Southern District of New York  
Attorney for Defendants

By:

*Carl T. Solberg*  
CARL T. SOLBERG  
Assistant United States Attorney  
One St. Andrew's Plaza  
New York, New York 10007  
Telephone: (212) 791-1966

SO ORDERED: MARCH 5, 1979

*Mrs. John R. ...*  
United States District Judge

## NATIONAL CAUCUS OF LABOR COMMITTEES

The National Caucus of Labor Committees (NCLC) was a violence-oriented, self-described "organization of revolutionary socialists" which was formed in 1969 with its stated aim to identify with American workers and orient them toward a socialist America. In its attempt to become the dominant Left group in the United States, NCLC members have attacked attendees at meetings, demonstrations, conferences and conventions of various communist, Trotskyist and socialist organizations because it contended that it is necessary to use violence to achieve socialism. According to statements made by LYN MARCUS, National Chairman, NCLC will have gained state power in the United States by 1979 and by the year 2000 in the world. NCLC, which was headquartered in New York City, had chapters in more than 40 cities in this country and had affiliated chapters in five foreign countries.

NCLC utilized its front group, the North American Unemployed and Welfare Rights Organization (NUWPO), to attract poor people to its philosophy; its youth group, the Revolutionary Youth Movement (RYM), to organize ghetto youths; and its political arm, the United States Labor Party (USLP), to conduct political campaigns aimed at acquainting the general public with the activities of NCLC.

The FBI ceased investigating the NCLC in September, 1977, pursuant to the Attorney General's Guidelines for Domestic Security Investigations. Therefore, receipt of an allegation that an individual is a member of the NCLC would no longer warrant an FBI investigation.

For your additional information, the NCLC has a pending suit against the FBI in the Southern District of New York. Attached is a copy of the Stipulation and Order Number 75 Civ. 6010 (MJL) governing what information may be disseminated concerning this organization. You may desire to consult Assistant United States Attorney Steven E. Obus, Southern District of New York, for information regarding the pending suit.

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency. This is in answer to your request for a check of FBI files.

# Memorandum



Dep. Dir. \_\_\_\_\_  
ADD Adm. \_\_\_\_\_  
ADD Inv. \_\_\_\_\_  
Asst. Dir.:  
Adm. Servs. \_\_\_\_\_  
Crim. Inv. \_\_\_\_\_  
Ident. \_\_\_\_\_  
Info. Mgnt. \_\_\_\_\_  
Insp. \_\_\_\_\_  
Intell. \_\_\_\_\_  
Lab. \_\_\_\_\_  
Legal Coun. \_\_\_\_\_  
Tech. Servs. \_\_\_\_\_  
Training \_\_\_\_\_  
Cong. Affs. Off. \_\_\_\_\_  
Off. of EEO \_\_\_\_\_  
Off. Liaison &  
Int. Affs. \_\_\_\_\_  
Off. of Public Affs. \_\_\_\_\_  
Telephone Rm. \_\_\_\_\_  
Director's Sec'y \_\_\_\_\_

To : *WCS* Assistant Director  
Information Management Division

Date 8/9/90

From : Legal Counsel *scg*

Subject : NATIONAL LAWYERS GUILD v.  
ATTORNEY GENERAL, et al.  
(U.S.D.C., S.D.N.Y.)  
CIVIL ACTION NO. 77 CIV 999 (PKL)  
MAJOR CASE NO. 41

TOP SERIAL  
THIS COMMUNICATION MUST  
REMAIN AS THE TOP SERIAL  
IN FILE. DO NOT FILE  
MAIL ON TOP OF THIS  
COMMUNICATION.

**PURPOSE:** To request that Information Management Division (IMD) conduct a search of general indices to identify any person on the attached list that has an individual file reflecting activities in or affiliation with the National Lawyers Guild (NLG) and its projects and to appropriately label the file to insure compliance with the attached settlement.

**RECOMMENDATION:** (1) That IMD conduct a search of general indices to determine whether any individual on the attached list has a file identifiable with the NLG or its projects.

APPROVED: \_\_\_\_\_  
Director \_\_\_\_\_  
Dep. Dir. \_\_\_\_\_  
ADD-Adm. \_\_\_\_\_  
ADD-Inv. \_\_\_\_\_  
Adm. Servs. \_\_\_\_\_  
Crim. Inv. \_\_\_\_\_  
Ident. \_\_\_\_\_  
Inspection \_\_\_\_\_  
Intell. \_\_\_\_\_  
Laboratory \_\_\_\_\_  
Legal Coun. \_\_\_\_\_  
Rec. Mgnt. \_\_\_\_\_  
Tech. Servs. \_\_\_\_\_  
Training \_\_\_\_\_  
Cong. Affs. Off. \_\_\_\_\_  
Off. of EEO \_\_\_\_\_  
Off. of Liaison \_\_\_\_\_  
Off. of Int. Affs. \_\_\_\_\_  
Off. of Public Affs. \_\_\_\_\_

(2) That IMD place a copy of the attached settlement in each file identified or otherwise appropriately label each file to insure compliance with the attached settlement.

APPROVED: \_\_\_\_\_  
Director \_\_\_\_\_  
Dep. Dir. \_\_\_\_\_  
ADD-Adm. \_\_\_\_\_  
ADD-Inv. \_\_\_\_\_  
Adm. Servs. \_\_\_\_\_  
Crim. Inv. \_\_\_\_\_  
Ident. \_\_\_\_\_  
Inspection \_\_\_\_\_  
Intell. \_\_\_\_\_  
Laboratory \_\_\_\_\_  
Legal Coun. \_\_\_\_\_  
Rec. Mgnt. \_\_\_\_\_  
Tech. Servs. \_\_\_\_\_  
Training \_\_\_\_\_  
Cong. Affs. Off. \_\_\_\_\_  
Off. of EEO \_\_\_\_\_  
Off. of Liaison \_\_\_\_\_  
Off. of Int. Affs. \_\_\_\_\_  
Off. of Public Affs. \_\_\_\_\_

**DETAILS:** On 10/12/90, the parties to the captioned civil action entered into the attached Settlement and Stipulation of Dismissal. The Settlement was approved by the Court on 10/13/90. In addition to a general prohibition on the use or dissemination

Enclosures (2)

NOT RECORDED

MEMO 16 - ATTACHMENT 2

MAY 24 1991

Memorandum from Legal Counsel to Assistant Director,  
Information Management Division  
Re: National Lawyers Guild v. Attorney General, et al.

of information on the NLG or its projects, the court approved settlement provides that present or former NLG members may request that their individual files which reflect Guild affiliation or activities be similarly withheld. Pursuant to this provision, the NLG has compiled the attached list of individual NLG members who have requested relief under 8c(iv) of the Settlement.<sup>1</sup>

Accordingly, IMD is requested to identify any individual on the attached list who has a file reflecting NLG affiliation or activities which was created prior to 3/1/77. Any identified file should be appropriately labeled to insure non-disclosure as required by the settlement. Please advise Legal Counsel Division as to the results of the indices search, including the number of individual files identifiable with the NLG, individuals for whom no file could be located or are not identical, and the actions taken to comply with the order. In addition, please preserve all search slips in case we are required to respond to the Court regarding our compliance. It is likely that no files will be identified with a substantial number of the individuals on the attached list. Finally, inasmuch as the Settlement applies to all FBI files, the Field should also be requested to conduct indices searches and to appropriately label their files.

We recognize that this is a time-consuming chore that is being imposed on IMD during a time of limited resources. Nevertheless, we have made this commitment to the court and we are

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<sup>1</sup> 8c(iv) provides in part:

c. The federal agencies which are parties defendant to this action (specifically, the FBI, the Central Intelligence Agency, the National Security Agency, the Internal Revenue Service, the Office of Personnel Management, the Postal Service, and the Departments of Defense, Justice, State, the Treasury, the Army, the Navy and the Air Force) shall not use, release or disclose, within or outside the Government:

(iv) any portion of any document or record created prior to March 1, 1977, or the information contained therein, to the extent that it mentions the Guild affiliation or Guild activities of any individual, provided, however, that because of the federal defendants' representation of the practical impossibility of assuring compliance with such broad restrictions, the following limitations shall apply:

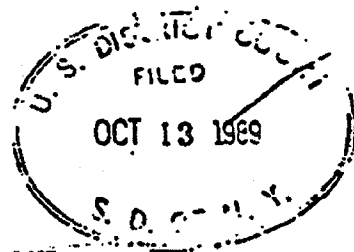
Memorandum from Legal Counsel to Assistant Director,  
Information Management Division  
Re: National Lawyers Guild v. Attorney General, et al.

obligated to comply irrespective of the unreasonably large number of individuals. Therefore your cooperation will be appreciated.

Any questions regarding this matter may be directed to Supervisory Special Agent WILLIAM D. CHASE, Administrative Law Unit, LCD, at extension 4829.

PKM:cb  
4-967/2

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----x  
NATIONAL LAWYERS GUILD,

Plaintiff,

- against -

ATTORNEY GENERAL OF THE  
UNITED STATES, et al.,

Defendants.  
-----x

:  
:  
: STIPULATION AND  
: ORDER OF SETTLEMENT  
: AND DISMISSAL

: 77 Civ. 999 (PKL)  
:

IT IS HEREBY STIPULATED AND AGREED by and among the  
parties as follows:

1. The parties agree to settle and compromise this  
action on the terms indicated below.

2. This action is hereby dismissed with prejudice as  
to all defendants except the City of New York, i.e., the "federal  
defendants."

3. Plaintiff hereby releases and forever discharges,  
and for its administrators, successors and assigns releases and  
forever discharges, the United States of America, its depart-  
ments, agencies and past or present officials, officers and  
employees (and their heirs, executors, administrators, successors  
and assigns) from all claims whatsoever, in law, admiralty, or  
equity, which plaintiff and its administrators, successors and  
assigns hereafter can, shall or may have for, upon or by reason  
of any surveillance, investigation, disruption, or similar  
conduct by the Federal Bureau of Investigation ("FBI") directed  
toward the National Lawyers Guild (the "Guild") at any time prior  
to the date of this stipulation; provided, however, that

plaintiff is entitled to rely upon the federal defendants' representations set forth in paragraph 7 below, and any claim based upon any conduct of the federal defendants inconsistent with such representations shall not be barred by the above release.

4. Each party shall bear the costs and expenses of this litigation as they have been incurred or paid as of the date of this stipulation and no costs or expenses shall be taxed subsequently. Plaintiff and its attorneys waive all claims for attorneys' fees and expenses in connection with the prosecution of this action.

5. This stipulation and agreement does not constitute an admission by the plaintiff that any of the conduct of the federal defendants was lawful, or an admission by the federal defendants or any of their present or former officials, officers or employees that any of their conduct was unlawful or legally actionable.

6. Without conceding the legality or illegality of any of the federal defendants' actions, the parties agree that the discovery in this case has shown the following:

a. The FBI engaged in extensive activities with respect to the Guild for the period 1940 through March 1975, and in the course of those activities generated voluminous files on the Guild.

b. It appears more likely than not that between 1940 and 1951 the FBI surreptitiously entered the Guild's national office approximately 7 times without judicial warrant or

Attorney General authorization and copied the Guild's internal records. Some of the material thus obtained provided the Government in advance with drafts of a report the Guild was planning to release criticizing FBI surveillance practices, and with details of the Guild's related public campaign calling for an investigation of the FBI. The FBI used this material in an effort to counter the Guild's report even before its issuance.

c. The FBI without judicial warrant maintained a wiretap on the Guild's national office telephone between 1947 and 1951.

d. Information derived from the surreptitious entries formed a material part of the information placed before the Attorney General for his consideration in deciding whether to initiate proceedings to designate the Guild as a subversive organization under the Federal Employment Loyalty Security Program, Executive Order 10450. Such designation proceedings were begun in 1953.

e. The FBI received information from an informant on the national executive board of the Guild in 1953 and 1954 who reported on its deliberations and discussions with counsel concerning the Guild's defense of the EO 10450 administrative designation proceedings and its conduct of related litigation against the Government.

f. In 1958, the Department of Justice determined that on the basis of the evidence then available it was unable to go forward with the designation proceedings, and the Attorney General therefore rescinded the proposal to designate the Guild



as a subversive organization under EO 10450. There were no further proceedings against the Guild under EO 10450.

g. The FBI continued its activities with respect to the Guild after the designation proceedings were discontinued in 1958. A Department of Justice review conducted in 1972 of the FBI's files on the Guild for the preceding five years concluded that there was no basis at that time for an investigation of the Guild under the Internal Security Act of 1950. In 1974-1975 the FBI, with Department of Justice authorization, conducted a preliminary inquiry concerning the Guild's prison work without discovering any basis for a further investigation.

h. Alleged or suspected criminal wrongdoing was not the predicate or reason for FBI activity concerning the Guild. No criminal prosecutions of the Guild were ever authorized or undertaken by the Department of Justice.

i. From 1940 through the early 1970's, the FBI placed Guild members on its Security Index, Adex and related indices because of their leadership positions in the Guild or, in some cases, because of their membership in the Guild in conjunction with their actual or suspected membership in other organizations.

j. The FBI engaged in certain COINTELPRO and similar disruptive operations against the Guild and Guild members. The FBI used information it had derived from its other activities with respect to the Guild and Guild members for that purpose.

k. The FBI over several decades provided information from its files on the Guild affiliation and activities of individuals to the National Conference of Bar Examiners at the request of the NCBE.

1. Further, at various times in its activities with respect to the Guild, the FBI used numerous informants and confidential sources, including Guild members and staff and third parties in contact with the Guild; obtained Guild bank records from banks with which the Guild had banking relations; obtained information from the National Conference of Bar Examiners and from some character committees; monitored trash covers on the Guild; and obtained information about the Guild from its surveillance of the law offices of some Guild members, which surveillance included use of trash covers, wiretaps, informants on the temporary or permanent staff of the law offices, bank records and surreptitious entries.

m. The conclusions stated here do not imply that the FBI did or did not engage in other activities.

7. The federal defendants represent as follows:

a. There is not now, and has not been since March 1977, any FBI investigation or preliminary inquiry of any nature of the Guild or its chapters, or of its projects, activities or enterprises readily identifiable as such or of individuals based upon their Guild affiliation or activities, and the FBI does not presently have information warranting any such investigation or preliminary inquiry.

b. To the extent, if any, that FBI inquiries or investigation of third parties has resulted in surveillance or acquisition of information about the Guild since March 1, 1977, no information so acquired has been stored in FBI investigative (i.e., non-litigation) main files on the Guild or its projects (as specified in Appendix A hereto) or see-referenced or otherwise indexed to the Guild or its projects, except as may have been disclosed to the plaintiff in this litigation.

c. There have been no additions to FBI investigative (i.e., non-litigation) main files on the Guild or its projects (as specified in Appendix A) or to see-references on the Guild or its projects, since March 1977, except as may have been disclosed to the plaintiff in this litigation.

d. The FBI is not now, and has not since March 1977, engaged in any activities intended to disrupt or impede the activities of the Guild or the Guild activities of its members, or the activities of individuals based upon their Guild affiliation.

e. The FBI does not now, and has not since March 1977, used Guild members as informants or confidential sources with respect to matters involving the Guild or Guild activities, placed wiretaps or pen registers on Guild telephones, surreptitiously entered Guild premises, obtained access to Guild bank records, maintained mail covers on Guild mail, maintained trash covers on the Guild, obtained access to Guild information at mailhouses used by the Guild, otherwise secured mailing or

membership lists of the Guild or obtained phone records on the Guild's phones.

f. Since March 1, 1977, and presently, the FBI has not provided information on the Guild affiliation or activities of individuals to the National Conference of Bar Examiners or to bar admission committees.

8. The federal defendants agree to the following disposition of their files concerning the plaintiff:

a. For purposes of this provision, the "FBI files on the Guild" means Headquarters, Field Office and Legat main files on the National Lawyers Guild and its projects (as specified in Appendix A); wiretap logs included in the main file on Robert Silberstein; EBF's to the Guild main files and the wiretap logs in the Silberstein main file; the see-reference cards and any other similar computerized or non-computerized reference capable of locating Guild-related information in files other than main files on the Guild, as well as references to the Guild in the Elsur Index and any indices to the informant files; and copies of the foregoing and any summaries thereof included in the FBI file on this litigation (62-117572). It is limited to documents created prior to the date of this stipulation.

b. Within 180 days after the date of this stipulation, the FBI shall place all copies of the "FBI files on the Guild" in its possession or custody in secure storage under the supervision of the Deputy Assistant Director, Legal Counsel Division, and shall not dispose of, or permit access to, such

files before the year 2025. At that time the files may be transferred to the National Archives and Records Service.

c. The federal agencies which are parties defendant to this action (specifically, the FBI, the Central Intelligence Agency, the National Security Agency, the Internal Revenue Service, the Office of Personnel Management,\* the Postal Service, and the Departments of Defense, Justice, State, the Treasury, the Army, the Navy and the Air Force) shall not use, release or disclose, within or outside the Government:

(i) any "FBI files on the Guild" readily identifiable as such, or copies thereof, in their possession or custody;

(ii) any portion of any document or record which is shown on its face to have been generated, prior to the date of this stipulation, in the course of any FBI activities directed in whole or in part toward the Guild, to the extent it concerns the Guild or its activities or the Guild affiliation or Guild activities of any individual;

(iii) any information contained in (i) and (ii) or reasonably identifiable as having been derived from (i) and (ii); or

---

\* The Office of Personnel Management is substituted as a party defendant in place of the Civil Service Commission pursuant to Rule 25 of the Federal Rules of Civil Procedure.

(iv) any portion of any document or record created prior to March 1, 1977, or the information contained therein, to the extent that it mentions the Guild affiliation or Guild activities of any individual, provided, however, that because of the federal defendants' representation of the practical impossibility of assuring compliance with such broad restrictions, the following limitations shall apply:

(a) With respect to documents or records of defendant federal agencies other than the FBI, this subparagraph (iv) shall apply only to such documents or records as are contained in a file the subject of which is either the Guild or a "Requesting Individual" (as defined below).

(b) With respect to documents or records of the FBI, this subparagraph (iv) shall apply only to such documents or records as are contained in a main file the subject of which is a "Requesting Individual" (as defined below), or in a volume containing see-references to the Guild, or in serials which are see-referenced to a

Requesting Individual (but only to the extent that such serials are accessed through the name of the Requesting Individual)).'

(c) A "Requesting Individual" is a present or former Guild member who requests, in writing, that this subparagraph (iv) be applied to him or her, and who includes in such request his or her full name, any previous names, date and place of birth, and social security number. Such information is required to identify relevant documents and records and will not be used for any other purpose. Requests must be sent to plaintiff's counsel and forwarded by them to counsel for the federal defendants within 180 days of the date of this stipulation.

d. Nothing herein shall preclude any agency from returning to the FBI any "FBI files on the Guild" or copies thereof in its possession (in which event the FBI shall handle such files as provided in subparagraph (b) above), or from disposing of any files by either destroying them in the ordinary course of business, or transferring them to the National Archives and Records Service in or after the year 2025. The United States Attorney's Office for the Southern District of New York will

return any copies of the "FBI files on the Guild" in its possession to the FBI within 90 days of the date of this Stipulation.

e. If, upon the application of a third party, subparagraphs (b) or (c) above, or any portion thereof, shall be invalidated by any court, no other provision of this stipulation and order shall thereby be affected.

f. Anything in this stipulation to the contrary notwithstanding, the Department of Justice may have access to and use of any of the documents and records described in subparagraphs (a), (b) and (c) above to the extent relevant and material to the defense of the United States or any of its departments, agencies, officers or employees in any judicial or administrative proceedings the gravamen of which arises from conduct alleged to have occurred prior to the date of this stipulation. Appropriate records shall be maintained of any such use. Upon completion of the litigation for which the records were necessary, they and any records derived from them shall be restored to the status quo ante except if they were filed as part of the court record in the litigation.

g. Nothing in this stipulation shall preclude the Guild from requesting the release to it, under the Freedom of Information Act or any successor statutes, of those portions of the "FBI files on the Guild" not previously released to it, or the FBI from releasing the same to the Guild if appropriate under such statutes; provided, however, that the Guild shall make no such request prior to January 1, 1994.



h. Nothing in this stipulation shall preclude the federal defendants from releasing or disclosing any document or file at the request or with the authorization of the subject of such document or file.

Dated: New York, New York  
October 12, 1989

RABINOWITZ, BOUDIN, STANDARD,  
KRINSKY & LIEBERMAN, P.C.  
Attorneys for Plaintiff

By: 

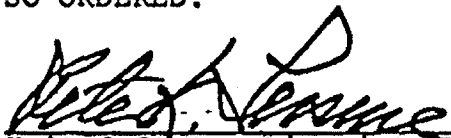
MICHAEL KRINSKY, ESQ.  
740 Broadway at Astor Place  
New York, New York 10003  
Telephone: (212) 254-1111

BENITO ROMANO  
United States Attorney for the  
Southern District of New York  
Attorney for Federal Defendants

By: 

PAUL K. MILMED  
Assistant United States Attorney  
One St. Andrew's Plaza  
New York, New York 10007  
Telephone: (212) 791-9175

SO ORDERED:

  
United States District Judge

11-12-89 85

## NATIONAL LAWYERS GUILD

### National Projects & Committees

National Labor Project  
National Labor Committee  
Labor Law Center Task Force  
National Labor Law Center  
Labor Committee  
National Immigration Project  
National Interim Commission on Oppression of Women  
National Committee to Combat Women's Oppression (NCCWO)  
National Committee on Women's Oppression  
Police Crimes Task Force  
Task Force on Minority Legal Resources  
International Committee  
Prison Task Force  
National Prison Network  
Military Law Project  
Military Law Office  
Military Law Task Force  
Military Law Office/Military Law Task Force  
Summer Projects Committee  
NLG Law Student Clearinghouse  
Law Students in Action  
National Housing Task Force  
Legal Services Task Force  
Task Force on Minority Adms.  
Puerto Rico Project  
Puerto Rico Subcommittee  
Instituto Puertorriqueno de Derechos Civiles  
Grand Jury Project  
Affirmative Action/Anti-Discrimination Committee  
Anti-Fascist Contact  
Anti-Nuke Legal Project  
Anti-Semitism Task Force

Housing Contact  
Immigration Project  
Subcommittee on China, International Committee  
Subcommittee on Cuba, International Committee  
Cuba Subcommittee  
Subcommittee on Southern Africa, International Committee  
Subcommittee on Vietnam, International Committee  
Law Student Organizing Committee  
Legal Workers Caucus  
National Committee Against Gov't Repression & Police Crimes  
Prison Committee  
Red Baiting Task Force  
Theoretical Studies on the Law and the State  
Theoretical Studies Committee  
Central America Task Force  
Civil Liberties Committee

### APPENDIX A

NATIONAL LAWYERS GUILD

National Energy Project  
People's Energy Project  
Subcommittee on Racist Groups  
The Public Eye  
Irish Task Force  
Ireland Task Force  
Middle East Subcommittee  
South African Subcommittee  
Travel Subcommittee  
Visa Denial Project  
Third World Caucus  
Criminal Law Task Force  
Criminal Justice Committee  
Economic Rights Task Force  
International Debt Crisis Subcommittee  
Legal Services Task Force  
Anti-Sexism Task Force  
Gay Rights Subcommittee  
Gay Rights Task Force  
AIDS Network  
Committee on Native American Struggles (CONAS)  
Rethinking Indian Law  
Anti-Repression Task Force  
Faculty Network  
Asia Subcommittee  
Chile Task Force  
Disinformation & Information Restriction  
International Law Subcommittee  
Peace & Disarmament Subcommittee  
Philippines Subcommittee  
Relations - International Organizations  
Central America Refugee Defense Fund (CARDF)  
Movement Support Network  
Rural Justice Committee  
50th Anniversary Committee  
Air War Project  
Attica Legal Defense  
Attica Brothers Offense-Defense  
Attica Memorial Day Rally, Buffalo, N.Y., 9/14/74  
Attica Now  
Attica Brothers Legal Defense, AKA Attica Defense Committee  
Committee for Legal Assistance in the South, AKA Committee to  
Aid Southern Lawyers  
Grand Jury Defense Office  
Midnight Special  
Military Legal Center  
National Electronic Surveillance Project  
Selective Service Law Committee  
Southeast Asia Military Law Office  
Wounded Knee Offense/Defense Committee

APPENDIX A

XXXXXX  
XXXXXX  
XXXXXXFEDERAL BUREAU OF INVESTIGATION  
FOIPA  
DELETED PAGE INFORMATION SHEET18 Page(s) withheld entirely at this location in the file. One or more of the following statements, where indicated, explain this deletion.☒ Deletions were made pursuant to the exemptions indicated below with no segregable material available for release to you.Section 552Section 552a☐ (b)(1)☐ (b)(7)(A)☐ (d)(5)☐ (b)(2)☐ (b)(7)(B)☐ (j)(2)☐ (b)(3)☒ (b)(7)(C)☐ (k)(1)☐ (b)(7)(D)☐ (k)(2)☐ (b)(7)(E)☐ (k)(3)☐ (b)(7)(F)☐ (k)(4)☐ (b)(4)☐ (b)(8)☐ (k)(5)☐ (b)(5)☐ (b)(9)☐ (k)(6)☒ (b)(6)☐ (k)(7)☐ Information pertained only to a third party with no reference to the subject of your request or the subject of your request is listed in the title only.☐ Documents originated with another Government agency(ies). These documents were referred to that agency(ies) for review and direct response to you.☐ Pages contain information furnished by another Government agency(ies). You will be advised by the FBI as to the releasability of this information following our consultation with the other agency(ies).☐ Page(s) withheld inasmuch as a final release determination has not been made. You will be advised as to the disposition at a later date.☐ Pages were not considered for release as they are duplicative of \_\_\_\_\_☒ Page(s) withheld for the following reason(s): This is a list of the names, SSNs and the DOBs of NLG members.☐ The following number is to be used for reference regarding these pages: \_\_\_\_\_XXXXXX  
XXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXX  
X Deleted Page(s) X  
X No Duplication Fee X  
X for this page X  
XXXXXXXXXXXXXXXXXXXX

ORGANIZATIONS  
(and known file numbers)

- 1) National Lawyers Guild  
HQ 100-7321
- 2) Southeast Asia Military Law Office  
aka Peoples House  
SF 100-75891
- 3) Committee for Legal Aid in the South  
aka Committee to Aid Southern Lawyers  
DE 100-31330
- 4) Selective Service Law Committee  
HQ 25-579217  
LA 100-71639  
BH 100-5696  
CO 100-605  
LA 25-81540  
SF 100-61391
- 5) Demonstration Known as Air War Project  
NK 100-54465  
PH 100-53960
- 6) Military Legal Center  
NY 100-174506
- 7) Attica Legal Defense Committee, AKA-  
HQ 157-30240  
AL 100-23968 Attica Brothers Defense Group  
AL 157-1469 Attica Defense Committee  
AL 157-1637 Attica Memorial Day Rally  
BS 100-46777 Attica Brothers Legal Defense  
BS 157-5301 Attica Memorial Day Rally  
BU 157-1495 Attica Brothers Legal Defense  
Attica Defense Committee

*Wounded Knee Offense Defense Comm.*

BU 157-2236 Attica Memorial Day Rally  
BU 175-83 Attica Defense Committee  
CG 100-55519 Attica Memorial Day Rally  
DE 157-10230 Attica Defense Committee  
DE 157-10825 Attica Memorial Day Rally  
IP 100-26923 Attica Trial Demonstration  
IP 100-27006 Attica Brothers Legal Defense  
MI 175-54 Attica Defense Committee  
MP 157-4142 Attica Memorial Day Rally  
NK 100-56734 Attica Memorial Day Rally  
NY 157-10646 Attica Defense Committee  
PG 157-2332 Attica Memorial Day Rally  
PH 157-9270 Attica Memorial Day Rally  
SF 157-10735 Attica Memorial Day Rally  
WFO 100-58764 Demonstration Sponsored By The  
Washington Area Attica Brothers  
Legal Defense Committee

8) Midnight Special

HQ 100-460251  
NO 100-18762  
BU 100-21461  
MI 100-18382  
NY 100-179625  
SF 100-79556

# Memorandum



Exec AD Inv. \_\_\_\_\_  
Exec AD LES \_\_\_\_\_  
Asst. Dir.:  
Adm. Servs. \_\_\_\_\_  
Crim. Inv. \_\_\_\_\_  
Ident. \_\_\_\_\_  
Insp. \_\_\_\_\_  
Intell. \_\_\_\_\_  
Lab. \_\_\_\_\_  
Legal Coun. \_\_\_\_\_  
Off. Cong. & Public Affs. \_\_\_\_\_  
Rec. Mgnt. \_\_\_\_\_  
Tech. Servs. \_\_\_\_\_  
Training \_\_\_\_\_  
Telephone Rm. \_\_\_\_\_  
Director's Sec'y \_\_\_\_\_

To : Assistant Director  
Records Management Division (RMD)

Date 5/13/85

From : Legal Counsel *SK*

Subject : NATIONAL LAWYERS GUILD v.  
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.  
(U.S.D.C., S.D.N.Y.)  
CIVIL ACTION NO. 77-CIV-0999 (PKL)  
MAJOR CASE 41

**PURPOSE:** To provide further explanation to the Freedom of Information/Privacy Acts Section (FOIPA), RMD, concerning Pretrial Order 115 (PTO 115) issued in the captioned civil litigation.

**RECOMMENDATION:** That FOIPA follow guidelines set forth in this memorandum.

APPROVED:	Adm. Servs. _____	Laboratory _____
	Crim. Inv. _____	Legal Coun. <i>SK</i>
Director _____	Off. of Cong. & Public Affs. _____	
Exec. AD-Adm. _____	Ident. _____	Rec. Mgnt. _____
Exec. AD-Inv. _____	Inspection _____	Tech. Servs. _____
Exec. AD-LES _____	Intell. _____	Training _____

**DETAILS:** As FOIPA is aware, PTO 115 supersedes Pretrial Order 100 which prohibited the FBI from releasing to persons not a party to the NLG litigation any document produced to plaintiff as part of discovery. PTO 115 has considerably lessened the burden on the FBI, and particularly on FOIPA. This memorandum will outline the provisions of PTO 115 and will address several questions still outstanding.

## A) Coverage of PTO 115:

1) PTO 115 prohibits the release to third party requesters of any document filed in Headquarters or field main files on the NLG or one of the NLG projects. (Refer to number C1 below for a list of the projects.) This prohibition, of course, would include requests specifically for materials on the NLG or the projects. However, first person requesters may be provided documents from these files if those documents are referenced to them. This exception is

- 2 - Mr. Monroe  
Attention: Mr. Hall  
Attention: Mr. *[redacted]* b6
- 1 - Mr. Kelley
- 1 - Mr. *[redacted]*
- 1 - Mr. *[redacted]* b6
- 1 - Third Party Disclosure Folder

*AL:jmw* (7)

(CONTINUED - OVER)

Memorandum from Legal Counsel to Assistant Director,  
Records Management Division (RMD)  
Re: National Lawyers Guild v.  
Attorney General of the United States, et al.

reiterated in number B2 below. Also, see references to the NLG and projects appearing in other files could not be released to persons requesting material about the NLG or projects. As discussed in number B3 below, though, these same documents could be released if the request was on another subject.

2) If we refuse to release documents pursuant to PTO 115, we should inform the requester that the NLG can waive the provisions of the order and grant access. A request for such a waiver should be directed to MICHAEL KRINSKY or JONATHAN MOORE, of the law firm of RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, 740 Broadway at Astor Place, New York, NY 10003, telephone (212) 254-1111. If the requester does not receive permission for access from the NLG, he would still have the right to intervene in the litigation to gain access.

B) Material Covered by PTO 100 not Covered by PTO 115:

1) None of the files or see references relating to the 71 member "Representative Group" are covered by PTO 115. Requesters may be given normal access to these materials.

2) First party requesters may receive see references to themselves filed in NLG main files and files on the projects. FOIPA should process these documents as they normally would handle see references to first party requesters.

3) Documents which incidentally happen to be see referenced to the NLG or projects, and which appear in files not on the NLG or projects, may be released to first or third party requesters who have made requests on subjects other than the NLG or projects.

C) Issues Left Outstanding

1) In issuing PTO 115, the Court directed both sides to the litigation to come to an agreement on a definitive list of the NLG projects inasmuch as there has been some dispute over the inclusion of certain projects. Plaintiff's counsel has yet to respond to our request for a final list. Once that list is received, it will be immediately forwarded to FOIPA. In the interim, however, the following list should be used.

(CONTINUED - OVER)



Memorandum from Legal Counsel to Assistant Director,  
Records Management Division (RMD)  
Re: National Lawyers Guild v.  
Attorney General of the United States, et al.

a) Committee to Assist Southern Lawyers, a/k/a  
Committee to Aid Southern Lawyers, a/k/a  
Committee of Legal Aid in the South

b) The Midnight Special (We have found that there were two publications in the 1970s which were named The Midnight Special and which the FBI investigated. One was affiliated with the NLG and is the publication in question here. The other was affiliated with the Students for a Democratic Society (SDS) and is not covered by PTO 115. The NLG publication was directed towards prisoners of the nation's penitentiaries.)

c) The National Electronic Surveillance Project.

d) Attica Legal Defense Committee

e) Wounded Knee Offense/Defense Committee

f) Selective Service Law Committee

g) Grand Jury Defense Office

h) Southeast Asia Military Law Office, aka the  
People's House

2) Another issue has been presented to the Court for resolution. We are unsure whether PTO 115 covers two classes of documents. The first class is made up of serials appearing in files other than those on the NLG or projects and which carry in their titles the name of the NLG or one of the projects. The second class of documents is made up of serials appearing in files other than those on the NLG or projects, which do not carry the name of the NLG or projects in their titles, but which indicate in their copy counts that copies had been channelized to a file on the NLG or one of the projects. Clearly, first party requesters can be given access to these documents under the terms of PTO 115. At this point, however, we are not certain whether these documents can be released to third party requesters, although we suspect that the Court will not object to such releases. FOIPA will be immediately informed of the Court's decision. In the meantime, FOIPA should not release these two classes of documents to third party requesters.

(CONTINUED - OVER)

Memorandum from Legal Counsel to Assistant Director,  
Records Management Division (RMD)  
Re: National Lawyers Guild v.  
Attorney General of the United States, et al.

b6 [REDACTED] Questions in this regard should be addressed to SA [REDACTED]  
b2 [REDACTED] extension 4532 or to Legal Technician [REDACTED]  
NLG Task Force, extension [REDACTED]

**F O I P A**  
**M A N U A L**

**MEMO 17**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Cross-References  
**Date:** March 31, 1998

**CROSS-REFERENCE POLICY**

The FBI FOIPA Section cross-reference policy is as follows:

When a FOIPA request was received prior to approximately 2/20/97, the IPU Legal Assistant listed main files and identifiable cross-references. During the processing of the responsive material, PLSs will initially process only the "main" files which are identified on the request search slip. If cross-references also exist, the PLS should advise the requester of the existence of the cross-references and that he should separately request the cross references if he wants them processed. Each Unit will maintain a log of all requests received for processing of cross-references. Those references will be processed as time and resources permit. However, if the requester appeals the FBI's cross-reference policy, the PLS should process all cross references pursuant to that appeal.

If there are only cross-references listed on the search slip, then the PLS should process those cross-references. If there are numerous cross-references (15 or more) listed on the search slip, which are identifiable to the subject matter, the PLS may want to discuss with their Team Captain about producing a "sampling" of the material for the requester. In this regard, the requester could be advised of a release being a "sampling" of references, how many existing references remain to be processed and if they are still interested in receiving the rest of the material.

For FOIPA requests received after approximately 2/20/97, cross-references will no longer be listed on the search slip. The File Assistant will not advise requesters as to the existence of cross-references nor will they advise requesters that a description of any such references will be furnished to the requester at a later date.

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Defunct Agencies or Departments  
**Date:** March 31, 1998

**Information From Defunct Agencies or Departments**

On occasion, information appears in FBI files which was obtained from other U.S. Government agencies which have been abolished, transferred, or terminated. Referrals or consultation concerning this information can usually be made if the functions of the former agency were transferred to another department or agency of the U.S. Government. The list of Defunct Agencies can be located in Appendix C of the U.S. Government Manual, of which copies of this Appendix have been reproduced and provided to all PLS's for inclusion into the FOIPA manual. If the functions of the former agency were not transferred to another agency, the records from the defunct agency are probably at the National Archives and Records Administration (NARA). Referral questions should be directed to Director of Records Declassification Division, telephone number 9-301-713-6620.

DOJ has also made the following partial list of defunct offices of the DOJ available, as well as the current record holder or component now responsible for their functions.

**DEFUNCT COMPONENTS OF DOJ**

**CURRENT RECORD HOLDER**

Administrative Division

Justice Management Division

Bond and Spirit Division

Criminal Division

Bureau of Criminal Identification

FBI

Bureau of Narcotics and Dangerous Drugs

DEA

Bureau of Prohibition

Criminal Division

Bureau of War Risk Litigation

Civil Division

**FOIPA Numbered Memo 18**

Page 2

**Defunct Agencies or Departments**

**DEFUNCT COMPONENTS OF DOJ**

Civil Liberties Unit

Claims Division

Communications and Records Section

Criminal Statistical Bureau

Customs Division

Department of Veterans Insurance

Internal Security Division

Office of Alien Property

Office of Criminal Justice

Office of Policy and Planning

Office of the Special Prosecutor

Public Lands Division

Special War Policies Unit

War Contract Division

War Division

**CURRENT RECORD HOLDER**

Civil Rights Division

Civil Division

Justice Management Division

FBI

Civil Division

Civil Division

Criminal Division

Civil Division

Office for Improvements in the  
Administration of Justice

Office for Improvements in the  
Administration of Justice

National Archives and Records  
Administration

Land and Natural Resources Division

Criminal Division

Criminal Division

Criminal Division

**F O I P A**  
**M A N U A L**

**MEMO 19**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Department of Health and Human Services  
**Date:** March 31, 1998

**Social Security Information in FBI Files**

Effective 11/21/88, Russell Roberts, Director, FOIPA Division, Department of Health and Human Services, advised that information from Social Security records which is contained in FBI files may be released to first party requesters. Such material is to be denied to all third party requesters under FOIA exemptions (b)(6) and/or (b)(7)(C). Furthermore, Social Security numbers of deceased individuals are releasable.

b2 It is to be noted that this type of information is occasionally set forth in our records as attributed to a symbol source, for example [REDACTED]. When processing this material for release to first party requesters, the symbol numbers are to be excised pursuant to FOIA exemption (b) (2).

**F O I P A**  
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**M A N U A L**

**MEMO 20**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Department of Justice, Civil Rights Division  
**Date:** March 31, 1998

The Department of Justice, Civil Rights Division, has requested that the FBI provide a clean copy of documents originated by their agency along with the redacted (blackened-out or highlighted) referral copy.

F O I P A

M A N U A L

# MEMO 21

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Department of Justice, Criminal Division  
**Date:** March 31, 1998

## Direct Response Referrals

When referring documents to the Criminal Division for their direct response, any FBI information you wish redacted should be highlighted and/or bracketed along with the request that the stated exemptions be asserted on behalf of the FBI. Do not black out the information.

## Foreign Agents Registration List

On 4/29/76, Mr. O'Shea, Criminal Division, Department of Justice, advised the Foreign Agents Registry is a public record and is available to anyone having an interest in it. Consequently, there is no necessity for referring material or contacting the Department regarding the release of information derived from examination of the list of persons or organizations registered as agents of a foreign government as required by the Foreign Agents Registration Act of 1938.



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F O I P A

MEMO 22

M A N U A L

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Document Classification Unit (DCU)  
Date: March 31, 1998

### Submitting Files to DCU

Effective July 9, 1997, Legal Technicians (LTs) in the Request Management Unit are responsible for submitting FBIHQ and/or the field office file(s) which may warrant or require classification review to DCU. OPCA -18 form should be completed and attached to the file(s) submitted for review. All forms should have the appropriate "PA" or "FOIA" box checked, to notify DCU whether the review is for a Privacy Act or Freedom of Information Act request. DCU personnel will then conduct a preliminary review of the file(s) and determine if they actually warrant a classification review. If it is determined a review is necessary, the file(s) will be placed in the DCU backlog maintained in RMU. If it is determined a file does not warrant classification review, Form 4-774 (See Attachment 1) will be placed as the top serial of the file and will indicate this fact. The file(s) will then be returned to RMU to be placed in one of the three queues for the Section's backlog.

When submitting material for DCU review, LTs/PLSs are responsible for providing DCU with all raw files, EBFs and Bulky enclosures for classification review (for files, EBFs and Bulky enclosures maintained by the Special File Room (SFR) See Numbered Memo 79). This includes referrals from other government agencies of FBI documents or information which requires DCU review. The LT/PLS should submit all material requiring review to DCU as one package. Some exceptions to this would be if certain files/documents have been on locate for an extended period of time and cannot be found or if the case is in litigation with a Court deadline.

Questions regarding this or any other DCU policy should be discussed with the DCU Unit Chief or Administrative Team Captain.

### DCU "Regular Review" or "Walk-Up"

DCU will process all requests requiring classification review which involves 50 pages or less, as part of its "walk-up" program. This program was designed as an administrative practice in order to allow cases involving minimal pages requiring classification review to be handled within a few days of being submitted to DCU, rather than sitting in the backlog for an extended

CLASSIFIED BY: *SP5/pcl*

REASON: 15 *1C*

DECLASSIFY ON: X1

*9-29-98*

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ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED EXCEPT  
WHERE SHOWN OTHERWISE.

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FOIPA Numbered Memo 22

Page 2

Document Classification Unit (DCU)

period of time. All other requests for DCU review of material containing over 50 pages will be conducted as a "regular review."

For those requests which involve only certain "serials" needing classification review, OPCA-18 form should contain the list of the serials being requested for review as well as placing tabs (yellow "stickies") on the actual serials in the raw file. The same procedures stated above for establishing a case as a walk-up or regular review is also applied to the submission of "serials" for DCU review.

File Classifications Requiring DCU Review

Documents in the following classifications, surfaced as a result of a FOIPA request, should be processed through DCU. This classification list is not meant to exclude reviews involving other classifications. If it appears that a question of national security protection is involved, the documents should be forwarded to DCU regardless of the classification.

- 2 Neutrality Matters
- 3 Overthrow or Destruction of the Government
- 9 Nuclear Extortion
- 14 Sedition
- 61 Treason; Misprision of Treason
- 64 Foreign Liaison
- 65 Espionage
- 97 Registration Act
- 98 Sabotage
- 100 Domestic Security/Revolutionary Activities
- 
- 102 Voorhis Act (S) b1
- 105 FCI
- 108 FCI - Foreign Travel Control
- 109 Foreign Political Matters
- 110 Foreign Economic Matters
- 111 Foreign Social Conditions
- 112 Foreign Funds
- 113 Foreign Military and Naval Matters
- 117 Atomic Energy Act
- 121 Labor Management Relations Act - 1947
- 134 Counterintelligence Assets
- 137 Domestic Security Informants
- 138 Loyalty Matters

b2  
b7E

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Document Classification Unit (DCU)

155	National Aeronautics and Space Act of 1958
163	Foreign Police Cooperation
170	Extremist Matters
174	Bombing Matters
176	Anti-Riot Laws*
185	Protection of Foreign Officials
199	International Terrorism
200 - 203	Foreign Counterintelligence Investigations
205	Foreign Corrupt Practices Act - 1977
212	Intelligence Community Support
215 - 229	Foreign Counterintelligence Investigations
230	Training Received - FCI
239	Training Received - Terrorism
243	Intelligence Identities Protection Act
246 - 248	Foreign Counterintelligence Investigations
256	Hostage Taking - Terrorism
253	Fraud and Related Activities-Ident Documents (FRAUD) - Terrorism
256	Hostage Taking by International Terrorists
262	Overseas Homicide/Attempted Homicide - International Terrorism
265	Acts of Terrorism in the United States - International Terrorists
266	Acts of Terrorism in the United States - Domestic Terrorists
268	Engineering Technical Matters - FCI
270	Cooperative Witnesses-Domestic Terrorism Extraterritorial International Terrorism-Cooperating Witness
271	Arms Control Treaty Matters
277	Adoptive Forfeiture Matters - Counter Terrorism
278	President's Intelligence Oversight Board
279	Biological Weapons - Anti-Terrorism
283	FCI
284	Economic Counterintelligence
285	Acts of Economic Espionage
288	Computer Investigations - Threat Analysis
290	Alien Terrorist Removal Court
291	Animal Enterprise Protection Act
292	Domestic Emergency Support Team
293	Foreign Emergency Support Team

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**FOIPA Numbered Memo 22**

Page 4

**Document Classification Unit (DCU)**

\*All 176 classifications that are 25 years or older (prior to and including 1971) have been sent to the National Archives along with the index cards.

Since minimal information from the files in the following list is classifiable, these files will be assigned directly to the FOIPA Section's backlog for processing. However, prior to the PLS processing the file(s), he or she should peruse the file(s) first to determine if there is any information that may have been classified at the time the document originated or if there is information which appears to warrant classification. Should information of this type appear, the PLS will be responsible for sending the material to DCU for review.

- 40 Passport and Visa Matters
- 67 Personnel Matters - Reinvestigation of FBI Personnel
- 140 Security of Government Employees (SGE)
- 157 **Civil Unrest (SEE ATTACHMENT 2)**
- 183 RICO - Terrorism\*
- 259 Security Clearance Investigations Program
- 260 Industrial Security Program
- 261 Security Officer Matters
- 263 Office of Professional Responsibility (OPR) Matters

\*Not all 183 (RICO) investigations need classification review. Only those investigations dealing with terrorism, foreign government sources (those listed on the Foreign Government Classification Guide #1 [G-1]) or information provided by foreign/domestic security informants/assets should be sent for DCU review.

It is recognized that unique classification situations periodically arise which require special handling because of the unusual type of information or where short deadlines have been imposed. These situations should be brought to the attention of the DCU Unit Chief.

**Classification of Notes and Addenda**

Classification regulations require that any notes or addenda which are added to a communication/correspondence or to certain copies of it should be treated separately. In order to comply with these regulations, the following guidelines should be followed:

1. When classifiable national security information is set forth in a note or addendum to a communication, the note or addendum should be prepared on a separate page. This allows for independent classification marking of the note or addendum.

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2. Top Secret or Sensitive Compartmentalized Information (SCI) should be avoided in a note or addendum. If possible, every effort should be made to exclude all classifiable information from the note or addenda.

### **Classification Review of Documents Previously Examined By DCU**

A classification review by DCU of previously classified documents, cross-references as well as main files, is required under any of the following circumstances:

1. The requester is unwilling to accept the prior classification.
2. A classification review was conducted prior to 10/14/95, but no release was made and Communist Party Informants are involved.
3. There has been no release of the previously classified documents and there is serious concern about the prior classification.

### **Notification to DCU of Prior Releases of Information**

Generally, material which is already in the public domain cannot be classified. In some instances, however, material is being referred to DCU which already has been released in whole or part through another FOIPA release or civil litigation.

If a prior release of material from all or even a portion of a file has already been made, it would be of great assistance to DCU if this fact were noted on the referral memorandum. Such information might be known to the PLS either through a review of the search slip, preliminary review of the file, or knowledge of other previously processed requests for the same information or portions thereof. Do not engage yourself in a research effort to make this determination, but note it only if readily available to you.

Your cooperation in bringing this to the attention of DCU would be appreciated and should not only help in speeding up the classification process, but will assist in providing for a more uniform and consistent classification procedure.

### **Mandatory Classification Review**

Included as Attachment 3 are some examples of requests for mandatory classification reviews from the National Security Council (NSC). These requests have previously been placed

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FOIPA Numbered Memo 22

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Document Classification Unit (DCU)

with FOIPA referrals to be handled in the queue.

Requests for mandatory classification reviews are handled by DCU and/or the Historical and Executive Review Unit (HERU). These mandatory classifications require no action by the FOIPA Disclosure Units. The mandatory reviews are to be completed within one year; therefore, it is essential that they be appropriately routed to DCU or HERU for handling. Outlined below are certain items which distinguish a request for mandatory review from a referral made to the Bureau in connection with an FOIPA request.

- Mandatory review requests are usually made by a Presidential Library, Archives or NSC.
- Letters requesting mandatory review will cite Section 3.6 of Executive Order 12958, which is the provision for mandatory review.
- Letters requesting mandatory review will be delivered with a receipt requiring the signature of the recipient.
- Letters requesting mandatory review will have enclosed "Certification of Citizenship" of the requester.

b2

b2

### Review of Special Compartmentalized Information (SCI) Material

Special security clearances are required in order to review or handle "Top Secret" files or documents which contain SCI material. If you should be notified that you do not have the appropriate clearance to review the classified material requested, one of the following PLSs should be contacted to conduct the review. It is recommended that the individual contacted to review the classified material be from the same Unit as the PLS handling the case.

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Document Classification Unit (DCU)

Disclosure Units:

1  
b6  
[REDACTED] - Unit 1  
[REDACTED] - Unit 4

[REDACTED] - Unit 3

Litigation Unit:

[REDACTED]

Help Desk:

[REDACTED]

DCU:

All Team Captains in DCU are afforded SCI clearances. However, should there be any questions concerning classification matters on a case prior to DCU review, the LT or PLS should initially contact the DCU Administrative Team Captain.

RMU:

Currently, there are no RMU employees with the SCI clearance. If a RMU employee has been advised by the SFR that they do not have the proper clearance to review file material, they should contact one of the above Disclosure PLSs.

~~SECRET~~

The following documents appearing in FBI files have been reviewed under the provisions of The Freedom of Information Act (FOIA) (Title 5, United States Code, Section 552); The Privacy Act of 1974 (PA) (Title 5, United States Code, Section 552a); and/or Litigation.

☐ FOIA/PA☐ Litigation☐ Executive Order Applied

Requester: \_\_\_\_\_

Subject: \_\_\_\_\_

Computer or Case Identification Number: \_\_\_\_\_

Title of Case: \_\_\_\_\_

\* File \_\_\_\_\_ Section \_\_\_\_\_

Serials Reviewed: THIS FILE HAS BEEN DETERMINED NOT TO WARRANT REVIEW BY THE  
DOCUMENT CLASSIFICATION UNIT. DATE \_\_\_\_\_

Release Location: \* File \_\_\_\_\_ Section \_\_\_\_\_

☐ FOIA/PA☐ Litigation☐ Executive Order Applied

Requester: \_\_\_\_\_

Subject: \_\_\_\_\_

Computer or Case Identification Number: \_\_\_\_\_

Title of Case: \_\_\_\_\_

\* File \_\_\_\_\_ Section \_\_\_\_\_

Serials Reviewed: \_\_\_\_\_

Release Location: \* File \_\_\_\_\_ Section \_\_\_\_\_

☐ FOIA/PA☐ Litigation☐ Executive Order Applied

Requester: \_\_\_\_\_

Subject: \_\_\_\_\_

Computer or Case Identification Number: \_\_\_\_\_

Title of Case: \_\_\_\_\_

\* File \_\_\_\_\_ Section \_\_\_\_\_

Serials Reviewed: \_\_\_\_\_

Release Location: \* File \_\_\_\_\_ Section \_\_\_\_\_

\* INDICATE IF FBIHQ OR FIELD OFFICE FILE NUMBER.

(THIS FORM IS TO BE MAINTAINED AS THE TOP SERIAL OF THE FILE, BUT NOT SERIALIZED.)

MEMO 22 - ATTACHMENT 1



4/15/94

TO: J. Kevin O'Brien  
Section Chief  
Freedom of Information-Privacy Acts Section (FOIPA)

FROM: [REDACTED] b6  
Supervisory Paralegal Specialist  
Disclosure Unit 1, FOIPA Section

SUBJECT: FOIPA HANDLING OF 157 CLASSIFICATION FILES

RECOMMENDATION: That the current procedure requiring that DCU review all 157 files be modified.

APPROVED: [REDACTED] [REDACTED] [REDACTED]  
Director [REDACTED] [REDACTED] [REDACTED]  
Deputy Director [REDACTED] [REDACTED] [REDACTED]

DETAILS: Reference is made to our conversation regarding the possibility of changing the procedure for handling files in the 157 classification (Civil Unrest - Disorders and Demonstrations). In particular, we discussed the FOIA request of Professor [REDACTED] for records pertaining to James Meredith/Integration of the University of Mississippi. Responsive records consist of 230 volumes (approximately 32,000 pages). The request was made in February 1991. Document Classification Unit (DCU) advised that this request is approximately number 238 in their backlog and will not come up for classification review for many months. Professor [REDACTED] has made numerous calls regarding the status of this request and is now becoming quite impatient.

Consultation with DCU Unit Chief [REDACTED] and several team captains in both Disclosure and DCU indicated that information in 157 classification files is rarely classifiable under current guidelines. Therefore, I propose that records responsive to the above-mentioned request as well as most 157 classification files no longer require complete DCU review as is required by Section Memo No. 103. Disclosure PLSs could list the symbol numbers of all informants appearing in the records and DCU could indicate whether any of the informants are classifiable. Disclosure could then request that DCU review only the documents in which a classifiable informant appears along with any other information that Disclosure determines to be possibly classifiable such as foreign police data. This would eliminate the need for a complete review of these files, thus minimizing DCU's backlog and allowing Disclosure to respond to requests on a more timely basis.

MEMO 22 - ATTACHMENT 2

Re: FOIPA Handling of 157 Classification Files

It is recognized that there could be exceptions, in which case Disclosure could request that an entire 157 file be reviewed by DCU prior to Disclosure processing.

WITH TOP SECRET  
ATTACHMENT

F90-56

NATIONAL SECURITY COUNCIL  
WASHINGTON, D.C. 20506

December 14, 1990

MEMORANDUM FOR EMIL P. MOSCHELLA  
CHIEF, FOI/PA SECTION  
FEDERAL BUREAU OF INVESTIGATION

SUBJECT: *b6* Declassification/Release Request of :  
[REDACTED]

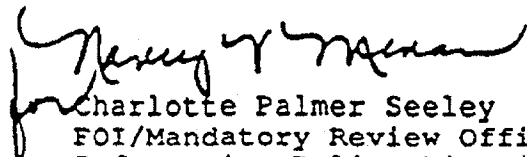
The attached document has been requested under provisions of Executive Order 12356.

Please review the document and advise the National Security Council if, in your opinion, the document may be declassified and/or released.

If you recommend the document or portions thereof should remain classified in the interest of national security or otherwise not releasable, please provide the NSC with the provisions of the appropriate sections of Executive Order 12356 on which your decision is based. If applicable, please provide downgrading recommendations as well.

We ask that you return the document along with your recommendations. Questions should be directed to Charlotte Palmer Seeley at (395-3103).

Additional comments for your information: NLE 90-124 document 9 - the bracketed portions are CIA's recommendations. Please review remaining portions for your equities.

  
for Charlotte Palmer Seeley  
FOI/Mandatory Review Officer  
Information Policy Directorate

Attachments: NLE 90-124, # 9 *xc*

MEMO 22 - ATTACHMENT 3

UNCLASSIFIED  
WITH TOP SECRET  
ATTACHMENT

2/5/91

WITH TOP SECRET  
ATTACHMENT

F89-131

NATIONAL SECURITY COUNCIL  
WASHINGTON, D.C. 20506

SSP  
CLASS  
SEC'D  
SER  
REC

August 15, 1990

MEMORANDUM FOR EMIL P. MOSCHELLA  
CHIEF, FOI/PA SECTION  
FEDERAL BUREAU OF INVESTIGATION

SUBJECT: Declassification/Release Request of  
[REDACTED]

b6

The attached document has been requested under provisions of the Freedom of Information Act.

Please review the document and advise the National Security Council if, in your opinion, the document may be declassified and/or released.

If you recommend the document or portions thereof should remain classified in the interest of national security or otherwise not releasable, please provide the NSC with the provisions of the appropriate sections of the Freedom of Information Act on which your decision is based. If applicable, please provide downgrading recommendations as well.

We ask that you return the document along with your recommendations. Questions should be directed to Charlotte Palmer Seeley at (395-3103).

Additional comments for your information: The Criminal Division of the Justice Department recommended that you review the enclosed document. The Departments of State, Energy, and Defense have no objection to declassify and release in full. The proposed deletions of the Criminal Division are shown in red brackets. The document is also out to CIA.

*Charlotte Seeley*  
Charlotte Palmer Seeley  
FOI/Mandatory Review Officer  
Information Policy Directorate

Attachment: NND 899013-475

8-24-90  
UNCLASSIFIED  
WITH TOP SECRET  
ATTACHMENT

11-1-89

2/5/91

NATIONAL SECURITY COUNCIL  
WASHINGTON, D.C. 20506

August 15, 1990

MEMORANDUM FOR EMIL P. MOSCHELLA  
CHIEF, FOI/PA SECTION  
FEDERAL BUREAU OF INVESTIGATION

SUBJECT: *b6* Declassification/Release Request of  
~~████████████████████~~

The attached document has been requested under provisions of the Freedom of Information Act.

Please review the document and advise the National Security Council if, in your opinion, the document may be declassified and/or released.

If you recommend the document or portions thereof should remain classified in the interest of national security or otherwise not releasable, please provide the NSC with the provisions of the appropriate sections of the Freedom of Information Act on which your decision is based. If applicable, please provide downgrading recommendations as well.

We ask that you return the document along with your recommendations. Questions should be directed to Charlotte Palmer Seeley at (395-3103).

Additional comments for your information: The Criminal Division of the Justice Department recommended that you review the enclosed document. The Departments of State, Energy, and Defense have no objection to declassify and release in full. The proposed deletions of the Criminal Division are shown in red brackets. The document is also out to CIA.

*joint ventures of all  
as are involved. We  
respond to Seeley at the  
request.*

Attachment: NND 899013-475

*Charlotte Seeley*  
Charlotte Palmer Seeley  
FOI/Mandatory Review Officer  
Information Policy Directorate

*2-7/90  
JTS*  
UNCLASSIFIED  
WITH TOP SECRET  
ATTACHMENT

**F O I P A**  
**M A N U A L**

**MEMO 23**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Drug Enforcement Administration (DEA)  
**Date:** March 31, 1998

**DEA Form 7 (Report of Drug Property Collected,  
Purchased or Seized)**

As the FBI becomes more involved in drug investigations, FBI field offices have been utilizing DEA Form 7 (See Attachment 1) for transmitting evidence to the DEA Lab in Bureau drug cases. While it is properly a DEA form when used in a Bureau drug case, the top half of the form will be FBI information while the lower half will be the results of examination conducted by the DEA lab personnel.

b6 On 7-18-90, [REDACTED], DEA, agreed that henceforth when any DEA Form 7 is located in a Bureau file in response to FOIPA requests, it should be referred to DEA for consultation.

Upon receipt, DEA will review the Form 7 and 1) return it to the FBI with appropriate notations, if any; or, 2) if any overriding factors exist, will opt to handle it as a direct response. If the latter should occur, DEA will call the PLS and advise them that DEA will handle the response to the requester.

\*Using our standard referral letter (OPCA-6), check the second block "FBI documents containing information furnished by your agency." On the reverse side complete Index B with the FBI file and serial number of the document and further identify the referred document as a DEA Form 7 (See Attachment 2).

## REPORT OF DRUG PROPERTY COLLECTED, PURCHASED OR SEIZED

[illegible]

15. WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG? ☒ NO (Included above) ☐ YES (If Yes, enter exhibit no. and describe original container fully)

REMARKS:

16. SUBMITTED BY SPECIAL AGENT (Signature)		17. APPROVED BY (Signature & Date)	
LABORATORY EVIDENCE RECEIPT REPORT			
18. No. PACKAGES	19. RECEIVED FROM (Signature & Date)	20. TITLE	
1	R235-855-042	Special Agent	
21. SEAL <input type="checkbox"/> Broken <input checked="" type="checkbox"/> Unbroken	22. RECEIVED BY (Signature & Date)	23. TITLE	
	1-14-87	E.T.	

LABORATORY ANALYSIS / COMPARISON REPORT	
24. ANALYSIS SUMMARY AND REMARKS	
Gross Wt.:	39.8 gm
Net Wt.:	17.1 gm
Adulterants:	--
Drug Code:	7360.000

Fingerprint evidence forwarded to F.B.I.  
(copy of letter attached)

(Copy of letter attached)							
28. Exhibit No.	29. Lab. No.	30. <b>ACTIVE DRUG INGREDIENT</b> (Established or Common Name)	<b>WEIGHT PER UNIT ANALYZED</b>			31. <b>TOTAL NET</b>	32. <b>RESERVE</b>
			28. Strength	29. Measure	30. Unit		
1(B1)	51131	Marijuana	--	--	--	--	15.6 gm
LYST (Signature)			34. TITLE FORENSIC CHEMIST			35. DATE COMPLETED 5-23-87	
APPROVED BY [REDACTED]			37. TITLE LABORATORY CHIEF			38. LAB. LOCATION NATIONAL CITY, CA	



U.S. Department of Justice

Federal Bureau of Investigation  
935 Pennsylvania Ave., N.W.

Washington, D.C. 20535-0001

To:

From: Chief  
Freedom of Information/Privacy Acts (FOIPA) Section  
Federal Bureau of Investigation

Subject: FOI/PA Request of \_\_\_\_\_  
FBI FOI/PA# \_\_\_\_\_ Re: \_\_\_\_\_

In connection with review of FBI files responsive to the above request, the following was surfaced:

- ☐ \_\_\_\_\_ unclassified document(s) which originated with your agency is/are being referred to you for direct response to the requester. We will advise the requester that your agency will correspond directly concerning this matter, and request that you furnish us a copy of your letter to the requester reflecting final determination regarding the document(s). (See index A).
- ☐ \_\_\_\_\_ FBI document(s) containing information furnished by or related to your agency. Please review this information (outlined in red) and return the document(s) to us, making any deletions you deem appropriate, and citing the exemption(s) claimed. (See index B).
- ☐ \_\_\_\_\_ classified document(s) which originated with your agency is/are being referred to you for direct response to the requester. We will advise the requester that your agency will correspond directly concerning this matter, and request that you furnish us a copy of your letter to the requester reflecting final determination regarding the document(s). Additionally, please advise us if the classification of the document(s) is changed so that we may amend our files. (See index C).
- ☐ \_\_\_\_\_ classified FBI document(s) containing information furnished by or related to your agency. Please review this information (outlined in red) and return the document(s) to us, making any deletions you deem appropriate, citing the exemption(s) claimed, and advising if the document(s) still warrant(s) classification. (See index D).
- ☐ Please note that some of the enclosed documents contain deletions made by this Bureau. The appropriate exemption appears next to the redacted information. Please advise the requester they may appeal these denials to the following address: Co-Director, Office of Information and Privacy, U.S. Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001.

A copy of the requester's initial letter and any other significant correspondence is enclosed for your convenience. If you have any questions concerning this referral, please contact \_\_\_\_\_ on (202) 324-\_\_\_\_\_. The FBI file number appearing on the lower right-hand corner of the enclosed document(s) as well as on the Index Listing (see reverse) should be utilized during any consultation with this Bureau concerning this referral.

Additional Remarks: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Enclosure(s) ( )

MEMO 23 - ATTACHMENT 2 (FRONT)

(Index Listing on Reverse)



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Index A:

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Index B:

HQ 12-3456-78 (DEA Form 7)

---

Index C:

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Index D:

MEMO 23 - ATTACHMENT 2 (BACK)

F O I P A

# MEMO 24

M A N U A L

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Duplicate Documents, Processing of  
**Date:** March 31, 1998

## Processing of Duplicate Documents

With the increased number of FOIPA requests being made to FBIHQ and the field offices, we are frequently encountering duplicate copies of the same document to be processed by the FOIPA Section. To process and release all copies of a single document not only causes an unnecessary duplication of effort, it also provides no additional substantive information to the requester. For reference purposes, duplicate documents are described as a document "recorded" or "serialized" at different locations within FBI record(s). (Duplicate documents should not be confused with additional "copies" of documents which are routinely provided by a reporting office and maintained within the same serial.)

In processing duplicate documents, if handwritten notations or administrative markings on one document substantially alter the document or contain additional information to which the requester seeks access, only the copy which contains the consensus of pertinent information should be processed. For those documents considered as duplicates, OPCA Form 20 (Deleted Page Sheet) can be completed in order to identify that the withheld pages are being considered as duplicate to another document recorded and already processed at another location in an FBI file. The following language should be included in your disclosure letter as a further explanation to the requester:

"Numerous documents in the \_\_\_\_\_ file(s) that were processed pursuant to your request were found to be duplicate of those contained in the file(s) at \_\_\_\_\_ which have also been processed. To minimize costs to both you and the Federal Bureau of Investigation, these duplicate documents have not been considered for release unless additional information was included on the duplicate document."

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Duplication  
Date: March 31, 1998

### Duplication of FOIPA Related Records

When responsive files are located for FOIPA requests, whether it be FBIHQ or field office files, they are duplicated by personnel in IPU's Duplication Center. This is accomplished by completing and attaching OPCA Form 19 - Duplication Requisition Form to the file and forwarding it to the Duplication Center. The file will then be duplicated and returned to the LT/PLS. As a reminder, if the files to be duplicated are Personnel type files (i.e., 67, 263, 280, etc.), they must be transmitted in a messenger envelope.

Files to be duplicated on a "Special" basis must be hand delivered to the Duplication Center and given directly to the Supervisor who will personally keep control over the files. Either a pink "Special" tag should be affixed to the requisition form or "SPECIAL" should be written on the form in large red letters to denote that expedite duplication is requested.

When requesting only certain serials to be duplicated, the serial numbers must be listed on the requisition form in vertical order, rather than horizontal order, directly under the word "Serials."

**REMINDER:** Do not duplicate any files in which duplication fees could exceed \$25 until a statement of willingness to pay has been received from the requester.

### Duplication of Special File Room Files

When it is necessary to have files from the Special File Room (SFR) duplicated, the same form should be completed; however, the actual duplication will be performed by personnel in the SFR. Therefore, once the form is completed and attached to the file, the file should be hand carried to the SFR for duplication. The SFR will notify the LT or PLS once the duplication is completed in order to retrieve the material.

Duplication

**Duplication of Microfiche/Microfilm**

b2 To have paper copies made of information that is maintained on microfilm or microfiche, contact the Micrographics Unit on extension [REDACTED] Room [REDACTED]. An administrative duplication form must be completed for personnel of that unit to duplicate the material. This form can be completed over the phone by micrographics personnel or copies of the form can be sent to the LT or PLS for completion and return to the Unit. Once the material has been duplicated, it will be sent to the LT or the PLS through the Bureau mail, unless a request had been made to be notified for it to be picked up.

**Duplication of Processed Material**

Where duplication fees are applicable, materials should not be duplicated until the requested amount of money has been received from the requester. This will eliminate unnecessary duplication costs to the FBI in the event the requester should abandon the fees.

Once responsive FOIPA files have been processed and fees, if applicable, have been received, the material may then be sent to the Duplication Center. At this time, the attached duplication form should be affixed to all volumes/sections in which duplication is requested. In addition to providing your name, date, extension and room number on this form, it should also indicate the number of copies requested, the subject matter, file number/section and any comments for special duplicating instructions, such as reducing the image to 98%, etc.

**F O I P A**  
**M A N U A L**

# MEMO 26

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Electronic Surveillance (ELSUR) Records  
**Date:** March 31, 1998

## Types of Electronic Surveillance

There are several forms of electronic surveillance. Following are a few examples: 1) a **telephone wiretap** records both sides of a conversation, 2) a **microphone surveillance** is when a small microphone is placed inconspicuously in a room to record conversations in the surrounding area, 3) a **pen register** records the telephone numbers being called by a monitored telephone, 4) a **trap and trace** is the opposite of a pen register, in that it determines the number of a telephone used to call a monitored telephone, 5) a **transmitter (body recorder)** is a device worn by a consenting individual or concealed in an item such as a purse, gym bag, attache, etc., and 6) a **consensual monitoring** means the FBI has the permission of the individual whose telephone is being monitored, or who has agreed to wear a body recorder. The **transmitter (body recorder)** may be worn by or concealed in an item carried by a consenting individual or by an FBI Special Agent.

## ELSUR Searches and Reviews

b2 When a request is made for a search of the electronic surveillance indices pursuant to a FOIPA request, RMU employees will complete the ELSUR form 0-63 (See Attachment 1) and forward it to the ELSUR Unit, Room [REDACTED] for the indices to be searched. The search will be limited to only retrieving Elsur information on those individuals considered as a target of the investigation and listed as a "principal" for the electronic surveillance. If records which may be identifiable to the subject of the request are located, an electronic communication must be sent to the appropriate field office(s) requesting a review of the field office file(s) to determine if it is identifiable to the requester/subject matter. The field office will notify RMU of the results of the review. If the material is not identifiable to the subject, RMU personnel will advise the requester that no responsive records were located which indicate the subject of the request has been the target of an ELSUR. If the records are identifiable, RMU will obtain a copy of the responsive material from the field office(s) to be maintained in the case folder until the time to be processed by the Disclosure PLS.

**Electronic Surveillance (ELSUR) Records**

**ELSUR Index Records**

A search of the ELSUR index can surface three types of references: 1) a **principal** means the individual/organization is the target of the ELSUR, 2) an **overhear** indicates the conversation of a third party (other than the principal) has been recorded and 3) a **mention** indicates that a participant of the recorded conversation mentioned the name of a third party. Form 0-63 (copy attached) should be used when requesting an ELSUR search. Under "**REQUEST FOR SEARCH OF ELSUR INDEX FOR THE PURPOSE OF:**" check the FOIPA block and write **principals only** next to it.

ELSUR index records showing electronic coverage in foreign intelligence, counter intelligence or international terrorism investigations, should be carefully reviewed to determine whether or not the (c)(3) exclusion is appropriate before admitting the existence of the record. Where the mere existence of the electronic coverage is classified, the (c)(3) exclusion may be appropriate.

**ELSURS Conducted in Criminal, Domestic Security  
and FCI Investigations**

The history of electronic surveillance at the federal level is set forth in House of Representatives Report 95-1283 which pertains to the Foreign Intelligence Surveillance Act (FISA). This six page summary, which is available in the FOIPA library, explains the development of the FBI's authority to use electronic surveillance in criminal, domestic security and foreign counterintelligence/international terrorism investigations. Each of these investigative programs has a specific date identified after which a court order is required to conduct electronic surveillance as follows:

**A) ELSUR Conducted in Criminal Investigations**

**Prior to 6/19/68**, electronic surveillance in criminal investigations was generally conducted without a court order. **Effective 6/19/68**, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510-2520) was enacted. With the establishment of this statute, Title III not only banned warrantless electronic surveillance in criminal investigations, it specified the offenses against which electronic surveillance could be used (18 U.S.C. § 2516).

For electronic surveillance conducted in criminal investigations prior to 6/19/68 (pre-Title III), the following FOIA exemptions may be asserted depending upon the type of request being made:

**FOIPA Numbered Memo 26**

Page 3

**Electronic Surveillance (ELSUR) Records**

- 1) When a request has been made by a non-participant in the intercepted conversation, Exemption (b)(7)(C) and/or (b)(7)(D) may be asserted on information which would tend to identify an individual or source.
- 2) When a request is made by a participant in the conversation, the requester's side of the conversation should be released, however, all conversations of a third party should be withheld pursuant to Exemption (b)(7)(C) if it would tend to identify the individual. If the release of information to a participant would pose potential harm or threaten the safety of the participant's life, then, Exemption (b)(7)(F) can be considered to withhold the information.

**(In processing items 1 and 2, if any of the participants in the conversation are deceased, the information must be released. The only privacy interests left to be protected are those held by living persons who are mentioned in the conversation.)**

- 3) Exemption (b)(7)(D) may be asserted, in addition to (b)(7)(C), for third party requests wherein the electronic surveillance was conducted with the consent of one of the parties to the conversation. However, if the requester is the party who gave the consent, then the requester should be given access to his/her side of the conversation as discussed in item 2.
- 4) If the investigation in question or a related investigation is pending when the request is received, Exemption (b)(7)(A) is appropriate if release will interfere with enforcement proceedings. This may be the case when an organized crime investigation is involved.

**For those intercepts after 6/19/68, post-Title III, Exemption (b)(3) should be invoked in addition to the exemptions discussed above.**

**B) ELSUR Conducted in Domestic Security/Terrorism Investigations**

In general, these investigations focus on organizations and individuals ("enterprises"), other than those involved in international terrorism or which have a nexus to a foreign government, whose goals are to achieve political or social change through activities that involve force or violence.

Prior to 6/19/72, electronic surveillance in domestic security cases was generally conducted without a court order. On 6/19/72, the decision in United States v. United States District Court 407 U.S. 297, changed this procedure. This decision, commonly called the Keith Case, mandated a court order in such cases. The Attorney General Guidelines on domestic security/terrorism investigations have, since 4/5/76, mandated that non-consensual electronic

**Electronic Surveillance (ELSUR) Records**

surveillance must be conducted pursuant to the warrant procedures and requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (as amended). In other words, when members of the group being investigated commit, or intend to commit imminently, an offense specified in 18 U.S.C. § 2516, any non-consensual electronic surveillance conducted to investigate that offense must be conducted pursuant to a Title III court order. Therefore, the records from such intercepts conducted on or after 6/19/72, are withheld pursuant to Exemption (b)(3).

For intercepts prior to 6/19/72, pre-Keith intercepts, or those involving the consent of one of the parties to the conversation, apply the principles discussed above regarding pre-Title III criminal investigations.

**C) ELSUR Conducted in Foreign Counterintelligence/International Terrorism Investigations**

Foreign Counterintelligence (FCI) investigations are conducted to protect against espionage and other intelligence activities, sabotage, or assassinations conducted by, or on behalf of foreign powers, organizations or persons, or international terrorist activities.

International terrorism investigations are conducted for activities of the following nature:

1. Involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the U.S. or of any State; or that would be a criminal violation if committed within the jurisdiction of the U.S. or of any State;
2. Appears to be intended:
  - a) to intimidate or coerce a civilian population;
  - b) to influence the policy of a government by intimidating or coercion; or
  - c) to affect the conduct of a government by assassination or kidnapping; and
3. Occur totally outside the U.S., or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

The Foreign Intelligence Surveillance Act (FISA), which was enacted on 10/25/78, was the first legislation governing the use of electronic surveillance in these investigative programs. Prior to 10/25/78, pre-FISA, electronic intercepts were generally conducted without a court order. Post-FISA intercepts are generally conducted pursuant to a court order, but in rare cases are conducted without one.



**FOIPA Numbered Memo 26**  
**Page 5**  
**Electronic Surveillance (ELSUR) Records**

Exemptions (b)(1), (b)(7)(A) and (b)(7)(C) may be applicable to records from pre-FISA intercepts. The Exemption (b)(1) and (b)(7)(C) implications are obvious, but those involving (b)(7)(A) are less so. The National Security Division, Division 5, should be consulted if necessary to determine whether the investigation in question is ongoing in another form or whether there is a related, pending investigation which may be impaired through disclosure.

Post-FISA intercepts can be protected by these same exemptions, however, Exemption (b)(3) is also available. Application of Exemption (b)(3) is relevant when the records which resulted from the intercept can no longer be classified and Exemption (b)(1) can no longer be invoked.

Consensual monitoring situations occurring prior to 10/25/78, which are not covered by the FISA, did not require a court order. The Attorney General Guidelines for FCI investigations state that FBIHQ may authorize consensual monitoring for up to 90 days, with extensions available if necessary. Although Exemption (b)(3) would not be available, the other exemptions discussed above could be applicable.

### **Court Orders Prohibiting Disclosure of ELSUR Material**

When a request is received for records which are covered by a court order prohibiting disclosure, that information should be denied as the FBI has no discretion to release the records. There can be no "improper withholding" under these circumstances. See GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980). The court order should be cited as the basis for withholding the records.

The following topics are listed for assistance in handling ELSUR material, particularly those topics which are known to involve court orders:

#### **ELSUR Information Pertaining to** **Martin Luther King, Jr., and The Southern Christian** **Leadership Conference (SCLC)**

The United States District Court for the District of Columbia has ordered results of certain microphone and telephone surveillance of Dr. King and the SCLC turned over to the National Archives and sealed for fifty years, Lee v. Kelley, No. 76-1185, and SCLC v. Kelley, No. 76-1186 (D.D.C. Jan. 31, 1977). This order includes paraphrased information obtained through electronic coverage which is included in documents such as letters, letterhead memoranda and reports.

PLSs should be alert for documents reporting contacts between individuals and Dr. King or representatives of the SCLC. If the information reported could have originated from some

electronic coverage of Dr. King or the SCLC, consult with Supervisory PLS [REDACTED] b6

**ELSUR Records in the Matter of David Dellinger et al., (Chicago Seven)**

On 2/26/74, a protective order was issued by the United States District Court for the District of Columbia in the matter of David Dellinger vs. John N. Mitchell, which placed restrictions on the release and dissemination of ELSUR documents and records involved in that case. The material in question dealt specifically with ELSUR coverage of the plaintiffs, David Dellinger, Jerry C. Rubin (deceased), Lee J. Weiner, John R. Froines, Abbott H. Hoffman aka Abbie Hoffman (deceased), Thomas E. Hayden, Rennard C. Davis aka Rennie Davis, as well as the Black Panther Party. Although the order did not specially prohibit the FBI from releasing documents involved in the case, the Court's permission was sought each time such a disclosure was to be made.

On 11/28/77, this Order was modified to permit dissemination of the logs and transcripts mentioned above pursuant to FOIPA requests by any person who was overheard or mentioned in any of these electronic surveillance.

**Release of Information from Wiretaps**

**NH 605-R\* and NH 687-R\***

Memorandum dated 11/28/80, advised that in the civil action of Miriam Abramovitz, et al., v. James Ahern, et al., (U.S.D.C., D Conn.) Civil Action No. N77-207, an agreement was entered into by the government and the plaintiffs. In this agreement a complete copy of the logs and transcripts from NH 605-R\* and NH 687-R\* (wiretaps on the Black Panther Party in New Haven, Connecticut) was provided to the plaintiffs. In exchange, the plaintiffs dropped allegations of illegal activity by the Federal defendants (four Former FBI Special Agents) which arose out of the Federal wiretaps.

Many of the 165 plaintiffs in this civil action are from the New Haven area and are represented by attorney John R. Williams. In addition, a number of them have made FOIPA requests, the processing of which may involve the same ELSUR logs, transcripts or information from NH 605-R\* and NH 687-R\*.

In view of the release already made of the logs and transcripts, any information from these two wiretaps, including the source symbol numbers, can generally be released without excision to any individual who was a party to the conversation, a plaintiff in the civil action or known to be represented by John R. Williams. See Attachment 2 for the list of plaintiffs represented by Mr. Williams in the above-referenced civil suit.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MIRIAM ABRAMOVITZ, *Conn*  
 ROBERT ABRAMOVITZ, *Conn*  
 MICHAEL AVERY, *Conn*  
 JOHN BANCROFT, *Conn*  
 VIRGINIA BLAISDELL, *Conn*  
 CATHERINE D. BOVA, *Conn*  
 ANN BOYD, *Conn*  
 ELISE C. BROWNE, *Conn*  
 PATRICIA BUCK, *Conn*  
 FRANCES CARTER, *Conn*  
 JOHN H. CHAMPION, *Conn*  
 KATHRYN CHILES, *Conn*  
 KATHY CHILES, *Conn*  
 LAURA CHILES-MARTIN, *Conn*  
 HARRIET COHEN, *Conn*  
 JOHN CONTI, *Conn*  
 JOHN P. CRISCUOLO, *Conn*  
 JAMES H. DAVIS, *Conn*  
 JOHN J. DERBACHER, *Conn*  
 MAUREEN DERBACHER, *Conn*  
 DAVID DICKSON, *Conn*  
 CARL DIXON, *Conn*  
 GEORGE EDWARDS, *Conn*  
 STEVEN ELLNER, *Conn*  
 LILLIAN FARMER, *Conn*  
 ELIZABETH A. FARRELL, *Conn*  
 ARTHUR FINN, *Conn*  
 ROBERT FORSEBERG, *Conn*  
 DONALD FREED, *Conn*  
 ANN FROINES, *Conn*  
 JOHN FROINES, *Conn*  
 KILU (PATRICIA) GALLYOT, *Conn*  
 CHARLES GARRY, *Conn*  
 ROBERT A. GELBACH, *Conn*  
 STEPHEN GLOVER, *Conn*  
 GEORGIA H. GOETERS, *Conn*  
 EDWARD H. GREER, *Conn*  
 LOUISE HARRIS, *Conn*  
 JULIA L. ILDEFONSO, *Conn*  
 GEORGE JOHNSON, *Conn*  
 RONALD S. JOHNSON, *Conn*  
 JAMES O. JONES, *Conn*  
 RENEE M. JONES, *Conn*  
 MORESON J. KAPLAN, *Conn*  
 PATRICIA KAPLAN, *Conn*  
 ELEANOR KAUFMAN, *Conn*  
 ALAN KAY, *Conn*  
 MARTIN KENNER, *Conn*  
 JOHN X. LAPORTA, *Conn*  
 PAUL N. LAHN, *Conn*  
 GWEN J. LOURIE, *Conn*

United States District Court  
 District of Connecticut

FILED AT

3/17/76

By: *[Signature]* Clerk

Deputy Clerk

CIVIL ACTION

NO. N77-207

U. S. C. 3 Conn

Civil Action #

N 77-207

G. SPARKS LUNNEY, Conn.  
LONNIE McLUCAS, Conn.  
JOHN C. MOLDENHAUER, Conn.  
WILLIAM MORICO, Conn.  
DAVID MORRAZZINI, Conn.  
PETER J. O'CONNELL, Conn.  
PETER ORRIS, Conn.  
LUCILLE OWENS, Conn.  
GUSSIE PHEANIOUS, Conn.  
CLARICE K. POLLACK, Conn.  
IRVIN H. POLLACK, Conn.  
PATRICIA PANFONE, Conn.  
JUDITH C. ROBISON, Conn.  
DAVID N. ROSEN, Conn.  
MARK ROSENBERG, Conn.  
BARNETT R. RUSIN, Conn.  
PHYLLIS RYAN, Conn.  
WILLIAM RYAN, Conn.  
JESSE A. SAMBERG, Conn.  
NENDY SAMBERG, Conn.  
DENNIS SILVESTRI, Conn.  
HELEN SILVESTRI, Conn.  
ROBERT SILVESTRI, Conn.  
HENRY J. TAMARIN, Conn.  
DAVID TOBIS, Conn.  
MORRIS WESSEL, Conn.  
CARL WILLIAMS, Conn.  
JUDITH WRIGHT, Conn.  
MARK WANGER and Assoc  
MICHAEL ZITO, Conn.

Suing on behalf of  
themselves and all  
others similarly  
situated,

PLAINTIFFS,

VS.

JAMES AHERN, Conn.  
STEPHEN AHERN, Conn.  
PASQUALE CARRIERY, Conn.  
RAYMOND CONNALLY, Conn.  
WALTER CONNOR, Conn.  
VINCENT DeROSA, Conn.  
BIAGIO DILIETO, Conn.  
WILLIAM GLOSSA, Conn.  
BARTHOLOMEW F. GUIDA, Conn.  
THEODORE GUNDERSON, Conn.  
JAMES H. HEINZ, Conn.  
ARTHUR LEE, Conn.  
RICHARD C. LEE, Conn.

25 Ind.  
10 Ind.  
5 Rose  
10 Fols  
1 St City  
6 Ind.  
1 F.B.I. Ind.  
3 Bell Ind.  
5 Bell Ind.  
1 City Ind.  
3 7 Ind. Conn.  
70 Ind. including  
25 Ind.  
30 Ind.  
12 Gov't Ind.  
3 7 Ind. Conn.  
10

MEMO 26 - ATTACHMENT 2

## ROUTE IN ENVELOPE

TO: Records Management Division, ELSUR Index

Date \_\_\_\_\_

FROM: ☐ CID ☐ LCD ☐ INTD ☐ RMD ☐ Other \_\_\_\_\_  
(specify)Priority: ☐ Expedite, will pick up;☐ Routine☐ Date needed: \_\_\_\_\_

## REQUEST FOR SEARCH OF ELSUR INDEX FOR THE PURPOSE OF:

- ☐ Title III Application ☐ FBI ☐ DEA  
☐ FISC Application  
☐ Legal Motion (DOJ)

☒ FOIPA *Principals only*

- ☐ SPIN/DAPLI  
☐ SPU  
☐ Investigative Lead  
☐ Other \_\_\_\_\_

(specify)

(One of the above must be checked before search will be conducted.)

Requesting/Authorizing Agent

Complete and Return to:

Name

Name

Ext. Room TL#

NAME; TELEPHONE #; VIN; OR  
ADDRESS TO BE SEARCHED

KNOWN ALIASES

SEARCH RESULTS

.file \_\_\_\_\_

Searched by \_\_\_\_\_

Date \_\_\_\_\_

ROUTE IN ENVELOPE

MEMO 26 - ATTACHMENT 2

FBI/DOJ

**F O I P A**  
**M A N U A L**

**MEMO 27**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Executive Secretariat Control Data Sheet  
**Date:** March 31, 1998

**Executive Secretariat Control Data Sheet**

Attached is a copy of an Executive Secretariat Control Data Sheet. These control sheets are used by the Departmental Executive Secretariat to track certain incoming correspondence and replies. From time to time these sheets are retrieved during a search for records responsive to FOIPA requests.

In processing the control sheets for release, it is not necessary to refer them to the Executive Secretariat for its determination, but please keep in mind that the sheets may contain sensitive information that warrants protection in the same way as the underlying records. In many instances, the sheets simply describe the correspondence in a summary fashion and indicate the office(s) to which the correspondence is being directed. In other cases, however, they may include information that may be withheld under various FOIA exemptions (for example, to protect material that is predecisional and deliberative or that implicates personal privacy concerns.)

The Executive Secretariat is no longer using the notation, "THIS DOCUMENT MUST BE DISPOSED OF BY SHREDDING," so you do not need to be concerned about its significance on prior versions of the form. If you have any questions about processing the control sheets, please do not hesitate to call DOJ/OIP at 514-[REDACTED]

b2

DEPARTMENT OF JUSTICE  
EXECUTIVE SECRETARIAT CONTROL DATA SHEET

From: DOE, JOHN J. PAWTUCKET, MI  
To: AG.  
Date Received: 10-13-89 Date Due: NONE Control #: X9101317598  
Subject & Date

10-01-89 LETTER REGARDING THE ISSUE OF IMMUNITY FOR CERTAIN  
KNOWN CRIMINALS INVOLVED WITH THE MARY K. DOE TRIAL WHICH IS  
SET FOR NOVEMBER 24, 1989. WRITER STATES THAT IMMUNITY  
SHOULD NOT BE GRANTED BASED ON THE CHANCE THAT DOJ MAY  
OBTAIN INFORMATION THAT MAY LEAD TO THE ARREST OF  
CRIME KINGPIN, JOE SCARPOOLA.

N O T E ! ! T H I S I S A T E S T R E C O R D \*\*\*

Referred To:	Date:	Referred To:	Date:	
(1) CRM;POLKA	10-13-89	(5)		W/IN:
(2)		(6)		
(3)		(7)		PRTY:
(4)		(8)		1B
INTERIM BY:		DATE:		OPR:
Sig. For: NONE		Date Released:		LON

emarks

INFO CC: OAG.

(1) REPLY DIRECTLY TO THE WRITER. PROVIDE EXEC. SEC., ROOM  
4400-AA, WITH ONE COPY OF REPLY.

Other Remarks:

N O T E ! ! ! ! ! THIS IS JUST A TEST RECORD DESIGNED  
TO ASSIST FOIA OFFICE IDENTIFY CERTAIN FIELDS THAT MAY  
EXPEDITE SEARCHING CAPABILITIES FOR COMPONENTS TASKED TO  
DO SEARCHED IN SUPPORT OF FOIA AND PRIVACY ACT.  
FILE:

THIS DOCUMENT MUST BE DISPOSED OF BY SHREDDING  
\*\*\*\*\*

**F O I P A**  
**M A N U A L**

# MEMO 28

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Exclusions ("Tip-offs")  
**Date:** March 31, 1998

Exclusions, also known by the term "tip-offs," are special provisions to the FOIA which were designed to allow for the protection of sensitive law enforcement matters. The three provisions authorize federal law enforcement agencies to "treat the records as not subject to the requirements of the FOIA." In other words, if a case falls within the purview of an exclusion, the requester can legally be given a "no record" response even though an identifiable record exists. Thus, the use of the "no records responsive to your request" language in all no record responses.

Listed below are the three provisions that may be implemented on law enforcement records. For further details, a review of the FOIA Guide and Privacy Act Overview publication provides an in-depth discussion and requirements for utilizing an exclusion.

**(c)(1) Exclusion** -- Whenever a request is made which involves access to records described in subsection (b)(7)(A) and (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

**(c)(2) Exclusion** -- Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifiers are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of the FOIA unless the informant's status as an informant has been officially confirmed.

**(c)(3) Exclusion** -- Whenever a request is made which involves access to records maintained by the FBI pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in Exemption (b)(1), the FBI may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of the FOIA.



**Procedures in Handling Possible Exclusion Records**

For the most part, exclusions are rarely asserted on FBI records. In most instances, any consideration for the possible assertion of an exclusion will be initiated by the LT in RMU during the initial review of the file to determine if it is identifiable to the subject. On rare occasions, this may be determined after a case has been assigned to a Disclosure Unit.

If there is an indication by a review of the file that an exclusion might apply, immediately notify and discuss the case with your Team Captain. If the Team Captain is in agreement, then the FOIPA Exclusion Coordinator should be contacted and provided with the case folder along with the identifiable file(s). If an exclusion is appropriate, the LT or PLS will be advised by the Coordinator, who will in turn, handle all of the paperwork. If an exclusion is not necessary, the Coordinator will also advise the LT or PLS of such and routine processing of the file may be conducted.

**F O I P A**  
**M A N U A L**

# MEMO 29

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Exemption (b)(3)  
**Date:** March 31, 1998

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Exemption (b)(3) should be cited to protect information which is prohibited from disclosure by statute. To qualify as a (b)(3) statute, the statute must be worded in a manner that leaves no discretion on the issue, or establish specific criteria for withholding, or refer to particular types of matters to be withheld.

### **I. Examples of Authorities Which are (b)(3) Statutes**

#### **Central Intelligence Agency (CIA) Personnel**

Section 6 of the Central Intelligence Agency Act of 1949, requires the Director of the CIA to protect from disclosure, "the organization, functions, names, official titles, salaries and numbers of personnel" employed by the CIA from public disclosure pursuant to 50 U.S.C., § 403.

### CIA Intelligence Sources and Methods

50 U.S.C. § 403-3(c)(5) requires the Director of the CIA to protect its "intelligence sources and methods."

### Grand Jury Information

Federal Rules of Criminal Procedure (FRCP) Rule 6(e) generally prohibits disclosure of matters occurring before a Federal grand jury. Since a FRCP is usually promulgated by the U.S. Supreme Court, the argument has been made that such a rule cannot be used as Exemption (b)(3) authority because no statute is involved. However, since Congress did enact Rule 6(e) by statute, the courts have held that Rule 6(e) can be used as an Exemption (b)(3) statute.

The District of Columbia Circuit Court (D.C. Circuit) has limited the use of Rule 6(e) as an Exemption (b)(3) statute, at least in that circuit. In order to prevent the Government from shielding information from the public simply by presenting the information to a grand jury, the D.C. Circuit has held that Rule 6(e) only prohibits the disclosure of information concerning the "inner workings" of the grand jury. Senate of Puerto Rico v. U.S. Department of Justice, 823 F. 2d 574, 582 (D.C. Cir. 1987). Included in the "inner workings" concept protected by Exemption (b)(3) are such items as grand jury transcripts or subpoenas, the identities of witnesses or jurors, the substance of testimony to the grand jury, the strategy or direction of a grand jury investigation, and the deliberations or questions of the jurors.

Records falling into such categories as grand jury transcripts and subpoenas are easy to recognize, but it is another matter to determine whether a record reveals the strategy or direction of a grand jury investigation. It can be especially difficult for someone not familiar with the investigation, with the background knowledge possessed by the subject concerning the matter under investigation. In Senate of Puerto Rico, for instance, the D.C. Circuit held that a release of all nonexempt records in an investigative file would not reveal the "inner workings" of the grand jury if the grand jury material was not labeled as such. Under those circumstances, the court reasoned the requester would be unable to even determine which records had been submitted to the grand jury. This overlooks the fact that a sophisticated requester can determine which records went to the grand jury if he has enough knowledge and experience to know which records could only be obtained with a grand jury subpoena. That, in turn, could reveal the direction of the grand jury investigation.

Compounding the problem is the fact that most of the other circuit courts have not decided this issue. Furthermore, at the time a FOIPA request is initially processed, one cannot be certain in which circuit a disgruntled requester will eventually file suit. Without that information, one cannot determine which rule of law to apply.

**FOIPA Numbered Memo 29**

**Page 3**

**Exemption (b)(3)**

In light of these problems, the following processing procedure will be followed. At the initial processing stage, Exemption (b)(3) shall be applied to all properly stamped grand jury material. If it is obvious that records bearing the grand jury stamp were not actually submitted to the grand jury, that material should be reviewed for all other applicable FOIA exemptions which may be invoked. However, this procedure should be discussed with the Unit Chief prior to disclosure of any material.

**Intelligence Sources and Methods of the FBI**

50 U.S.C., § 403-3(c)(5) authorizes not only the CIA, but other intelligence gathering agencies of the Federal Government, including the FBI, to protect their intelligence sources and methods. Often there is an overlap between the Exemption (b)(1) and Exemption (b)(3) protection of intelligence sources and methods. Citing these two exemptions in conjunction with one another is appropriate; however, either can be cited independently of the other. The Exemption (b)(3) protection has an equal force to the Exemption (b)(1) protection. Therefore, should Exemption (b)(1) be downgraded, Exemption (b)(3) could still be applied in situations where release of the information would jeopardize the FBI's intelligence sources and methods.

Foreign intelligence and counterintelligence investigations are vital aspects of the FBI's law enforcement mission. When it engages in these activities, the FBI utilizes national security intelligence sources and methods and relies not only on the Executive Order, but also on Exemption (b)(3), 50 U.S.C. 403-3(c)(5) to protect these intelligence sources and methods from disclosure under the FOIA.

With respect to intelligence sources in particular, the Supreme Court has held that the broadest possible protection is necessary in order for intelligence agencies to carry out their mission and to protect the intelligence process. The Court recognized that intelligence sources are diverse and are not limited to covert or secret agents but may include such open and innocuous sources as books, magazines, newspapers, and the citizens who travel abroad. As to all intelligence sources, the court held that they must be provided "an assurance of confidentiality that is as absolute as possible."

**Internal Revenue Code**

26 U.S.C. Section 6103 of the Internal Revenue Code protects tax records obtained from the Department of the Treasury. If tax records were obtained from a source other than the Department of the Treasury, then Exemptions (b)(6) and (b)(7)(C) should be considered in third party requests. See FOIA Update, Volume IX, No. 2, page 5.

**Juvenile Delinquency Act and Juvenile Justice  
Delinquency Prevention Act (JJDPA)**

18 U.S.C. § 5038, which is known as the Juvenile Delinquency Act, protects records of juvenile delinquency proceedings.

The attached memorandum of 11/17/87, from the Office of Information and Privacy (OIP), clarifies instructions regarding JJDPA documents. (See Attachment 1)

In summary, OIP suggests that although the Juvenile Justice and Delinquency Prevention Act (JJDPA) qualifies as an Exemption (b)(3) statute, it should not be invoked to deny the juvenile access to his/her own file. Similarly, information pertaining to other adult subjects unrelated to the juvenile and reasonably segregable cannot be withheld. OIP further suggests that to ensure the privacy interests of juvenile offenders, Exemption (b)(7)(C) in conjunction with Exemption (b)(3) should be used to protect records showing a juvenile's arrest regardless of whether the juvenile was subsequently released or formally charged.

OIP also notes that the JJDPA authorizes release of the final disposition to a victim or immediate members of a deceased victim's family. Should the court's sentence or court's disposition appear in the records (not the AUSA's opinion concerning prosecution), it can be disclosed to the victim or deceased victim's family upon satisfactory proof of identity.

Furthermore, the JJDPA should not be confused with the Federal Youth Corrections Act which is not an Exemption (b)(3) statute. Thus, the PLS must be certain under which statute the subject was prosecuted before it can be determined if Exemption (b)(3) applies.

**National Driver Register**

23 U.S.C., Section 206 (c) protects from third party requesters information obtained by the Secretary of Transportation for the National Driver Register concerning drivers who have committed serious traffic offenses.

**National Drivers Records Act**

On 2/3/88, National Highway Safety Administration, Department of Transportation, advised that the National Drivers Records Act is a (b)(3) statute, and any information furnished to the FBI from this system of records is exempt from THIRD PARTY access under (b)(3). Information from this system is releasable to a FIRST PARTY requester.

### National Security Agency

Public Law 86-36, Section 6(a) protects the organization of the National Security Agency, its function and activities, and the names, titles, salaries, and number of its employees.

### Pen Registers/Trap and Trace Devices

Pen registers and trap and trace devices are opposite sides of the same coin. While a pen register determines a telephone number being called by the monitored telephone, a trap and trace device determines the number of a telephone being used to call the monitored telephone.

Effective 1/18/87, 18 U.S.C., § 3123 mandated that a court order be obtained prior to installing or using a pen register or trap and trace device, unless the user of the telephone consents to the device. Pursuant to 18 U.S.C. Section 3123(d), these court orders are sealed unless otherwise ordered by the court. If the file does not indicate the court order is unsealed, assume it is still sealed and deny pursuant to Exemption (b)(3). Furthermore, the telephone company responsible for the line is not to disclose either the existence of the device or the investigation unless otherwise ordered by the court. **Therefore, Exemption (b)(3) of the FOIA protects from disclosure the application order, the court order, the telephone number and the identity of the individual on which it was placed.** Exemption (b)(7)(C) will still apply to protect the subscribers names and identifying information.

Prior to 1/18/87, the date 18 U.S.C. § 3123 was established, it was DOJ policy to obtain a court order before using a pen register. However, those court orders were issued pursuant to Federal Rules of Criminal Procedure 57. Since no statute was involved, **Exemption (b)(3) cannot be used to protect information concerning pen registers not covered by 18.U.S.C. Section 3123.** In those situations and taking into account the implications of the Landano decision, Exemption (b)(7)(D) will neither protect information obtained via a pen register prior to 1/18/87, nor will Exemption (b)(7)(D) protect the involvement of the telephone company regarding installation of the device.

The same dates and procedures for invoking Exemption (b)(3) for the use of the trap and trace devices should be followed as stated for the pen registers.

For the time period not covered by Exemption (b)(3), the use of a pen register or a trap and trace device may be released. Exemption (b)(7)(E) will not protect the use of the trap and trace devices or the pen registers as investigative tools because their general principles of operation have been widely publicized. Exemption (b)(7)(E) will apply for the technical or mechanical details regarding these devices.

### Pre-sentence Reports

18 U.S.C. § 4208(c) and Rule 32(c)((3)(A) of the Federal Rules of Criminal Procedure exempt those portions of a pre-sentence report pertaining to a probation officer's sentencing recommendations, diagnostic opinions which would seriously disrupt a rehabilitation program if disclosed, information obtained upon a promise of confidentiality, and information which might result in harm to any person if disclosed.

### Title III. Wiretap Intercepts

18 U.S.C., Section 2518 (8) governs the disclosure of information from Title III wiretap intercepts. This statute does not cover all wiretap intercepts. (See Electronic Surveillance Records, Memo 26, for a detailed discussion of the applicable exemptions for wiretaps.)

### Visas and Permits: Issuance or Refusal of

8 U.S.C., § 1202(f) protects records pertaining to the issuance or refusal of visas and permits to enter the United States. Generally, all Visa/Permit matters are referred to the Department of State for handling.

## II. Examples of Authorities Which Are Not (b)(3) Statutes:

1) **Executive Orders and Federal Regulations** do not qualify because they are not statutes.

2) **Federal Rules of Procedure** promulgated by the Supreme Court generally do not qualify unless they are modified and specifically enacted into law by Congress, thus becoming "statutes." See Fund for Constitutional Government v. National Archives and Records Service, 656 F. 2d 856 (D.C. Cir. 1981). [See prior discussions of **Rule 6(e)** and **Rule 32 of the Federal Rules of Criminal Procedure**, which were specifically enacted into law by Congress.]

3) **5 U.S.C., Section 551 of the Administrative Procedure Act** does not qualify because it merely defines terms. (This section, which defines the term "Federal Agency," apparently has been erroneously used to exempt documents prepared by the Judicial and Legislative Branches.)

4) **The Privacy Act** is not an Exemption (b)(3) statute because Congress explicitly provided so in Public Law 98-477.

**FOIPA Numbered Memo 29**

Page 7

**Exemption (b)(3)**

5) 28 U.S.C., Section 534 does not qualify because it does not expressly prohibit the disclosure of "rap sheets." See Reporters Committee for Freedom of the Press v. Department of Justice, 816 F. 2d 730, at 736 n.9 (D.C. Cir. 1987). Note, however, that Exemptions (b)(6) and (b)(7)(C) may be used to protect third party requests for rap sheets of living subjects.

6) The Copyright Act of 1976, 17 U.S.C., Section 101-810, does not qualify because it specifically permits public inspection of copyrighted documents. Note, however, that application of Exemption (b)(4) to copyrighted documents may be appropriate. For an overview of this issue, see FOIA Update, Fall 1983, at 3-5, "Copyrighted Materials and the FOIA."

7) The Federal Youth Corrections Act (FYCA) which began as 18 U.S.C. § 5005, is not an Exemption (b)(3) statute. Thus, a PLS must be certain under which statute the subject was processed, the previously mentioned Juvenile Justice Delinquency Prevention Act or the FYCA, before making a determination on whether Exemption (b)(3) applies or not. Furthermore, if the requester's conviction was set aside under Section 5021 of the FYCA, one must determine whether the court issued an order for the record to be sealed. If conviction records have been ordered sealed, they should not be released pursuant to an FOIA or PA request. The PLS should advise the requester that records are sealed from disclosure pursuant to FYCA Court Order by citing the court case number and the date of the order (i.e., #84-726-CR-RYSKAMP, dated September 4, 1987).





U.S. Department of Justice  
Office of Legal Policy  
Office of Information and Privacy

Washington, D.C. 20530

November 17, 1987

**MEMORANDUM**

**TO:** Emil P. Moschella  
Chief, FOI/PA Section  
Records Management Division  
Federal Bureau of Investigation

**FROM:** *RM* Richard L. Huff  
Co-Director  
Office of Information and Privacy

**SUBJECT:** FOIA Requests Relating to  
Juvenile Delinquency Proceedings

I wish to suggest a clarification of FBI FOI/PA memorandum No. 708, dated December 28, 1983, regarding 18 U.S.C. §5038, a provision of the Juvenile Justice and Delinquency Prevention Act. That memorandum authorizes use of Exemption 3 to withhold juvenile records "where the juvenile was charged formally." It has been generally construed to authorize a blanket withholding of all FBI files in which a juvenile is a captioned subject and, by some teams, to include withholding of such files from the juvenile himself.

As most recently revised, 18 U.S.C. §5038(a), in pertinent part, states that "[t]hroughout and upon completion of the juvenile delinquency proceeding, the record shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet [six enumerated] circumstances."<sup>1</sup> Although we regard this statute as qualifying as an Exemption 3 statute it is our view that the juvenile cannot be considered to be an "unauthorized person" within the meaning

<sup>1</sup> Of the six circumstances enumerated, five pertain to inquiries from agencies which are either government entities or acting on behalf of the government such as a court, a law enforcement agency, an agency considering the juvenile for employment in a sensitive position or a treatment agency or facility to which the juvenile has been committed by the court. Presumably such inquiries would be received through channels other than the FOIA. The effect on FOIA processing of the remaining provision, §5038(a)(6), is discussed below.

of the statutory language and that Exemption 3 cannot be invoked to deny the juvenile access to his own file. Additionally, while the entire record of the juvenile court proceeding is protected, an entire FBI file cannot be exempted simply because a juvenile appears as one of several captioned subjects. Information pertaining to other adult subjects which is unrelated to the juvenile and reasonably segregable from information pertaining to the juvenile cannot be withheld under the Juvenile Justice and Delinquency Prevention Act.

It is not absolutely clear whether a mere arrest involving a juvenile constitutes a juvenile delinquency proceeding triggering Exemption 3 protection. If not, this would produce the anomalous result of a juvenile who is arrested and subsequently released receiving less protection than a juvenile who is formally charged. To ensure maximum protection for juveniles, in light of the express congressional concern for the privacy interests of juvenile offenders, Exemption 7(C) should be invoked in conjunction with Exemption 3 in such circumstances.

Finally, I note that §5038(a)(6) authorizes disclosure of juvenile records in response to "inquiries from any victim of such juvenile delinquency, or if the victim is deceased from the immediate family of such victim, related to the final disposition of such juvenile by the court in accordance with section 5037." Section 5037 pertains to sentencing of juveniles. Consequently, in the unusual instance in which a requester satisfactorily identifies himself as a victim or immediate member of a deceased victim's family, the sentence, should it appear in the file, can be disclosed. All other information pertaining to the juvenile must be withheld, however, even from the victim or the victim's survivors.

**F O I P A**

**M A N U A L**

# MEMO 30

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Exemption (b)(7)(A)  
**Date:** March 31, 1998

When reviewing a responsive file(s) pursuant to a FOIPA request, an important factor to initially determine is whether the investigation is "pending" or "closed." If this cannot be determined by a review of the documents contained in the file(s), this information may be obtained through the Automated Case Support system located in the FBI Network. In some instances, this information may not be recorded in the ACS and it may be necessary to contact the field office which is the Office of Origin of the investigation in order to obtain the status.

Generally when a responsive file(s) involves an ongoing investigation, Exemption (b)(7)(A) is cited to withhold the material from disclosure. This includes even the amount of material compiled during the investigation. Therefore, if (b)(7)(A) is cited, the existing number of pages should not be revealed to the requester.

On the other hand, it may be determined that certain portions of a pending investigation may be processed for release, but only after discussions and coordination with the substantive HQ Division or the field office Case Agent wherein a decision was made that release will not interfere with enforcement proceedings. Contact and coordination must always be conducted when dealing with pending investigations and the proposed release made available for review by either the Case Agent or the substantive HQ Division prior to disclosing any material to the requester.

Further, even after an investigation is closed the (b)(7)(A) exemption may be applicable if disclosure could be expected to interfere with a related, pending enforcement proceeding. This not only applies to other pending federal cases, but may be applicable to the possibility of jeopardizing pending state or local criminal proceedings. In these instances, it will be necessary to obtain a solid justification for asserting the exemption in this case, and therefore, should be coordinated with the Case Agent and possible contact with the state/local authorities.

In most cases, the (b)(7)(A) exemption is sufficient to guard against any impairment of law enforcement investigations or proceedings through the FOIA. However, FOIPA employees should be alert for situations in which the (c)(1) Exclusion could be asserted in lieu of Exemption (b)(7)(A) in order to protect even the existence of the investigation. Another consideration that should be kept in mind is the possible assertion of exemption (b)(7)(B) which protects records or information compiled for law enforcement purposes, the disclosure of which would deprive a person of a right to a fair trial or an impartial adjudication. (See the DOJ FOIA Guide and Privacy Act Overview publication for an in-depth discussion of these provisions.)

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Exemption (b)(7)(D)  
Date: March 31, 1998

During the course of FBI investigations, numerous sources are contacted to obtain information. These sources may be individuals, institutions, foreign state or local law enforcement agencies, etc. All sources of information are not confidential sources. Therefore, some sources of information are not protectable under Exemption (b)(7)(D). The standard for identifying confidential sources was established by the Supreme Court in the civil lawsuit U.S. Department of Justice v. Landano, (113. Ct. 2014, May 24, 1993).

### Implied Confidentiality

The Supreme Court made it clear that not all sources of information are entitled to a "presumption" of confidentiality. Instead, the Court ruled that implied confidentiality must be determined on a case-by-case basis. Therefore, the PLS must be able to articulate that the source had an expectation that he/she was providing information in confidence.

Factors that figure prominently in determining implied confidentiality under the Landano standard are:

- 1) nature of the crime - investigations involving violent crimes, drug related, organized crime, terrorism, etc.
- 2) source's relationship to the crime - source's relationship to the crime is such that there would be fear of reprisal if cooperation were known (e.g., physical harm, harassment, legal action, etc.).

Once implied confidentiality has been established, the identity and the information provided by the source is technically and legally exempt from release under Exemption (b)(7)(D). However, a further review of the information provided by the source must be conducted pursuant to Attorney General Janet Reno's policy of discretionary release (hereafter referred to as the Reno policy). The Reno policy requires consideration of a discretionary release of any information which is technically and legally exempt with an eye towards "foreseeable harm." That is, (b)(7)(D) information which would not tend to identify the source and there is no "foreseeable harm" in releasing the information could be subject to discretionary release.

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Exemption (b)(7)(D)

In most instances, it will no longer be appropriate to protect the source of information under Exemption (b)(7)(D) in the following situations when it is an exchange of "routine information":

1) **Police Departments (PD)** negative record checks, arrest records  
(Exception: Exemption (b)(7)(D) may be applied to actual PD records which contain information from their investigation or intelligence reports.

2) **State and local agencies** (marriage records, court documents, Department of Motor Vehicles, Board of Elections, etc.)

670 3) **Credit Bureau reports**  
(Exception: [REDACTED] which are protected under expressed confidentiality.)

4) **Commercial Institutions** (schools or college registrars, utility companies {telephone, electric, gas companies}, insurance companies, etc.)

If any of the above information indicates that the material may not be released to the public or otherwise used without the production of a subpoena duces tecum, then Exemption (b)(7)(D) should be utilized to protect the identity of the source and, if necessary, the information since this statement is paramount to an expressed assurance of confidentiality.

Exemption (b)(7)(C) should continue to be applied to protect information, the release of which would be an unwarranted invasion of privacy, i.e., the name of the individual who provided the information and information pertaining to third parties.

### Expressed Confidentiality

The Landano ruling did not affect instances where an expressed assurance of confidentiality was granted to the source. The identity of and the information provided by these sources may be protected by the first and second clauses of Exemption (b)(7)(D), respectively. However, the Reno policy should be applied to the source's information and discretionary releases made where there is no "foreseeable harm" to the confidential source. **The following are examples of sources granted an expressed assurance of confidentiality:**

1) **T-symbols and permanent symbol source numbers** - assert exemptions (b)(2) and (b)(7)(D) for human sources. For non-human sources (i.e., techs, mikes, telephones, etc.) assert only exemption (b)(2), unless doing so will identify human sources. (See, Mosaic Theory, infra.)

2) **Paid informants**

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**Exemption (b)(7)(D)**

**3) Potential Security Informant (PSI) and Potential Criminal Informant (PCI)**

**4) Specifically stated "Request Identity," "Protect Identity by Request (PIBR)," "Confidentiality Requested," etc.**

**5) Foreign Agencies/Authorities (Refer to the G-1 Guide)**

**Informant File Numbers**

It is also important to protect the file number of an informant case as well as any other material which would identify the informant. The informant file designations are shown below:

134 - Security Informant  
137 - Criminal Informant  
170 - Extremist Informant  
270 - Cooperative Witness

FOIA exemptions (b)(7)(D) and (b)(2) are appropriate to protect these file numbers.

**Mosaic Theory**

Once it has been established that Exemption (b)(7)(D) is being utilized for informant information, the PLS should be aware of the "mosaic theory," which involves the analysis of apparently innocuous bits of information to identify sensitive sources, methods or investigative direction. The PLS should become familiar with the overall investigation and any related files to be processed. He/she should be aware of the informant information and its reappearance later in the same investigation or any related files abbreviated or written in paraphrased form. If this information is singular in nature or would tend to identify the source, even though the normal identifiers are not indicated (i.e., the source's name, symbol number, etc.), then the information may be exempt pursuant to Exemption (b)(7)(D) under the mosaic theory.

**Foreign Agencies and Authorities**

In many instances, foreign police departments or foreign authorities are classified; however, several are not. The PLS should refer to the G-1 Classification Guide to identify foreign agencies/authorities (listed in alphabetical order by countries) cooperating with the FBI and whether confidentiality has been requested. In those cases where a foreign agency/authority is not classified, it is the responsibility of the PLS to insure the level of protection requested by the

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**Exemption (b)(7)(D)**

foreign agency/authority is honored (i.e., some may request only their identity be protected, while others do not mind that their cooperation is made public and they may or may not request their information be protected. Others may request that neither their cooperation nor their information be made public). If the foreign agency/authority is not listed on the G-1 Guide and there is no indication on the document of whether confidentiality was requested, the PLS should review the material to determine if there was implied confidentiality and process accordingly.

**Police Departments/Sheriff Offices Requesting Confidentiality**

In processing FBI records, the following police departments and sheriff offices have requested confidentiality for their identity and information provided:

- b7D
- 1) [REDACTED]
  - 2) [REDACTED]
  - 3) [REDACTED]

For a further discussion and an in-depth review of exemption (b)(7)(D), please refer to the Freedom of Information Act Guide and Privacy Act Overview publication provided by the Department of Justice.

**F O I P A**  
**M A N U A L**

**MEMO 32**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Exemption (b)(7)(E)  
**Date:** March 31, 1998

With the Freedom of Information Reform Act of 1986, Exemption (b)(7)(E) was strengthened to allow for protection of all law enforcement information which **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.

In applying the first clause of the exemption, a technique or procedure need not be new or even sophisticated to qualify for protection -- however, it should be generally unknown to the public and be of such character that revelation would impair its future effectiveness. On the other hand, a technique or procedure may be protected if it is known to the public, but the circumstances of its usefulness may not be widely known and release of the information would risk circumvention of the law.

The second clause of the exemption protects guidelines (e.g., guidelines for response to terrorist attacks or a final contingency plan in the event of an attack on the U.S.) prepared for law enforcement investigations and prosecutions if release could reasonably be expected to give anyone with that particular knowledge the ability to circumvent the law.

Therefore, the mere fact that a "technique was utilized" in an investigation is insufficient for asserting Exemption (b)(7)(E), even though it falls within the scope of the exemption. A PLS must review each technique or procedure on its own merit and determine if there is any "foreseeable harm" in the disclosure of the information. In other words, could the disclosure of a particular technique, procedure or guideline lessen the effectiveness, assist in circumvention or compromise its integrity? If there is a question as to whether information could be protected by Exemption (b)(7)(E), it should be discussed with the Team Captain or Unit Chief. Also, contacting the Case Agent of the investigation or the substantive Division for assistance is recommended when contemplating whether to protect this type of information.



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**Exemption (b)(7)(E)**

Listed below are some situations where Exemption (b)(7)(E) might apply:

- 1) Location, denomination, and serial numbers of bait money (See Memo 43)
- 2) Location, activation, and type of bank security devices (See Memo 43)
- 3) Location and type of cars used in a surveillance
- 4) Mechanics of surveillance
- 5) Location of and types of aircraft used in a surveillance b2  
b7E
- 6) Model, serial number and type of recording equipment (e. g., [REDACTED] transmitters)  
{Exemption (b)(7)(E) does not provide protection for the fact that a Nagra body recorder was utilized in an investigation.}
- 7) Mechanics of installation of recording equipment
- 8) Mechanics of wire tap monitoring
- 9) Certain polygraph information (See Memo 71)
- 10) Computerized Telephone Number File (CTNF)/Telephone Application (TA)  
(See Memo 82)
- 11) Effectiveness ratings of known techniques (FD-515) (See Memo 44)
- 12) Personality profiles, equivocal death analysis (See Memo 66)
- b2/b7E 13) [REDACTED] (See Memo 55)
- 14) Mail Covers (limited use) (See Memo 64)
- 15) Pretext phone calls

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Exemption (j)(1)  
Date: March 31, 1998

**Discussion of Exemption (j)(1) - CIA Records**

Title 5, United States Code, Section 552a (j)(1) provides that "The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of Sections 553 (b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10) and (11), and (I) if the system of records is maintained by the Central Intelligence Agency."

The Privacy Act contains two general exemptions which permit heads of specified agencies to promulgate regulations exempting certain systems of records from the Privacy Act's access and amendment requirements. The first of these is exemption (j)(1), which pertains exclusively to Central Intelligence Agency (CIA) records, permitting the Director of the CIA to exempt certain records from access under the Privacy Act and the second being Exemption (j)(2).

The Director of Central Intelligence has promulgated regulations<sup>1</sup> which provide, "Pursuant to authority granted in subsection (j) of the Act, the Director of Central Intelligence has determined to exempt from access by individuals under subsection (d) of the Act those portions and only those portions of all systems of records maintained by the CIA that: (1) consist of, pertain to, or otherwise would reveal intelligence sources and methods; and (2) consist of documents or information provided by foreign, Federal or state or other public agencies or authorities."

FOIPA personnel of the FBI will claim exemption (j)(1) only after consultation with, and on behalf of, the CIA. The claim of exemption (j)(1) will be made in conjunction with FOIA exemptions (b)(1) and (b)(3).<sup>2</sup>

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<sup>1</sup>Title 32, Code of Federal Regulations, Section 1901.61(d).

<sup>2</sup> Title 5, United States Code, Section 552a (t)(2).

**F O I P A**  
**M A N U A L**

**MEMO 34**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Field Offices  
**Date:** March 31, 1998

**Contacts with Field Office Personnel**

Effective June 9, 1995, all requests for field office assistance, will be made by Electronic Communication (EC) or by a routing slip. ECs should be used for all requests concerning ELSUR reviews. ECs or routing slips may be utilized for requesting files to be sent to FBIHQ or to return the files to the field office(s).

Any requests for assistance which will require a substantial amount of work to be done by the field office Paralegal Specialist will now be made by EC. All ECs of this nature are to be initially coordinated with the Regional Coordinator in the Field Coordination Team (FCT) prior to transmitting the communication to the field office. Once this has been done, the EC should be directed to the attention of the field office Chief Division Counsel for appropriate handling. Requests for routine minor assistance may be made via routing slips.

Telephone requests are to be kept at a minimum. Prior to making any telephone requests, the HQ PLS is required to contact the proper Regional Coordinator in FCT and discuss the nature and need of the telephone contact or request.

**Procedures for Field Office FOIPA Requests**  
**(Searches and Referrals to FBIHQ)**

Effective April 1997, the following search procedures are to be followed in handling FOIPA requests made to FBI field offices:

- When a FOIPA request is limited or directed to a particular field office, only the indices for that field office will be searched for responsive main files. No processing of auxiliary offices or FBIHQ files will be conducted, unless a requester states he desires a search of the indices for other field offices or FBIHQ; or if he actually directs his correspondence to other field offices and FBIHQ.
- When a field office searches its indices upon receipt of a FOIPA request and determines

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**Field Offices**

that one or more main files exist and the investigation(s) were "reported" to FBIHQ, the field office will follow established procedures in referring those files to FBIHQ for processing. In addition, if cross-references exist, the field office will advise the FBIHQ PLS of this fact, and it will be his or her responsibility to advise the requester in the disclosure letter of the existence and that the requester must specifically request them to be processed.

- When a field office searches its indices and only "unreported" main files and/or "cross-references" exist, the field office PLS will process the responsive file(s) and release the material directly to the requester.

**Field Office Files Transmitted to FBIHQ**  
**(Use of Green File Fronts)**

Since the field offices use the same type of file fronts as FBIHQ, on many occasions they had been confused with FBIHQ files and misplaced into the FBIHQ filing system. Therefore, it was necessary to develop special procedures for field office files being transmitted to FBIHQ so they would be visibly distinguishable from FBIHQ files. To minimize this problem, the field file front remains on the field file, but is covered by a green file front that prevents intermingling of field and FBIHQ files. Furthermore, it allows the field file front to be marked appropriately relative to FOIPA processing. No file number or other markings should be placed on the green file front so that it can be used again.

**F O I P A**  
**M A N U A L**

**MEMO 35**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** File Classification "73"  
**Date:** March 31, 1998

**Application for Pardon After Completion  
of Sentence (APACS) Cases**  
**(File Classification "73")**

A Presidential pardon is a constitutional power of the Executive Branch under Article II, Section 2, and as such is fully discretionary with the President. Pardon applications are frequently referred to the FBI in order to conduct an **Application for Pardon After Completion of Sentence (APACS)** background investigation. Often, the subject of that investigation submits a FOIPA request for this material.

As of June 30, 1996, in conducting an APACS background investigation, Manual of Investigative Operations and Guidelines (MIOG) Part II, Section 17-5.4 and (3)(b) procedures are currently being followed in order to record interview results of persons requesting total confidentiality. These procedures are the same as followed in background investigations conducted in 67, 77, 116, 140, 161, 259 and 260 classifications. That is, all persons interviewed are advised of the appropriate provisions of the Privacy Act and, if requested, their identities and information may be kept confidential.

Therefore, in processing an APACS file of a first party requester, the PLS should consider the file exempt pursuant to (k)(2) of the Privacy Act and provide the requester all information with the exception of that material which would identify a source who furnished information under an expressed promise of confidentiality. For those cases compiled prior to June 30, 1996, an implied promise of confidentiality exists for those individuals interviewed during the course of the background investigation.

Upon completion of processing an APACS, the Pardon Attorney's Office has requested a copy of the FBI disclosure letter and a black out copy of the release made to first party requesters.

**Pardon Applications**

The FBI is authorized to release a copy of the pardon application in its entirety to first party requesters without consulting the Pardon Attorney's Office. However, continue to consult with the office with respect to any intra-departmental memoranda or information in FBI documents which originated with this office.

**F O I P A**  
**M A N U A L**

# MEMO 36

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** File Classification "77"  
**Date:** March 31, 1998

**File Classification "77"**  
**DOJ and Judicial Appointment Files**

The Office of the Deputy Attorney General maintains DOJ and Federal judicial appointment files which include FBI background investigation reports. When DOJ receives a request for one of those files, the request letter will be referred to the FBI for handling. Prior procedures required that the proposed release be reviewed by any Office of Information and Privacy (OIP) attorney upon completion of processing these files. By memorandum dated 4/11/96, Richard L. Huff, Co-Director, OIP, advised that these files may now be released without OIP review.

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: File Classification "92"  
Date: March 31, 1998

**File Classification "92"**  
**Anti-Racketeering Investigative Files**

Anti-Racketeering (AR) investigative files serve as a repository for the collection of criminal intelligence data usually gathered during an organized crime investigation. There is not a substantive criminal violation associated with this type of investigation; when a substantive violation is discovered, a separate case is opened under the appropriate character. AR files may remain open for a lengthy period of time on individuals who are known members or longtime associates of an organized crime family, or may be closed on lesser members or those no longer active. Their activities may still be monitored, nevertheless, through informants or through the investigation of other members of the same LCN family or organized crime group to which the subject belongs.

It is important, therefore, to recognize that when processing a FBIHQ or Field Office "92" file, particularly one which is closed, that it may contain information applicable to another open investigation either on the subject, one or more of his associates, or on the organized crime family to which he belongs. At this time, exemption (b)(7)(A) should be considered to protect this information.

One area often overlooked in these AR files is the intelligence information gathered as a result of surveillance by FBI Agents. Such material will show, for example, the identity of associates, meeting places, methods and frequency of travel. If released, this information could enable the subject or his associates to alter their activities and change their current method of operation, thereby frustrating the ability of the FBI to actively investigate either the subject, his associates, or the organized crime family of which he is a member. To prevent this, such information should be withheld as (b)(7)(A) material as long as it can be established that the subject is a member or a longtime key associate of an organized crime family whose activities are currently under investigation by the FBI.

While most AR files relate to individuals who are members of an organized crime family currently under investigation, some pertain to individuals who are later determined not to be members of the LCN. If the file itself does not indicate the status or affiliation of the subject, you should contact the Organized Crime Section, Criminal Investigative Division, prior to processing to establish if the subject is an LCN member or longtime key associate. You should also contact the appropriate Field Office to ascertain if there are any other pending investigations on the subject and to alert them as to the nature of the FOIPA request.

**F O I P A**  
**M A N U A L**

# MEMO 38

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** File Classification "161"  
**Date:** March 31, 1998

**File Classification "161"**  
**Special Inquiry Investigations**

The 161 classification covers investigations requested by the White House, Congressional Committees and other Government agencies. From 1993 through May 1995, former Special Agent H. Gary Harlow from the A-1 squad at WFO, was assigned to investigate or conduct some aspect of Special Inquiry investigations. In January 1996, Harlow pled guilty to several counts of an indictment in which he was charged with, among other things, falsifying his investigations in certain 161 investigations and was sentenced in U.S. District Court, Eastern District of Virginia, Alexandria, Virginia.

b6 Special Inquiry and General Background Investigations Unit (SIGBIU) advised that all of the applicant type investigations have not been identified wherein former SA Harlow was the investigator. As of December 31, 1996, discussions with SAs Richard Hildreth, Jr., Section Chief, and [REDACTED] Unit Chief, SIGBIU, resulted in the following procedures being implemented when processing a 161 file pursuant to a FOIPA request within the time frame of 1993 through 1995:

1) When any portion of a 161 file has been identified by SIGBIU as having been handled by Harlow, a "Routing Slip" (example attached) should appear as the top document in the file and is to be released to the requester.

b6 2) If there is no indication in the file that SIGBIU has reviewed the file (i.e., there is not "Routing Slip" in the file) and it contains investigative material conducted by former SA Harlow, contact [REDACTED] SIGBIU, Room 4371, Ext. [REDACTED], so that SIGBIU is made aware of that specific investigation.

In all instances, when PLSs are processing 161 investigations which were conducted by former SA Harlow in the above time frame, his name is to be released throughout the file.



"MAINTAIN AS TOP SERIAL IN THE BELOW LISTED 161 CASE FILE"

ROUTING SLIP

April 3, 1996

To: File (161F-HQ-12345)

From: Unit Chief [REDACTED] b6  
Special Inquiry and General Background Investigations Unit (SIGBIU)  
Personnel Division

Subject: NAME  
CLASSIFICATION 161 BACKGROUND INVESTIGATION CONTAINING  
INVESTIGATION ALLEGEDLY CONDUCTED BY FORMER WMFO SPECIAL  
AGENT (SA) H. GARY HARLOW

IN VIEW OF THE INFORMATION SET FORTH BELOW, UNDER NO  
CIRCUMSTANCES IS THERE TO BE ANY FURTHER DISSEMINATION OF ANY  
INFORMATION OR DOCUMENT CONTAINED IN CAPTIONED 161 FILE WITHOUT  
PRIOR APPROVAL OF, AND COORDINATION WITH, THE SIGBIU UNIT CHIEF.

Attached is one xerox copy of those document(s) (if more than one, stapled together and considered as one enclosure) contained in captioned 161 case file reflecting investigation conducted on captioned subject by WMFO, including investigation allegedly conducted by former WMFO SA H. Gary Harlow (hereinafter "Harlow").

This 161 case file is one of many containing investigation allegedly conducted by Harlow during the time he was assigned to the A-1 squad in WMFO. Harlow is currently awaiting sentencing in U.S. District Court, Eastern District of Virginia, Alexandria, Virginia. Harlow previously plead guilty to several counts of an indictment returned in 1/96, in which he was charged with, among other things, falsifying his investigation in certain 161 cases.

Regarding captioned 161 case, it is not known if Harlow falsified any part of his investigation. If Harlow did falsify any part of his investigation, then the FBI's summary memorandum(s) dated 10/15/93, contained in captioned 161 file, as well as the document(s) enclosed herewith, contain inaccurate information. It is noted that the aforementioned summary memorandum(s) were furnished by the SIGBIU to the client entity in response to its request of the FBI to conduct a background investigation on captioned subject.

1 - WMFO (161F-HQ 12345) (Enclosure)  
(Attention: SSA [REDACTED] Squad A-1)

[REDACTED] (2)

MEMO 38 - ATTACHMENT 1

b6

The handling of 161 background investigations containing investigation allegedly conducted by Harlow is being addressed on a case by case basis as follows:

(A) In the event a request is received of the FBI which would involve dissemination of investigation, or documents reporting investigation, allegedly conducted by Harlow and contained in captioned 161 case file, SIGBIU will promptly initiate appropriate steps, with the assistance of WMFO, to determine if Harlow falsified any part his investigation. Based upon those findings, SIGBIU will (1) initiate further steps to amend any summary memoranda to accurately reflect the results of the background investigation and make it suitable for dissemination, if necessary, and (2) will make other appropriate corrections/notations in captioned case file to avoid any dissemination of incorrect information.

(B) If, in the future, the FBI is requested by an outside entity to conduct another background investigation on captioned subject, SIGBIU will take appropriate steps to determine if Harlow falsified any part of his investigation in the prior FBI background investigation, and, if so, redo that part and report the results in the current background investigation.

WMFO IS REQUESTED TO MAINTAIN THIS ROUTING SLIP AND THE ENCLOSURE THERETO AS THE TOP SERIAL(S) IN ITS 161 CASE FILE

F O I P A

M A N U A L

# MEMO 39

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: File Classification "197"  
Date: March 31, 1998

## File Classification "197" Civil Suits and Administrative Claims

Prior to a decision to disclose information from any 197 classification file (or equivalent file reporting civil actions or claims against the Government or individual employee such as 62 or 63 classifications), the PLS should identify through the Automated Case Support system the status of the litigation and to whom the case is assigned within the Office of General Counsel (OGC). Upon obtaining this information, the PLS should consult with the attorney to determine the following: 1) whether there is any privileged material in the file, and; 2) whether affidavits and other similar records were actually filed with the court, thus making them public source material.

Records prepared for litigation involving DOJ/FBI matters may generally be protected from disclosure by Exemption (d)(5) of the Privacy Act and/or FOIA exemption (b)(5), in addition to, any other applicable FOIA exemptions. The basis for claiming (d)(5) of the Privacy Act is that "nothing in this [Privacy Act] shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding." The basis for claiming Exemption (b)(5) is either: (1) the deliberative process privilege, which is to protect decision making processes of government agencies; (2) the attorney work-product privilege, which protects documents prepared by an attorney in contemplation of litigation; or (3) the attorney-client privilege, which protects confidential communications between an attorney and his client regarding a legal matter for which the client has sought professional advice.

In applying these exemptions to 197 files, the PLS must determine what type of request is being made (i.e., first vs. third party) and if the requester is a party to the lawsuit or administrative claim. Records requested by third parties (those individuals which are not a party to the lawsuit) are processed strictly under FOIA. The applicability of Exemption (b)(5) may be considered, however, the PLS must be mindful of Attorney General Janet Reno's "foreseeable harm" standard to establish if the disclosure of the information would harm the basic institutional interests. The information should be disclosed unless the PLS is able to articulate a specific harm after his or her discussion with the OGC attorney.

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**Page 2**

**Classification "197"**

Records processed for first party requesters who are a party to the civil suit or claim (i.e., a plaintiff) must be reviewed pursuant to Exemption (d)(5) of the Privacy Act. It should be noted, however that this provision in certain respects is not as broad as Exemption (b)(5) and does not incorporate certain (b)(5) privileges. It should be kept in mind the application of other PA and FOIA exemptions may be contained within the documents maintained in these files and that information should be processed accordingly.

First party requests for 197 files wherein the requester was represented by a DOJ attorney (i.e., a DOJ attorney represents an Agent who is being sued), are also processed using the (d)(5) exemption, and generally, he or she should have access to the entire file.

It is recommended the PLS refer to the DOJ/OIP FOIA Guide and Privacy Act Overview publication for a detailed and in-depth discussion concerning the application of Exemptions (b)(5)/(d)(5) and the "foreseeable harm" standard.

**F O I P A**  
**M A N U A L**

# MEMO 40

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Filing of FOIPA Material  
**Date:** March 31, 1998

## Preparing Mail for File

Once the LT/PLS has closed a case, wait approximately 60 days prior to preparing or sending the mail to file. This will avoid unnecessary delays in handling appeals or responding to the requester should he/she correspond after the final disclosure letter or the last action taken by the FBI.

The following steps will assist the LT/PLS in preparing and sending the mail to file:

(1) **Date Order**: Mail should be placed in date order before sending it to file. Do not staple communications together. Intra-Bureau forms such as the OPCA-18 form (referral to DCU) should also be treated as separate pieces of correspondence and not stapled to any outgoing or incoming mail. All enclosures indicated on the correspondence should be placed directly behind the piece of mail. Every enclosure should be accounted for and any missing enclosure should be identified and a notation made as to the disposition. Once the separate pieces of correspondence have been arranged in date order, the package should be secured by heavy rubber bands or straps to ensure that it will not detach in the mail during transmittal. **Do not staple the package together or place the entire package on a file back.**

(2) **Enclosure Count**: The number of enclosures designated on the yellow should correspond with the number of enclosures being sent to file with the exception of routine enclosures such as the "Explanation of Exemptions" sheet, a copy of the requester's letter, "Fee Waiver Regulations", "Attorney General Order 556-73" (instructions for requesting arrest records), etc. It might be helpful to note on the yellow the identity of each enclosure if there is any doubt as to the number of enclosures being transmitted. Place a **file cover sheet** on top of each enclosure in the processed package (See Attachment for an example). When an enclosure has been detached, (such as a field office file from an EC) the LT/PLS should make a notation on the EC that "files detached in Room \_\_\_\_" and initial the notation. A blank sheet of paper should be placed on the bottom of all the enclosures so that during routine handling and filing of the mail if the bottom page becomes torn it will be the blank sheet of paper torn and not the last page of your processing package or an original communication.

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**Filing of FOIPA Material**

(3) **Search Slips**: The search slip(s) should be attached to one of the following: a) the yellow no record letter, b) the processed package (place between the file cover sheet and the inventory sheet of the top enclosure in the processed package), or c) stapled to the front of the initial FOIPA request.

(4) **Duplicate Copies**: Do not send the following documents to file: tickler copies, extra copies, or duplicate copies which have been made of any correspondence. Carbon copies of original correspondence directed to the FBI may be detached and destroyed, however, a notation should be made on the copy count that the additional copies have been detached. Since each piece of mail is being recorded/serialized, this will ensure that only one piece of correspondence is placed on record.

(5) **Mail not Addressed to the FBI**: Place the notation "FBI" on the lower left-hand corner of correspondence not addressed to the FBI (e.g., copies of letters sent by DOJ to the requester acknowledging receipt of an administrative appeal or advising of the final determination of the appeal). This designates it as an official FBI copy.

(6) **Receipts**: Copies of receipts which FOIPA employees sign acknowledging receipt of mail from a requester, DOJ, or another Government agency should not be sent to file. The fact that the mail is in file is sufficient acknowledgment of our possession. The only receipts that are necessary to file are those which we might ask a requester to sign acknowledging his/her receipt of certain material. Therefore, all other receipts will be kept in IPU/RTSS.

(7) **Abandoned Cases**: Form OPCA-25 should be used to transmit documents to file in cases where the material has been processed but is not sent to the requester (i.e., the material was processed and the money letter sent to the requester, but no reply was received, or the material was processed and not sent because the request was withdrawn).

(8) **Mail Returned by the Postal Service**: When material is sent to the requester and then returned by the Postal Service for insufficient address, addressee unknown, etc., the LT/PLS will write the complete file number and, if known, the serial number of the outgoing yellow at the bottom of the original letter and send the letter **with the envelope on top** to the 190 Processing Subunit to be filed behind the original yellow. There is no need to send the enclosure (the black-out copy of the release material) to the 190-file, therefore, the LT/PLS should indicate on the original letter that the enclosure has been detached and destroyed.

(9) **Copies of Original Mail**: If the original piece of mail is not available (misplaced or inadvertently destroyed) and the LT/PLS maintained a copy of the original, then the copy of this mail may be sent to file with the notation "Treat as Original" in red pencil on the bottom left side of the copy. If the original mail is located, it will be inserted in file in place of the copy.

**FOIPA Numbered Memo 40**

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**Filing of FOIPA Material**

(10) **Placing the 190 number on the documents:** The LT/PLS should write the 190 file number in red on the lower right corner of every document. In all instances, when sending the mail to be placed on record and filed by the 190 Processing Subunit, the salmon tag (O-100c) should be completed and attached to the upper right-hand corner of the most current piece of mail. If a Universal Case File Number for the 190-file (the case number consists of seven or more digits) has been assigned to the FOIPA case, the 190 number should be documented and placed on the O-100c by checking the block adjacent to "Place in Existing \_\_\_\_". If a pre-UCFN 190-file (six digits or less) is still being used, a new UCFN 190-file number will be assigned to the case when it is sent to the 190 Processing Subunit for placing the mail on record. In this situation, the O-100c should be completed by checking the blocks adjacent to "New 190" and "Place in Existing \_\_\_\_", entering the pre-UCFN on this line. At the time the 190 Processing Subunit places the mail on record, a new UCFN 190 number will be assigned to the case. Keep in mind that these FOIPA requesters will now have both a pre-UCFN and a regular UCFN 190 file.

(11) **Indexing:** Underline the subject in green pencil on the most recent piece of mail when the package has been assembled. If the most recent piece of correspondence is something other than the disclosure letter, such as a DOJ/OIP letter affirming an appeal or an electronic communication returning field office files, the PLS should underline the subject of the request in green pencil on the disclosure letter. This allows IPU to easily determine the subject of the request for indexing purposes.

(12) **Enclosure Behind File (EBF)/ Bulky:** When an enclosure contains 50 pages or less, the material will be placed in the main 190 file behind the original mail. If the enclosure is approximately 51 to 99 pages, the material will be placed on record as an EBF, or when over 100 pages, it will be prepared as a Bulky. This step of preparing an EBF and Bulky will be done by the 190 Processing Subunit.

**Sending Processed Personnel Material to File**

When preparing processed personnel material for file, the above procedures should be followed except the 62 {Administrative Inquiry (AI)}, 67, 263, or 280 file number should be documented on the bottom of each document instead of a 190 file number. Each piece of mail (all incoming, outgoing and inter/intra office communications) should also have "FOIPA" or "OPCA" written or stamped on the bottom right corner and the PLS should initial through the FOIPA or OPCA.

When a Privacy Act request involves processing of material from a 62 (AI), 67, 263 or 280 file classification, only those pages containing deletions should be forwarded to the Personnel Records Section, Room 11741, for filing into the respective 62 (AI), 67, 263 or 280 file along with the original FD-488 and/or OPCA-16 form (Disclosure letter). Please note those

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### **Filing of FOIPA Material**

documents from the 67 Sub M and/or the Sub S which contain redactions are to be filed in the 67 Sub M and/or Sub S, along with a copy of the FD-488 or the OPCA-16 form, and not in the main 67 file.

If processing also involves additional file classifications other than personnel type records, a 190 file should be opened and the processed documents from the other file classification(s) should be filed in the 190 file along with a copy of the FD-488 and/or OPCA-16 form. The 190 file number should be recorded in the "Miscellaneous" block on the computer sheet.

**Note:** All personnel type records must be placed in and transmitted by a messenger envelope.

### **Filing of Previously Released FOIPA Material**

When a request is made for the same information which has been previously released, it will not be necessary to have the released documents filed again. Instead, place the notation "previously processed material" in the lower left margin next to the referral blocks on the disclosure letter. A notation of the prior release should be noted on the yellow outgoing communication (disclosure letter) by indicating the 190-file number where the preprocessed material is located and the serial number (Bulky and/or EBF). The note should also include a list of the preprocessed file numbers and/or documents as well as the number of pages being released to the subsequent FOIPA requester. Further, the PLS should forward a copy of the current FOIPA release letter to the preprocessed 190-file (where the documents were originally released) in order to keep the original 190-file from being destroyed.

### **190 Classification Control Files**

Below is a list of FOIPA control files:

190	Main File for each requester
190-0	General Type Mail, Administrative Closings
190-00	FOIPA Policy and Federal Legislation
190-1	FOIPA Regional Field Division Conferences
*190-2	FOIPA No Record Responses
190-3	FOIA Impact on Law Enforcement Activities



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**Filing of FOIPA Material**

190-4	FOIPA Reading Room Requests and Releases
190-6	FOIA Annual Report to Congress
190-710	FOIPA - Instruction to Field Offices
190-711	State Privacy Legislation
190-56511	FOIPA Training FBIHQ
190-HQ-1046286	FOIPA Third Party Denials
190-HQ-1056344	FOIPA Referral Policy Matters
197-122	FOIPA Litigation Cases
242-42	FOIPA Automation

**\*190-2 has been changed to 190-HQ-1189353**

**F O I P A**  
**M A N U A L**

# MEMO 41

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Foreign Intelligence Surveillance Court (FISC)  
**Date:** March 31, 1998

## Foreign Intelligence Surveillance Court (FISC)

The FISC was established pursuant to the Foreign Intelligence Surveillance Act (FISA) of 1978 and has sole responsibility for approving requests for electronic surveillance coverage in FCI and international terrorist cases. Unlike other federal courts, the records of the FISC are not public in nature and must be maintained under secure conditions. Care must be exercised in order to avoid releasing under the FOIA any FISC material where disclosure would violate the FISA.

The investigative file of an individual, group, entity, or organization which was the target of an FISC approved electronic surveillance will normally contain the following documents:

- (1) Application to the FISC for an order approving the electronic surveillance.
- (2) Minimization procedures adopted by the Attorney General which govern the FBI's acquisition, retention, and dissemination of information obtained through the electronic surveillance ordered by the court.
- (3) Certification attesting to certain facts concerning the electronic surveillance (i.e., purpose of the surveillance, type of foreign intelligence information sought, etc.). It can only be signed by the Director of the FBI or certain other high-level government officials designated by the President.
- (4) Primary order authorizing the FBI to conduct electronic surveillance. This order also makes reference to the minimization procedures by directing that they be followed.
- (5) Secondary order directing a communications carrier to render operational assistance to the FBI in connection with the electronic surveillance.

The application and minimization procedures are classified by the Deputy Counsel for Intelligence Operations, Office of Intelligence Policy and Review (OIPR), Department of Justice (DOJ). The certification is classified by the FBI Director or other certifying official and both the primary and secondary orders receive derivative classification by the FISC clerk of court based on the application.

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**Foreign Intelligence Surveillance Court (FISC)**

Since the minimization procedures originate from DOJ and are classified by OIPR, that portion must be referred to OIPR for a decision regarding access under the FOIA. [REDACTED]

b2 [REDACTED] Established procedures should then be followed as outlined in the memorandum pertaining to Exclusions.

b2 Prior to processing FISC records or notifying the requester that FISC records were referred to DOJ for review, the PLS is to consult with the National Security Division (Room [REDACTED], Ext. [REDACTED] as well as DOJ, OIPR.

**F O I P A**  
**M A N U A L**

**MEMO 42**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** **FD-376 Dissemination Letter to Secret Service**  
**Date:** March 31, 1998

**FD-376 Dissemination Letter to Secret Service**

Pursuant to the letter from William J. Bacherman, ATSAIC, Freedom of Information and Privacy Acts Officer, U.S. Secret Service, to Mr. Thomas Bresson, FBI, dated 12/1/80, the practice of consulting with the U.S. Secret Service prior to the release of each FD-376 was discontinued. Experience indicated that there were very few situations where the U.S. Secret Service objected to the release of an FD-376 pursuant to exemptions (b)(5) and (b)(7)(E). Likewise, Mr. Bacherman believed that their objections would most likely be overruled on appeal. **Therefore, the PLS may process and release the FD-376 form, however, other applicable FOIA exemptions such as privacy interests may apply. (See Attachment)**



U.S. Department of Justice  
Federal Bureau of Investigation

Washington, D.C. 20535

Director  
United States Secret Service  
Department of the Treasury  
Washington, D. C. 20223

RE:

The information furnished herewith concerns an individual or organization believed to be covered by the agreement between the FBI and Secret Service concerning protective responsibilities, and to fall within the category or categories checked.

1. ☐ Threats or actions against persons protected by Secret Service.
2. ☐ Attempts or threats to redress grievances.
3. ☐ Threatening or abusive statement about U.S. or foreign official.
4. ☐ Participation in civil disturbances, anti-U.S. demonstrations or hostile incidents against foreign diplomatic establishments.
5. ☐ Illegal bombing, bomb-making or other terrorist activity.
6. ☐ Defector from U.S. or indicates desire to defect.
7. ☐ Potentially dangerous because of background, emotional instability or activity in groups engaged in activities inimical to U.S.

Photograph ☐ has been furnished ☐ enclosed ☐ is not available.

Director  
Federal Bureau of Investigation

1 - Special Agent in Charge (Enclosure(s))  
U.S. Secret Service

Enclosure(s)

MEMO 42 - ATTACHMENT 1

**F O I P A**  
**M A N U A L**

# MEMO 43

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** FD-430 Bank Robbery Summary Report  
**Date:** March 31, 1998

When processing the FD-430, copies attached, the following procedures should be utilized:

All of the boxes for the answers in the "Security Devices" portion of the FD-430 should be redacted when any of the boxes are checked pursuant to Exemption (b)(7)(E). (The response boxes cannot be selectively withheld since that would reveal which devices were in use at the time of the crime, thus rendering the bank vulnerable to future robbery attempts.) The names of the devices should not be redacted. If none of the boxes are checked, this portion of the form may be released entirely.

In the "Modus Operandi" portion of the form, all of the information should be redacted with the exception of the checked boxes with their corresponding techniques in first party requests pursuant to Exemption (b)(7)(E). (Since the requester is the perpetrator of the crime, he already knows the modus operandi which was utilized.) In third party requests, this entire portion of the form should be redacted. The concern in both cases is that a list of robbery techniques may suggest to the requester a technique to be used in a future robbery.

The older FD-430 forms include a statement in the "Solution" portion of the form indicating whether informant information contributed to the solution of the crime. This statement has been challenged under the Landano decision, and the statement itself can be released, however the boxes should be redacted in all cases under (b)(7)(D).

At times there may be a letterhead memorandum (LHM) attached as an enclosure to the FD-430 or other documents within the file which may indicate the denomination and serial numbers of the bait money taken during the robbery. If the PLS is able to determine from a review of the file that all of the bait money was recovered, there is no harm in the release of the denomination and the serial numbers. If only partially recovered, not recovered, or if the PLS is unable to determine this information from the file, excise only the denomination and serial numbers of the bait money pursuant to Exemption (b)(7)(E). Exemption (b)(7)(E) may also be applied to the specific location of the bait money in the teller's drawer. **Do not withhold the fact that bait money was taken.**

**FOIPA Numbered Memo 43**

**Page 2**

**FD-340 Summary Bank Robbery Reports**

Many banks utilize what is known as "dye packs." This exploding device, when detonated, releases a red dye on its surroundings. The denomination and serial numbers of the money in the dye pack are recorded by the bank in the same manner as bait money. The denomination and serial numbers should be redacted using the same criteria applied to the bait money mentioned above.

Exemption (b)(7)(E) should be cited for any mention or details of the construction of the dye pack and Exemption (b)(4) for the specific chemical makeup of the dye.

## MEMO 43 - ATTACHMENT 1 (FRONT)

Date:

Field Office Case:

Subject:

## TYPE:

- ☐ Robbery  
☐ Burglary  
☐ Larceny  
☐ Extortion  
☐ Hobbs Act - Armored Carrier

## ENTRY (check one):

- ☐ New Case  
☐ Change or addition - complete applicable categories only  
☐ Deletion - remove entry, no violation

Time of offense \_\_\_\_\_ ☐ am ☐ pm  
 Demand Note Available ☐ Yes ☐ No  
 Surveillance Photos Available ☐ Yes ☐ No  
 Quality of Photos ☐ (P) Poor ☐ (F) Fair ☐ (G) Good  
 Is there any Noteworthy Text for this case ☐ Yes ☐ No  
 County \_\_\_\_\_

Initial submission must be uploaded within 10 calendar days of the offense.

## INSTITUTION TYPE:

- ☐ (A) Armored Carrier  
☐ (B) Commercial Bank  
☐ (C) Credit Union  
☐ (M) Mutual Savings Bank  
☐ (S) Savings and Loan

## INSTITUTION/COMMUNITY CHARACTERISTICS: (Check one of each group)

- Facility Type: ☐ (B) Branch Office ☐ (M) Main Office ☐ (O) Other ☐ (R) Remote Facility  
 Facility Location: ☐ (C) Commercial District ☐ (L) Rural ☐ (R) Residential ☐ (S) Shopping Center  
 Community Type: ☐ (C) Small City or Town ☐ (M) Metropolitan ☐ (R) Rural ☐ (S) Suburban

## INSTITUTION AREA INVOLVED:

- ☐ (A) Teller Counter ☐ (E) Drive-in/Walk-up ☐ (I) Courier  
☐ (B) Vault/Safe ☐ (F) Night Depository ☐ (O) Other  
☐ (C) Safe Deposit Area ☐ (G) Armored Vehicle  
☐ (D) Office Area ☐ (H) Automatic Teller Machine

## SECURITY DEVICES:

- Alarm System ☐ Yes ☐ No ☐ Activated ☐ Yes ☐ No ☐ Functioned ☐ Yes ☐ No  
 Surveillance Camera ☐ Yes ☐ No ☐ Activated ☐ Yes ☐ No ☐ Functioned ☐ Yes ☐ No  
 Bait money maintained ☐ Yes ☐ No ☐ Taken ☐ Yes ☐ No ☐ Bait Criteria met ☐ Yes ☐ No  
 Guards(s) ☐ Yes ☐ No ☐ On Duty ☐ Yes ☐ No ☐ Armed ☐ Yes ☐ No  
 Currency dye/gas pack ☐ Yes ☐ No ☐ Taken ☐ Yes ☐ No ☐ Functioned ☐ Yes ☐ No ☐ (U) Unknown  
 Electronic Tracking Devices ☐ Yes ☐ No ☐ Activated ☐ Yes ☐ No ☐ Functioned ☐ Yes ☐ No  
 Bullet resistant enclosure ☐ Yes ☐ No

SUBJECTS: Number known involved \_\_\_\_\_ or ☐ (U) Unknown

Race/sex-specify number each:

White Male \_\_\_\_\_ White Female \_\_\_\_\_  
 Black Male \_\_\_\_\_ Black Female \_\_\_\_\_  
 Hispanic Male \_\_\_\_\_ Hispanic Female \_\_\_\_\_  
 Other Male \_\_\_\_\_ Other Female \_\_\_\_\_  
 Unknown Male \_\_\_\_\_ Unknown Female \_\_\_\_\_  
 Unknown Race/Sex \_\_\_\_\_

VIOLENCE: ☐ Yes ☐ No

- ☐ Shooting ☐ Physical Assault  
☐ Explosion ☐ Hostage Taken

Injury ☐ Yes ☐ No Death ☐ Yes ☐ No Hostage ☐ Yes ☐ No

Specific number of each:

LOOT TAKEN: ☐ Yes ☐ No

- ☐ Cash \$ \_\_\_\_\_ ☐ (U) Unknown  
☐ Security - Face Value \$ \_\_\_\_\_ ☐ (U) Unknown  
☐ Checks \$ \_\_\_\_\_ ☐ (U) Unknown  
☐ Traveler's Checks \$ \_\_\_\_\_ ☐ (U) Unknown  
☐ Food Stamps \$ \_\_\_\_\_ ☐ (U) Unknown  
☐ Other Property \$ \_\_\_\_\_ ☐ (U) Unknown

LOOT RECOVERED: ☐ Yes ☐ No

- ☐ Cash \$ \_\_\_\_\_  
☐ Security - Face Value \$ \_\_\_\_\_  
☐ Checks \$ \_\_\_\_\_  
☐ Traveler's Checks \$ \_\_\_\_\_  
☐ Food Stamps \$ \_\_\_\_\_  
☐ Other Property \$ \_\_\_\_\_

	Injury	Death	Hostage
Customer			
Employee			
Employee Family			
Subject			
Law Officer			
Guard			
Other			



MEMO 43 - ATTACHMENT 1 (BACK)

DDUS OPERANDI:

- |  |  |  |
|--|--|--|
| <input type="checkbox"/> Oral demand<br><input type="checkbox"/> Demand Note<br><input type="checkbox"/> No weapon threatened<br><input type="checkbox"/> Weapon threatened<br><input type="checkbox"/> Orally<br><input type="checkbox"/> Written<br><input type="checkbox"/> Gestured<br><input type="checkbox"/> Firearm used<br><input type="checkbox"/> Hand gun<br><input type="checkbox"/> Shoulder weapon<br><input type="checkbox"/> Sawed-off shotgun<br><input type="checkbox"/> Explosive device or hoax bomb<br><input type="checkbox"/> Knife Used/Threatened<br><input type="checkbox"/> Hypodermic Needle Used/Threatened<br><input type="checkbox"/> Other weapon used<br><input type="checkbox"/> Counter vaulted<br><input type="checkbox"/> Occupants ordered to floor<br><input type="checkbox"/> Bank business pretense<br><input type="checkbox"/> Facial disguise<br>(wig, mustache, beard, etc.)<br><input type="checkbox"/> Ski masks/theatrical masks<br><input type="checkbox"/> Head Covering/Helmet Used<br><input type="checkbox"/> Gloves/hand covering worn | <input type="checkbox"/> Law enforcement impersonation<br><input type="checkbox"/> Walkie-talkies used<br><input type="checkbox"/> Handcuffs/other restraints used<br><input type="checkbox"/> Employees confronted before work<br><input type="checkbox"/> Employee(s)/victim(s) put in vault/back room<br><input type="checkbox"/> Subject(s) took employee's vehicle<br><input type="checkbox"/> Till theft/grab and run<br><input type="checkbox"/> Foot getaway<br><input type="checkbox"/> Vehicle getaway<br><input type="checkbox"/> Auto <input type="checkbox"/> Truck <input type="checkbox"/> Other<br><input type="checkbox"/> Motorcycle <input type="checkbox"/> Aircraft <input type="checkbox"/> Bicycle<br><input type="checkbox"/> Switch vehicle(s) used<br><input type="checkbox"/> Police diversion<br><input type="checkbox"/> Alarm compromised<br><input type="checkbox"/> Vault/Safe Burglary/Larceny<br><input type="checkbox"/> Rip/peel<br><input type="checkbox"/> Punch<br><input type="checkbox"/> Torch/thermal bar<br><input type="checkbox"/> Explosive<br><input type="checkbox"/> Drill<br><input type="checkbox"/> Hydraulic equipment/tools | <input type="checkbox"/> Night Depository Burglary/Larceny<br><input type="checkbox"/> Forcible entry<br><input type="checkbox"/> Depository trap/basket<br><input type="checkbox"/> Drill<br><input type="checkbox"/> Explosives<br><input type="checkbox"/> Glue/Adhesive<br><input type="checkbox"/> Automatic Teller Machine Attack<br><input type="checkbox"/> Extortionate Demand<br><input type="checkbox"/> Phone call<br><input type="checkbox"/> Written<br><input type="checkbox"/> Mailed to victim<br><input type="checkbox"/> Left in Night Depository<br><input type="checkbox"/> Other delivery<br><input type="checkbox"/> Bomb threat<br><input type="checkbox"/> Hostage claimed<br><input type="checkbox"/> Real<br><input type="checkbox"/> Hoax<br><input type="checkbox"/> Residence invasion<br><input type="checkbox"/> Forcible<br><input type="checkbox"/> Pretense<br><input type="checkbox"/> Other M.O.<br>(Describe in narrative) |
|--|--|--|

Demand Note Text (Is Demand Note Text Exact or Paraphrased: ☐ Exact ☐ Paraphrased)

Significant Information

SOLUTION: Complete only upon identification of all subjects. Complete justification for solution credit must be set forth in accompanying narrative pages.

Solution communication date: \_\_\_\_\_ (mm/dd/yyyy)

Solution by: ☐ (F) FBI ☐ (J) Joint Police/FBI ☐ (P) Police

Predominate solution factor: ☐ (D) Defensive action by employee, guard, etc. ☐ (E) Extended investigation ☐ (L) Law enforcement response

Elapsed time-violation to solution: ☐ (A) Response ☐ (B) Same Day ☐ (C) 1-5 Days ☐ (D) 6-30 days ☐ (E) 1-3 months ☐ (F) 3-6 months  
☐ (G) 6-12 months ☐ (H) 1 year or longer

Total number of subjects: \_\_\_\_\_

Interstate aspect: ☐ Yes ☐ No ☐ (U) Unknown Multiple BR, BB, BL or BE activity ☐ Yes ☐ No

Subject(s) previously convicted (Federal or State) for BR, BB, BL, or BE: ☐ Yes ☐ No Number \_\_\_\_\_

Subject(s) on parole/probation (Federal or State) at the time of offense: ☐ Yes ☐ No Number \_\_\_\_\_

Subject(s) in escape status: ☐ Yes ☐ No Number \_\_\_\_\_

Drug user(s) involved: ☐ Yes ☐ No ☐ (U) Unknown Number \_\_\_\_\_

NABRA cancellation: ☐ Yes ☐ No (Attach administrative comments)

## Federal Bureau of Investigation

AIRTEL

Date: 5/18/88

Director, FBI

From: SAC, CHICAGO

(P)

Subject: See attached for Title.

Attention: CRIMINAL INVESTIGATIVE DIVISION

## TYPE:

☒ Robbery  
☐ Burglary  
☐ Larceny  
☐ Extortion  
☐ Hobbs Act - Armored Carrier  
 Subclass: ☒ 91A ☐ 91B ☐ 91C ☐ 91F ☐ 192C

## ENTRY (check one):

☒ New case  
☐ Change or addition - complete applicable categories only  
☐ Deletion - remove entry, no violation

Offense location: HQ/RA code: 3150 (see codes listed on back)

Initial submission must be made within 14 calendar days of the offense.

## INSTITUTION TYPE:

☐ Commercial Bank  
☐ Mutual Savings Bank  
☒ Savings and Loan  
☐ Credit Union  
☐ Armored Carrier Co.

## INSTITUTION/COMMUNITY CHARACTERISTICS: Check one of each group

Facility Type: ☐ Main Office ☒ Branch Office ☐ Remote Facility ☐ Other  
 Facility Location: ☒ Commercial District ☐ Shopping Center ☐ Residential ☐ Rural  
 Community Type: ☒ Metropolitan ☐ Suburban ☐ Small City or Town ☐ Rural

## INSTITUTION AREA INVOLVED:

☒ Teller Counter ☐ Drive-in/Walk-up ☐ Courier  
☐ Vault/Safe ☐ Night Depository ☐ Other  
☐ Safe Deposit Area ☐ Armored Vehicle  
☐ Office Area ☐ Automatic Teller Machine

## OCCURRENCE - Indicate both Day and Time:

Date: ☐ Monday ☐ Tuesday ☐ Wednesday ☐ Thursday  
☒ Friday ☐ Saturday ☐ Sunday ☐ Unknown  
 Time: ☐ 6-9am ☒ 9-11am ☐ 11am-1pm ☐ Unknown  
☐ 1-3pm ☐ 3-6pm ☐ 6pm-6am

## SECURITY DEVICES:

Alarm System ☒ Yes ☐ No ☐ Activated ☒ Yes ☐ No  
 Surveillance camera ☒ Yes ☐ No ☐ Activated ☒ Yes ☐ No  
 Bait money maintained ☒ Yes ☐ No ☐ Taken ☒ Yes ☐ No  
 Guard(s) ☒ Yes ☐ No ☐ On duty ☒ Yes ☐ No  
 Currency dya/gas pack ☐ Yes ☒ No ☐ Taken ☐ Yes ☐ No  
 Fire resistant enclosure ☐ Yes ☒ No

Functioned ☒ Yes ☐ No  
 Functioned ☒ Yes ☐ No  
 Bait criteria met ☒ Yes ☐ No  
 Armed ☒ Yes ☐ No  
 Functioned ☐ Yes ☐ No ☐ Unknown

JECTS: Number known involved 4 or ☐ Unknown

a./sex - specify number each:

White Male 4 White Female \_\_\_\_\_  
 Black Male \_\_\_\_\_ Black Female \_\_\_\_\_  
 Hispanic Male \_\_\_\_\_ Hispanic Female \_\_\_\_\_  
 Other Male \_\_\_\_\_ Other Female \_\_\_\_\_  
 Unknown Male \_\_\_\_\_ Unknown Female \_\_\_\_\_

LOOT TAKEN: ☒ Yes ☐ No

☒ Cash \$ 41,456.00 ☐ Unknown  
☐ Securities - Face value \$ \_\_\_\_\_ ☐ Unknown  
☐ Other property \$ \_\_\_\_\_ ☐ Unknown

## LOOT RECOVERED:

☒ Cash \$ 1,635.00  
☐ Securities - Face value \$ \_\_\_\_\_  
☐ Other property \$ \_\_\_\_\_

VIOLENCE: ☒ Yes ☐ No

☒ Shooting ☐ Physical Assault  
☐ Explosion ☐ Hostage Taken

Specify number each:

☐ Injury ☐ Death ☐ Hostage  
 Customer \_\_\_\_\_  
 Employee \_\_\_\_\_  
 Employee family \_\_\_\_\_  
 Subject \_\_\_\_\_  
 Law Officer \_\_\_\_\_  
 Guard \_\_\_\_\_  
 Other \_\_\_\_\_

## MODUS OPERANDI:

☐ Oral demand/no weapon threatened ☒ Switch vehicle(s) used  
☐ Weapon threatened ☐ Police diversion  
☐ Orally ☐ Alarm compromised  
☐ Written ☐ Vault/Safe Burglary/Larceny  
☐ Gestured ☐ Rip/peel  
☐ Robbery note ☐ Punch  
☒ Firearm used ☐ Torch/thermal bar  
☒ Hand gun ☐ Explosive  
☒ Shoulder weapon ☐ Drill  
☐ Sawed-off shotgun ☐ Hydraulic equipment/Tools  
☐ Explosive device or hoax bomb ☐ Night Depository Burglary/Larceny  
☐ Other weapon used ☐ Forcible entry  
☒ Counter vaulted ☐ Depository trap/basket  
☒ Occupants ordered to floor ☐ Drill  
☐ Bank business pretense ☐ Explosives  
☒ Facial disguise ☐ Automatic Teller Machine Assault  
 (wig, mustache, beard, etc.) ☐ Extortionate Demand  
☐ Ski masks/theatrical masks ☐ Phone call  
☒ Gloves/hand covering worn ☐ Written  
☐ Law enforcement impersonation ☐ Mailed to victim  
☐ Walking ☐ Left in Night Depository  
☐ Handcuffs/other restraints used ☐ Other delivery  
☐ Employees confronted before work ☐ Bomb threat  
☐ Employee(s)/victim(s) in vault/back room ☐ Hoax  
☐ Subject(s) took employee's vehicle ☐ Residence invasion  
☐ Till theft/grab and run ☐ Forcible  
☐ Foot getaway ☐ Pretense  
☒ Vehicle getaway ☐ Other M.O.  
☐ Auto ☐ Truck ☐ Other ☐ Motorcycle ☐ Aircraft ☐ Bicycle  
 (Describe in narrative)

SOLUTION: Complete only upon identification of all subjects. Complete justification for solution credit must be set forth in accompanying narrative pages.

Solution by: ☐ FBI ☐ Police ☒ Joint FBI/Police Total number of subjects 4  
 Predominate solution factor: ☒ Law enforcement response ☐ Extended investigation ☐ Defensive action by employee, guard, etc.  
 Elapsed time-violation to solution: ☐ Response ☒ Same day ☐ 1-5 days ☐ 6-30 days ☐ 1-3 mos ☐ 3-6 mos ☐ 6-12 mos ☐ over 1 yr  
 Interstate aspect: ☐ Yes ☒ No ☐ Unknown Multiple BR, BB, BL, or BE activity: ☐ Yes ☐ No  
 Subject(s) previously convicted (Federal or State) for BR, BB, BL, or BE: ☒ Yes ☐ No Number 2  
 Subject(s) on parole/probation (Federal or State) at the time of offense: ☐ Yes ☒ No Number \_\_\_\_\_  
 Subject(s) in escape status: ☐ Yes ☒ No Number \_\_\_\_\_  
 Subject(s) involved: ☐ Yes ☐ No ☒ Unknown Number \_\_\_\_\_  
 JABRA cancellation: ☐ Yes ☒ No (Attach administrative comments)

2 - Bureau  
☐ Copy of demand note enclosed.  
☐ Surveillance/arrest photos enclosed.  
 1 - Cincinnati  
 1 - Cleveland  
 1 - Detroit  
 1 - Indianapolis  
 1 - Milwaukee  
 1 - Minneapolis  
 1 - Omaha  
 1 - Louisville  
 1 - Springfield  
 1 - St. Louis  
 7 - Chicago LJJ:mam  
 (19)



MEMO 43 - ATTACHMENT 2b  
(THIRD PARTY REQUEST)  
Federal Bureau of Investigation

AIRTE

Date: 5/18/88

Director, FBI

From: SAC, CHICAGO

(P)

Subject: See attached for Title.

Attention: CRIMINAL INVESTIGATIVE DIVISION

## TYPE:

- ☒ Robbery  
☐ Burglary  
☐ Larceny  
☐ Extortion  
☐ Hobbs Act - Armored Carrier  
 Subclass: ☒ 91A ☐ 91B ☐ 91C ☐ 91F ☐ 192C

## ENTRY (check one):

- ☒ New case  
☐ Change or addition - complete applicable categories only  
☐ Deletion - remove entry, no violation

Offense location: HQ/RA code: 3150 (see codes listed on back)

Initial submission must be made within 14 calendar days of the offense.

## INSTITUTION TYPE:

- ☐ Commercial Bank  
☐ Mutual Savings Bank  
☒ Savings and Loan  
☐ Credit Union  
☐ Armored Carrier Co.

## INSTITUTION AREA INVOLVED:

- ☒ Teller Counter ☐ Drive-in/Walk-up ☐ Courier  
☐ Vault/Safe ☐ Night Depository ☐ Other  
☐ Safe Deposit Area ☐ Armored Vehicle  
☐ Office Area ☐ Automatic Teller Machine

## SECURITY DEVICES:

- Alarm System ☐ Yes ☐ No ☐ Activated ☐ Yes ☐ No  
 Surveillance camera ☐ Yes ☐ No ☐ Activated ☐ Yes ☐ No  
 Bait money maintained ☐ Yes ☐ No ☐ Taken ☐ Yes ☐ No  
 Guard(s) ☐ Yes ☐ No ☐ On duty ☐ Yes ☐ No  
 Currency dye/gas pack ☐ Yes ☐ No ☐ Taken ☐ Yes ☐ No  
 Bullet resistant enclosure ☐ Yes ☐ No

## INSTITUTION/COMMUNITY CHARACTERISTICS: Check one of each group

- Facility Type: ☐ Main Office ☒ Branch Office ☐ Remote Facility ☐ Other  
 Facility Location: ☒ Commercial District ☐ Shopping Center ☐ Residential ☐ Rural  
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 Time: ☐ 6-9am ☒ 9-11am ☐ 11am-1pm ☐ Unknown  
☐ 1-3pm ☐ 3-6pm ☐ 6pm-6am

- Functioned ☐ Yes ☐ No  
 Functioned ☐ Yes ☐ No  
 Bait criteria met ☐ Yes ☐ No  
 Armed ☐ Yes ☐ No  
 Functioned ☐ Yes ☐ No ☐ Unknown

## MODUS OPERANDI:

VICTIMS: Number known involved 4 or ☐ Unknown

Race/sex - specify number each:

White Male 4 White Female  
 Black Male Black Female  
 Hispanic Male Hispanic Female  
 Other Male Other Female  
 Unknown Male Unknown Female

LOOT TAKEN: ☒ Yes ☐ No

- ☒ Cash \$ 41,456.00 ☐ Unknown  
☐ Securities - Face value \$ ☐ Unknown  
☐ Other property \$ ☐ Unknown

## LOOT RECOVERED:

- ☒ Cash \$ 1,635.00  
☐ Securities - Face value \$  
☐ Other property \$

VIOLENCE: ☒ Yes ☐ No

- ☒ Shooting ☐ Physical Assault  
☐ Explosion ☐ Hostage Taken

Specify number each:

☐ Injury ☐ Death ☐ Hostage  
 Customer \_\_\_\_\_  
 Employee \_\_\_\_\_  
 Employee family \_\_\_\_\_  
 Subject \_\_\_\_\_  
 Law Officer \_\_\_\_\_  
 Guard \_\_\_\_\_  
 Other \_\_\_\_\_

SOLUTION: Complete only upon identification of all subjects. Complete justification for solution credit must be set forth in accompanying narrative pages.

- Solution by: ☐ FBI ☐ Police ☒ Joint FBI/Police Total number of subjects 4  
 Predominate solution factor: ☒ Law enforcement response ☐ Extended investigation ☐ Defensive action by employee, guard, etc.  
 Elapsed time-violation to solution: ☐ Response ☒ Same day ☐ 1-5 days ☐ 6-30 days ☐ 1-3 mos ☐ 3-6 mos ☐ 6-12 mos ☐ over 1 yr  
 Interstate aspect: ☐ Yes ☒ No ☐ Unknown Multiple BR, BB, BL, or BE activity: ☐ Yes ☐ No  
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 Subject(s) on parole/probation (Federal or State) at the time of offense: ☐ Yes ☒ No Number  
 Subject(s) in escape status: ☐ Yes ☒ No Number  
 Justice user(s) involved: ☐ Yes ☐ No ☒ Unknown Number  
 ABRA cancellation: ☐ Yes ☒ No (attach administrative comments)

2 - Bureau  
☐ Copy of demand note enclosed.  
☐ Surveillance/arrest photos enclosed.

1 - Cincinnati  
 1 - Cleveland  
 1 - Detroit  
 1 - Indianapolis

1 - Milwaukee  
 1 - Minneapolis  
 1 - Omaha  
 1 - Louisville

1 - Springfield  
 1 - St. Louis  
 7 - Chicago LJF:mam  
 (19)

**F O I P A**  
**M A N U A L**

# MEMO 44

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** FD-515 Accomplishment Report  
**Date:** March 31, 1998

Attached is a copy of Bureau form FD-515 (Attachment 1-two samples) and FD-515a (Attachment 2). The FD-515 is used to record convictions, recoveries, and other FBI field office accomplishments credited to a particular investigation. The FD-515a, a supplemental page to the Accomplishment Report, is prepared when reporting an indictment and/or conviction of a subject of an Organized Crime Program case. At times, several FD-515a reports may be attached to the FD-515 since a supplemental page is required for each subject indicted and/or convicted.

When processing the FD-515, particular attention should be given to the "Investigative Assistance or Techniques (IA/T) Used" block located in the upper right corner of the form. The "IA/T" block lists various items of IA/T which are publicly known; however, opposite each item is a space for a numerical rating of each IA/T (from one to four) to record its assistance in the captioned investigation. If any IA/T block has a numerical rating assigned to it, all spaces adjacent to each activity under the word "rating" in all four columns should be redacted pursuant to Exemption (b)(7)(E). This will preclude disclosure of which activities were used and what ratings were awarded, while the list of activities remain visible.

In addition, the agent's social security number, located to the left of the "IA/T" block, should be redacted pursuant to Exemption (b)(7)(C).

The FD-515a supplemental page is generally releasable, although privacy issues may be considered if warranted.

FD-515 (Rev. 2-24-86)  
**ACCOMPLISHMENT REPORT**  
 (Effective 10/1/85)  
 (Submit within 30 days from date of accomplishment)  
**TO: DIRECTOR, FBI**

ST: SAC,

Bureau File Number
Field Office File Number
Squad or RA Number
Agent's Social Security No.

☐ If it is joint operation with:  
 (Identify of other agency)  
☐ If case involves corruption of a public official (Federal, State or Local).

Date \_\_\_\_\_

Investigative Assistance or Technique Used			
Were any of the investigative assistance or techniques listed below used in connection with accomplishment being claimed? <input type="checkbox"/> No <input type="checkbox"/> Yes - If Yes, rate each used as follows: 1 = Used, but did not help    3 = Helped, substantially 2 = Helped, but only minimally    4 = Absolutely essential			
1. Acctg Tech Assistance	Rating	8. Eng. Sect. Tape Exams	Rating
2. Aircraft Assistance	Rating	9. Hypnosis Assistance	Rating
3. Computer Assistance	Rating	10. Ident Div Assistance	Rating
4. Confidential Monitoring	Rating	11. Informant Information	Rating
5. ELSUR - PSC	Rating	12. Lab Div Exams	Rating
6. ELSUR - Title III	Rating	13. Lab Div Field Support	Rating
7. Eng. Sect. Field Support	Rating	14. Pen Registers	Rating
15. Photographic Coverage	Rating	16. Polygraph Assistance	Rating
17. Search Warrants Executed	Rating	18. Show Money Usage	Rating
19. Surveil. Sec. (SOG) Asst	Rating	20. SWAT Team Action	Rating
21. Tech. Apt. or Tech Equip	Rating	22. Telephone Toll Recs	Rating
23. UCO Group I	Rating	24. UCO Group II	Rating
25. UC Other	Rating	26. NCACV/VI-CAP	Rating
27. Visual Invest. Analysis (VIA)	Rating		Rating

Preliminary Judicial Process (Number of subjects)	Complaints	Informations	Indictments	D. Recoveries, Restitutions, or Potential Economic Loss Prevented (PELP)	(Explain valuation in remarks)																																																
<b>a. Arrests, Locates, Summonses or Subpoenas Served (No. of Subj.)</b> <table border="1"> <thead> <tr> <th colspan="3">Subject Priority*</th> <th rowspan="2">Subpoenas Served</th> </tr> <tr> <th>A</th> <th>B</th> <th>C</th> </tr> </thead> <tbody> <tr> <td>FBI Arrests -</td> <td></td> <td></td> <td></td> </tr> <tr> <td>FBI Locates -</td> <td></td> <td></td> <td></td> </tr> <tr> <td>Local Arrests -</td> <td></td> <td></td> <td></td> </tr> <tr> <td>FBI Subj. Released</td> <td></td> <td></td> <td>Local Crim. Summons</td> </tr> </tbody> </table>				Subject Priority*			Subpoenas Served	A	B	C	FBI Arrests -				FBI Locates -				Local Arrests -				FBI Subj. Released			Local Crim. Summons	<table border="1"> <thead> <tr> <th>Property Type Code*</th> <th>Recoveries</th> <th>Restitutions</th> <th>PELP Type Code*</th> <th>Potential Economic Loss Prevented</th> </tr> </thead> <tbody> <tr><td></td><td>\$</td><td>\$</td><td></td><td>\$</td></tr> <tr><td></td><td>\$</td><td>\$</td><td></td><td>\$</td></tr> <tr><td></td><td>\$</td><td>\$</td><td></td><td>\$</td></tr> <tr><td></td><td>\$</td><td>\$</td><td></td><td>\$</td></tr> </tbody> </table>	Property Type Code*	Recoveries	Restitutions	PELP Type Code*	Potential Economic Loss Prevented		\$	\$		\$		\$	\$		\$		\$	\$		\$		\$	\$		\$	
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Attach additional forms if reporting final judicial process on more than four subjects, and submit a final disposition for (R-64) for each subject.

Remarks: (For every subject reported in Sections A, B or F above, provide name, DOB, race\*, sex, and POB and SSAN if available.)

MEMO 44 - ATTACHMENT 1 (FRONT)  
 Sample 1

1 - Bureau  
 2 - Field Office  
 \* See codes on reverse side

## Sample 1

## Property Type Codes\*

Code No	Description
	Cash (U.S. and foreign currency)
	Stock, Bonds or Negotiable Instruments (checks, travelers checks, money orders, certificates of deposit, etc)
3	General Retail Merchandise (clothing, food, liquor, cigarettes, TVs, etc)
4	Vehicles (autos, trucks, tractors, trailers, campers, motorcycles, etc)
5	Heavy Machinery & Equipment (heavy equipment, computers, etc)
6	Bulk Materials (grain, fuel, raw materials, metals, wire, etc)
7	Jewelry (including unset precious and semiprecious stones)
8	Precious Metals (gold, silver, silverware, platinum, etc)
9	Art, Antiques or Rare Collections
11	Weapons or Explosives
20	All Other Recoveries (not falling in any category above)

## Potential Economic Loss Prevented (PELP) Type Codes\*

Code No	Description
22	Counterfeit Stocks, Bonds, Currency or Negotiable Instrument
23	Counterfeit or Pirated Sound Recordings or Motion Pictures
24	Bank Theft Scheme Aborted
25	Ransom, Extortion or Bribe Demand Aborted
26	Theft from, or Fraud Against, Government Scheme Aborted
27	Commercial or Industrial Theft Scheme Aborted
30	All Other Potential Economic Loss Prevented (not falling in any category above)

\*Except for cash, the Remarks section must contain an explanation of the computation of the recovery value or loss prevented. An explanation airtel must accompany this report if the recovery is \$1 million or more, or if the PELP is \$5 million or more.

## Subject Description Codes\*

\* Enter Description Code Only When Reporting a Conviction -

## Organized Crime Subjects (Include Family Name Or Group):

- 1A Boss, Underboss or Consigliere
- 1B Capodecina or Soldier
- 1C Possible LCN Member or Associate
- 1D OC Subject Other Than LCN
- 1E Not a Member or Associate of LCN Family or OC Organization

## Union Members:

- 5A International or National Officer
- 5B Local Officer
- 5C Union Employee

## Known Criminals (Other Than OC Members):

- 2A Top Ten or I.O. Fugitive
- 2B Top Thief
- 2C Top Con Man

## Foreign Nationals:

- 3A Legal Alien
- 3B Illegal Alien
- 3C Foreign Official Without Diplomatic Immunity
- D U.N. Employee Without Diplomatic Immunity
- E Foreign Students
- 3F All Others

## Terrorists:

- 4A Known Member of a Terrorist Organization
- 4B Possible Terrorist Member or Sympathizer

## Government Officials Or Employees:

## Federal

- 6A Presidential Appointee
- 6B U.S. Senator
- 6C U.S. Representative
- 6D Judge
- 6E Prosecutor
- 6F Law Enforcement Officer
- 6G Fed Empl - GS 13 & above
- 6H Fed Empl - GS 12 & below

## State

- 6J Governor
- 6K Lt. Governor
- 6L Legislator
- 6M Judge
- 6N Prosecutor
- 6P Law Enforcement Officer
- 6Q All Others - State

## Local

- 6R Mayor
- 6S Legislator
- 6T Judge
- 6U Prosecutor
- 6V Law Enforcement Officer
- 6W All Others - Local

## Bank Officers or Employees:

- 7A Bank Officer
- 7B Bank Employee

## All Others:

- 8A All Other Subjects (not fitting above categories)

\*If a subject can be classified in more than one of the categories, select the most appropriate in the circumstance.

## Instructions

## Subject Priorities for FBI Arrest or Locates:

- A - Subject wanted for crimes of violence (i.e. murder, manslaughter, forcible rape, robbery and aggravated assault) or convicted of such crimes in the past five years.
- B - Subjects wanted for crimes involving the loss or destruction of property valued in excess of \$25,000 or convicted of such crimes in the past five year
- C - All others

## Claiming Non-Federal Arrests, Summonses, Recoveries or Convictions:

It is permissible to claim a local arrest, summons, recovery or conviction if the FBI significantly contributed to the accomplishment. A succinct narrative setting forth the basis for the claim must accompany this report. When claiming a local recovery, enter the word "LOCAL" to the right of the amount. Enter "LF" in the "In-Jail" block for all life sentences and "CP" for capital punishment sentences.

## Reporting Convictions:

Convictions should not be reported until the sentence has been issued. There are two exceptions to this rule. The conviction information can be submitted by itself if:

- 1. The subject becomes a fugitive after conviction but prior to sentencing.
- 2. The subject dies after conviction but prior to sentencing.

An explanation is required in the Remarks section for either of the above exceptions.

## Rule 20 Situations:

The field office that obtained the process (normally the office of origin) is the office that should claim the conviction, not the office where the subject enters the plea in cases involving Rule 20 of the Federal Rules of Criminal Procedures.

## Investigative Assistance or Techniques (IA/Ts) Used:

-Since more than one IA/T could have contributed to the accomplishment, each IA/T used must be rated.

-The IA/T used must be rated each time an accomplishment is claimed. (For example - if informant information was the basis for a complaint, an arrest, recovery and a conviction and if separate FD-515s are submitted for each of the aforementioned accomplishments, the "Informant Information" block must be repeated on each FD-515 even if it was the same information that contributed to all the accomplishments.)

## Codes:

C = Chinese; I = Indian/American; J = Japanese; N = Negro; O = All other; U = Unknown; W = White

<b>Accomplishment involves:</b> (check all that apply)		<b>File Number</b>		<b>Data Loader's Initials _____</b>																																																																																																																																																							
Drugs	<input type="checkbox"/>			<p align="center"><b>Investigative Assistance or Technique Used</b></p> <p>1 - Used, but did not help                      3 - Helped, substantially            2 - Helped, minimally                        4 - Absolutely essential</p> <p>For Sub. Invest. Assist. by other FO (s) indicate A,B,C,D for corresponding FO</p> <table border="1" style="width: 100%; border-collapse: collapse; font-size: small;"> <thead> <tr> <th>Rate</th><th>FO</th><th>IAT</th><th>Rate</th><th>FO</th><th>IAT</th><th>Rate</th><th>FO</th><th>IAT</th><th>Rate</th><th>FO</th><th>IAT</th></tr> </thead> <tbody> <tr> <td></td><td></td><td>Fin. Analyst</td><td></td><td></td><td>Lab. Div. Exam</td><td></td><td></td><td>UCO - Group I</td><td></td><td></td><td>Ft. Mon. - M</td></tr> <tr> <td></td><td></td><td>Aircraft Asst.</td><td></td><td></td><td>Lab. Field Sup</td><td></td><td></td><td>UCO - Group II</td><td></td><td></td><td>For. Lang</td></tr> <tr> <td></td><td></td><td>Computer</td><td></td><td></td><td>Pen Registers</td><td></td><td></td><td>UCO - Nat. Back</td><td></td><td></td><td>Non FBI L</td></tr> <tr> <td></td><td></td><td>Consens Mon.</td><td></td><td></td><td>Photo Cover,</td><td></td><td></td><td>NCAVC / VI - CAP</td><td></td><td></td><td>Vict-Witn</td></tr> <tr> <td></td><td></td><td>Elsur / FISC</td><td></td><td></td><td>Polygraph</td><td></td><td></td><td>Crim Intel Asst</td><td></td><td></td><td></td></tr> <tr> <td></td><td></td><td>Elsur / T. III</td><td></td><td></td><td>Search Warrant</td><td></td><td></td><td>Crisis Neg. - Fed.</td><td></td><td></td><td></td></tr> <tr> <td></td><td></td><td>Eng. Field Spt.</td><td></td><td></td><td>Show Money</td><td></td><td></td><td>Crisis Neg. - Local</td><td></td><td></td><td></td></tr> <tr> <td></td><td></td><td>Eng. Tape Ex</td><td></td><td></td><td>SOG Asst.</td><td></td><td></td><td>ERT Asst.</td><td></td><td></td><td></td></tr> <tr> <td></td><td></td><td>Legats Asst.</td><td></td><td></td><td>Swat Team</td><td></td><td></td><td>Butte - ITC</td><td></td><td></td><td></td></tr> <tr> <td></td><td></td><td>Evid Purchase</td><td></td><td></td><td>Tech. Ag/Equip</td><td></td><td></td><td>Sav - ITC</td><td></td><td></td><td></td></tr> <tr> <td></td><td></td><td>Int/CW Info</td><td></td><td></td><td>Phone Toll Rec</td><td></td><td></td><td>Poc - WRCS</td><td></td><td></td><td></td></tr> </tbody> </table>								Rate	FO	IAT	Rate	FO	IAT	Rate	FO	IAT	Rate	FO	IAT			Fin. Analyst			Lab. Div. Exam			UCO - Group I			Ft. Mon. - M			Aircraft Asst.			Lab. Field Sup			UCO - Group II			For. Lang			Computer			Pen Registers			UCO - Nat. Back			Non FBI L			Consens Mon.			Photo Cover,			NCAVC / VI - CAP			Vict-Witn			Elsur / FISC			Polygraph			Crim Intel Asst						Elsur / T. III			Search Warrant			Crisis Neg. - Fed.						Eng. Field Spt.			Show Money			Crisis Neg. - Local						Eng. Tape Ex			SOG Asst.			ERT Asst.						Legats Asst.			Swat Team			Butte - ITC						Evid Purchase			Tech. Ag/Equip			Sav - ITC						Int/CW Info			Phone Toll Rec			Poc - WRCS			
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<div style="display: flex; justify-content: space-between;"> <div style="width: 30%;"> <p><b>A. Complaint / Information / Indictment</b></p> <p><input type="checkbox"/> Federal <input type="checkbox"/> Local <input type="checkbox"/> International</p> <p>Complaint Date _____</p> <p>Check if Civil Rico Complaint <input type="checkbox"/></p> <p>Information Date _____</p> <p>Indictment Date _____</p> </div> <div style="width: 30%;"> <p><b>D. Hostage(s) Released Date</b> _____</p> <p>Released by: <input type="checkbox"/> Terrorist <input type="checkbox"/> Other</p> <p>Number of Hostages: _____</p> <p>Child Located Date _____</p> </div> <div style="width: 30%;"> <p><b>F. Civil Rico Matters Date</b> _____</p> <p>Also Complete Section I _____</p> <p>or _____</p> <p>Other Civil Matters Date _____</p> <p>Judgment _____ *</p> <p>Judicial Outcome _____ X *</p> <p>Amount: \$ _____</p> <p>Suspension: <table border="1" style="display: inline-table; vertical-align: middle;"><tr><td>Years</td><td>Months</td></tr><tr><td> </td><td> </td></tr></table></p> </div> </div>						Years	Months																															
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<div style="display: flex; justify-content: space-between;"> <div style="width: 30%;"> <p><b>B. Locate/ Arrest</b></p> <p><input type="checkbox"/> Federal <input type="checkbox"/> Local <input type="checkbox"/> International</p> <p>Subject Priority: <input type="checkbox"/> A <input type="checkbox"/> B <input type="checkbox"/> C</p> <p>Locate Date _____</p> <p>Arrest Date _____</p> <p><input type="checkbox"/> Subject Resisted Arrest</p> <p><input type="checkbox"/> Subject Arrested was Armed</p> </div> <div style="width: 30%;"> <p><b>E. Recovery / Restitution / PELP X</b></p> <p><input type="checkbox"/> Federal <input type="checkbox"/> Local <input type="checkbox"/> International</p> <p>Recovery Date _____</p> <p>Code * Amount</p> <table border="1" style="width: 100%;"> <tr><td> </td><td>\$</td></tr> <tr><td> </td><td>\$</td></tr> </table> <p>Restitution Date _____</p> <p><input type="checkbox"/> Court Ordered</p> <p><input type="checkbox"/> Pretrial Diversion</p> <p>Code * Amount</p> <table border="1" style="width: 100%;"> <tr><td> </td><td>\$</td></tr> </table> <p>PELP Date _____</p> <p>Code * Amount</p> <table border="1" style="width: 100%;"> <tr><td> </td><td>\$</td></tr> </table> </div> <div style="width: 30%;"> <p><b>G. Administrative Sanctions Date</b> _____</p> <p>Subject Description Code _____ *</p> <p>Type: _____ Length: _____</p> <p><input type="checkbox"/> Suspension <input type="checkbox"/> Permanent</p> <p><input type="checkbox"/> Debarment <input type="checkbox"/> <table border="1" style="display: inline-table; vertical-align: middle;"><tr><td>Years</td><td>Months</td></tr><tr><td> </td><td> </td></tr></table></p> <p><input type="checkbox"/> Injunction</p> </div> </div>							\$		\$		\$		\$	Years	Months																							
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Years	Months	Years	Months	Years	Months																																	
<p><b>H. Conviction</b></p> <p><input type="checkbox"/> Federal <input type="checkbox"/> Local <input type="checkbox"/> International</p> <p>Conviction Date: _____</p> <p>Subject Description Code: ____ * (____) *</p> <p><i>For 6F, G, H--Include Agency Code</i></p> <p><input type="checkbox"/> Felony Or <input type="checkbox"/> Misdemeanor</p> <p><input type="checkbox"/> Plea Or <input type="checkbox"/> Trial</p> <p>State: _____ Judicial District: _____</p>																																						
<p><b>K. Acquittal / Dismissal / Pretrial Diversion</b></p> <p>Acquittal Date _____</p> <p>Dismissal Date _____</p> <p>Pretrial Diversion Date _____</p>																																						
<p><b>L. Subject Information (Required for all Sections excluding Section D (Hostages) and E (Recovery/PELP))</b></p>																																						

Serial No. of FD-51



PROPERTY CODES

01 Cash  
02 Stocks, Bonds or Negot. Instruments  
03 General Retail Merchandise  
04 Vehicles  
05 Heavy Machinery & Equipment  
06 Aircraft  
07 Jewelry  
08 Vessels  
09 Art, Antiques or Rare Collections  
11 Real Property  
20 All Other

SENTENCE TYPES

CP Capital Punishment  
JS Jail Sentence  
LS Life Sentence  
NS No Sentence (Subject is a Fugitive, Insane, has Died, or is a Corporation)  
PB Probation  
SJ Suspension of Jail Sentence  
YC Youth Correction Act

PELP CODES

22 Counterfeit  
Stocks/Bonds/Currency/  
Negotiable Instruments  
23 Counterfeit/Pirated Sound  
Recordings or Motion Pictures  
24 Bank Theft Scheme Aborted  
25 Ransom, Extortion or Bribe  
Demand Aborted  
26 Theft From or Fraud Against  
Government Scheme Aborted  
27 Commercial or Industrial  
Theft Scheme Aborted  
30 All Other

RACE CODES

A Asian/Pacific Islander  
B Black  
I Indian/American  
U Unknown  
W White  
X Nonindividual

AGENCY CODES

ACIS Army Criminal Investigative Service  
BATF Bureau of Alcohol, Tobacco & Firearms  
BIA Bureau of Indian Affairs  
DCAA Defense Contract Audit Agency  
DCIS Defense Criminal Investigative Service  
DEA Drug Enforcement Administration  
DOC Department of Corrections  
DOI Dept. of Interior  
EPA Environmental Protection Agency  
FAA Federal Aviation Administration  
FDA Food and Drug Administration  
HHS Dept. of Health & Human Services  
HUD Dept. of Housing & Urban Development  
INS Immigration and Naturalization Service  
IRS Internal Revenue Service  
NASA Nat'l Aeronautics & Space Admin  
NBIS Nat'l NARC Border Interdiction  
NCIS Naval Criminal Investigative Service  
RCMP Royal Canadian Mounted Police  
SBA Small Business Administration  
USBP U.S. Border Patrol  
USCG U.S. Coast Guard  
USCS U.S. Customs Service  
USDS U.S. Department of State  
USMS U.S. Marshals Service  
USPS U.S. Postal Service  
USSS U.S. Secret Service  
USTR U.S. Treasury  
LOC Local  
CITY City  
COUN County  
ST State  
OTHER Other

JUDGMENT CODES

CJ Consent Judgment  
CO Court Ordered Settlement  
DF Default Judgment  
DI Dismissal  
JN Judgment Notwithstanding  
MV Mixed Verdict  
SJ Summary Judgment  
VD Verdict for Defendant  
VP Verdict for Plaintiff

JUDICIAL OUTCOME

AG Agreement  
BR Barred/Removed  
CC Civil Contempt  
DC Disciplinary Charges  
FI Fine  
PI Preliminary Injunction  
PR Temporary Restraining Order  
PS Pre-filing Settlement  
RN Restitution  
SP Suspension  
VR Voluntary Resignation  
OT Other

SUBJECT PRIORITY

A Subject wanted for crimes of violence (i.e., murder, manslaughter, forcible rape) against another individual or convicted of such a crime in the past five years  
B Subject wanted for crimes involving loss or destruction of property valued in excess of \$25,000 or convicted of such a crime in the past five years.  
C All other subjects.

SUBJECT DESCRIPTION CODES

ORGANIZED CRIME SUBJECTS

1F Boss  
1G Underboss  
1H Consigliere  
1J Acting Boss  
1K Capodecina  
1L Soldier

KNOWN CRIMINALS

2A Top Ten or I.O. Fugitive  
2B Top Thief  
2C Top Con Man

FOREIGN NATIONALS

3A Legal Alien  
3B Illegal Alien  
3C Foreign Official W/out  
Diplomatic Immunity  
3D U.N. Employee W/out  
Diplomatic Immunity  
3E Foreign Student  
3F All Others

OTHERS

8A All Other Subjects  
8B Company or Corporation

TERRORISTS

4A Known Member of a  
Terrorist Organization  
4B Possible Terrorist Member  
or Sympathizer

UNION MEMBERS

5D President  
5E Vice-President  
5F Treasurer  
5G Secretary/Treasurer  
5H Executive Board Member  
5I Business Agent  
5J Representative  
5K Organizer  
5L Business Manager  
5M Financial Secretary  
5N Recording Secretary  
5P Office Manager  
5Q Clerk  
5R Shop Steward  
5S Member  
5T Trustee  
5U Other

GOVERNMENT SUBJECTS

(6F, 6G, 6H- Include Agency Code)

6A Presidential Appointee  
6B U.S. Senator/Staff  
6C U.S. Representative/Staff  
6D Federal Judge/Magistrate  
6E Federal Prosecutor  
6F Federal Law Enforcement Officer  
6G Federal Employee - GS 13 & Above  
6H Federal Employee - GS 12 & Below  
6J Governor  
6K Lt. Governor  
6L State Legislator  
6M State Judge/Magistrate  
6N State Prosecutor  
6P State Law Enforcement Officer  
6Q State - All Others  
6R Mayor  
6S Local Legislator  
6T Local Judge/Magistrate  
6U Local Prosecutor  
6V Local Law Enforcement Officer  
6W Local - All Others  
6X County Commissioner  
6Y City Councilman

BANK EMPLOYEES

7A Bank Officer  
7B Bank Employee

# Supplemental Page to the Accomplishment Report (FD-515) for Organized Crime Program (OCP) Matters Only

This supplemental page is required with the FD-515 reporting an indictment and/or conviction of a subject of an OCP case. A separate page is required for each subject indicted and/or convicted. The completion of Section A - D is mandatory. The other sections should be completed as applicable.

**A. Name of Subject** \_\_\_\_\_

**B. Field Office** \_\_\_\_\_ **Field Office File No.** \_\_\_\_\_

**C. Criminal Activity** - Indicate the primary criminal activity which resulted in the reported indictment and/or conviction. (Indicate only activity.)

<input type="checkbox"/> Labor Racketeering (LRK) (See Section E and G if applicable)	<input type="checkbox"/> Extortion (EXT)
<input type="checkbox"/> Corruption (COR) (See Section F if applicable)	<input type="checkbox"/> Loansharking (LNS)
<input type="checkbox"/> Illegal Gambling (IGM)	<input type="checkbox"/> Drugs (DRS)
<input type="checkbox"/> Other (OT), specify _____	

**D. Organized Criminal Group**

1. LCN: ☐ Member (MEM) ☐ Associate (ASO)

<input type="checkbox"/> BU	<input type="checkbox"/> KC	<input type="checkbox"/> NO	<input type="checkbox"/> NY - Luchese (LU)	<input type="checkbox"/> RC - Rochester
<input type="checkbox"/> CG	<input type="checkbox"/> LA	<input type="checkbox"/> NY - Bonanno (BO)	<input type="checkbox"/> PH	<input type="checkbox"/> SF
<input type="checkbox"/> CV	<input type="checkbox"/> MI	<input type="checkbox"/> NY - Colombo (CO)	<input type="checkbox"/> PX	<input type="checkbox"/> SO - San Jose
<input type="checkbox"/> DN	<input type="checkbox"/> NK - De Cavalcante	<input type="checkbox"/> NY - Gambino (GA)	<input type="checkbox"/> PG	<input type="checkbox"/> SL
<input type="checkbox"/> DE	<input type="checkbox"/> NE - New England - Patriarca	<input type="checkbox"/> NY - Genovese (GE)	<input type="checkbox"/> PI - Pittston - Bufalino	<input type="checkbox"/> TP

Position:

<input type="checkbox"/> Boss	<input type="checkbox"/> Consigliere (CNS)	<input type="checkbox"/> Capo (CPO)
<input type="checkbox"/> Underboss (UBS)	<input type="checkbox"/> Acting Boss (ABS)	<input type="checkbox"/> Soldier (SOL)

2. Other Non-LCN OC Groups, specify \_\_\_\_\_ ☐ Member (MEM) ☐ Associate (ASO)

**E. Business Influenced/Affected** (If applicable) Indicate below if the subject's criminal activity influenced or affected a particular trade industry:

<input type="checkbox"/> Toxic Waste (TW)	<input type="checkbox"/> Building Trades (BT)	<input type="checkbox"/> Entertainment (ET)	<input type="checkbox"/> Hotel/Restaurant (HR)
<input type="checkbox"/> Carting (CR)	<input type="checkbox"/> Meat/Poultry/Fish (MT)	<input type="checkbox"/> Garment (GR)	
<input type="checkbox"/> Vending (VN)	<input type="checkbox"/> Shipping (SH)	<input type="checkbox"/> Trucking/Trans (TT)	
<input type="checkbox"/> Other (OT) Specify _____			

Name of company subject connected with \_\_\_\_\_

**F. Elected/Appointed Public Officials** - Complete if subject was a public official at time of indictment and/or conviction. Indicate one each category.

Level - ☐ Federal (FD) ☐ State (ST) ☐ Local (LO)

Branch - ☐ Executive (EX) ☐ Legislative (LE) ☐ Judicial (JD)

Position/Title:

<input type="checkbox"/> Governor (GV)	<input type="checkbox"/> Mayor (MY)	<input type="checkbox"/> City	<input type="checkbox"/> House of Rep/ Staff (HR)	<input type="checkbox"/> Prosecutor (PR)
<input type="checkbox"/> Lt. Governor (LG)	<input type="checkbox"/> County Comm (CC)	<input type="checkbox"/> Senator/Staff (SE)	<input type="checkbox"/> Judge/Magistrate (JM)	<input type="checkbox"/> Law Enforcement Officer (LE)
<input type="checkbox"/> Other (OT), specify _____				

**G. Union Members or Officials** - If the subject was a Union member or official at the time of indictment and/or conviction, indicate the highest position the subject held/holds in the Union and the Union's name.

Name of Union \_\_\_\_\_

Union Affiliation:

<input type="checkbox"/> Teamsters	<input type="checkbox"/> Hotel and Restaurant Employee	<input type="checkbox"/> Laborers International	<input type="checkbox"/> Longshoremen's Association
<input type="checkbox"/> Other, specify _____			

Level - ☐ International ☐ Conference ☐ Council ☐ Local - Local No. \_\_\_\_\_

Position:

<input type="checkbox"/> Pres (PR)	<input type="checkbox"/> Sec/Treas (ST)	<input type="checkbox"/> Repr (RP)	<input type="checkbox"/> Fin Sec (FS)	<input type="checkbox"/> Clerk (CL)	<input type="checkbox"/> Trustee (T)
<input type="checkbox"/> Vice Pres (VP)	<input type="checkbox"/> Ex Brd Memb (EB)	<input type="checkbox"/> Orgzr (OR)	<input type="checkbox"/> Rec Sec (RS)	<input type="checkbox"/> Shop Stew (SS)	
<input type="checkbox"/> Tres (TR)	<input type="checkbox"/> Bus Agt (BA)	<input type="checkbox"/> Bus Mgr (BM)	<input type="checkbox"/> Off Mgr (OM)	<input type="checkbox"/> Memb (ME)	
<input type="checkbox"/> Other (OT), specify _____					

**Supplemental Page to the Accomplishment Report (FD-515)  
for Organized Crime/Drug (OC/Drug) Program Matters or  
Violent Crimes/Major Offenders (VCMO) Program Matters  
relating to street gangs involved in drugs.**

*This supplemental page is required with the FD-515 when a field office has either disrupted or dismantled an organization under the OC/Drug Program or the VCMO Program relating to street gangs involved in drugs.*

Subject Name: \_\_\_\_\_

Field Office File Number: \_\_\_\_\_

- A. For the Subject identified on Section "L" of the FD-515, was the Subject's Role in the Organization/Enterprise (check only one): **Mandatory**

☐ Leadership                      ☐ Associate/Member                      ☐ Other

- B. The investigative efforts resulted in the (check only one): **Non-Mandatory**

☐ **Disruption** of a Drug Organization/Criminal Enterprise

or

☐ **Dismantlement** of a Drug Organization/Criminal Enterprise

Note: A disruption should only be claimed once per event.  
A dismantlement should only be claimed once per organization.

- C. As to the Organization/Enterprise Disrupted or Dismantled, the scope of the Organization/Enterprise was (check only one): **Only Check if B was Claimed**

☐ International                      ☐ National                      ☐ Regional                      ☐ Local

- D. Case file serial(s) in which disruption/dismantlement is documented: \_\_\_\_\_

#### Definitions

- A. **Disruption** occurs when the normal and effective operation of a specific enterprise is significantly impacted as a result of an affirmative law enforcement action, including (but not limited to) the indictment/conviction of the organization's leadership. A substantial seizure of the organization's assets may constitute a Disruption if the organization's operations are significantly impacted by the event.
- B. **Dismantlement** occurs when an organization's structure is removed to the extent that it no longer operates as a coordinated organized criminal enterprise, and that removal is a result of an affirmative law enforcement action as outlined above. Further, if any components of the organization remain, their ability to re-form into another such organized criminal enterprise is not possible for an extended period of time.
- C. As to the scope, although the membership of an organization/enterprise may have contacts or relationships with persons or entities in other countries, regions or states, Section C describes the primary scope of operations and influence of the organization/enterprise. "International" and "Local" Organizations/Enterprises are self-explanatory. "Regional" Organizations/Enterprises are multi-state (or multi-metropolitan area in a large state). "National" Organizations/Enterprises are multi-region.
- D. May be any case file communication or document describing the events resulting in the reported disruption/dismantlement, and the nature of the organization/enterprise as contained in Sections B and C.

**Note:**

Divisions currently are to communicate significant investigative developments (such as disruptions/dismantlements) to FBIHQ substantive units.

**F O I P A**

**M A N U A L**

# MEMO 45

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** FD-761 Public Corruption Data Transmittal Form  
**Date:** March 31, 1998

Form FD-761 was previously utilized for statistical purposes by the Public Corruption Unit, Criminal Investigative Division. However, the use of this form was terminated in 1995. Since the form is no longer in use, it would be difficult to articulate harm or risk of circumvention of the law. Therefore, none of the information contained on this form is exempt pursuant to (b)(7)(E).

In certain instances, the code asserted for the subject (public official) in item number 6 of the form may warrant protection pursuant to (b)(7)(C).

F O I P A

M A N U A L

# MEMO 46

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Fugitive Requesters  
Date: March 31, 1998

The issue of FOIPA requests from or on behalf of fugitives was decided in Doyle v. United States Department of Justice, 668 F.2d 1365 (D.C. Cir. 1981). Invoking the equitable doctrine that "those who demand equity must come into court with clean hands," the court ruled that a fugitive cannot seek assistance from the courts in his FOIPA claim because he has removed himself from the jurisdiction of the courts. Thus, FOIPA requests from fugitives should be denied the release of any material and the request suspended at the outset.

## Procedures for Handling a FOIPA Request Involving a Fugitive

b2 When reviewing files responsive to a FOIPA case which may involve 88 classifications or information contained in any security or criminal investigative file, the LT or PLS should immediately determine if the fugitive requester has been apprehended and the status of the overall case. In some instances, it may be necessary to contact the **Violent Crimes/Fugitive Unit on extension** to obtain this information. If determined that the subject has been apprehended and the case is closed, the file or information may be processed under normal guidelines. However, if the subject is still considered a fugitive, then the file(s) should not be released to the requester. The LT/PLS should advise the Team Captain and/or the Unit Chief and, if not already done, the Fugitive Unit should be notified and provided with all pertinent information pertaining to the FOIPA request. A response to the fugitive requester will be determined on a case-by-case basis.

The following is an excerpt of the response which was made in the aforementioned Doyle v. DOJ lawsuit:

"In view of the fact that (subject's name) remains in a fugitive status, a determination has been made that it would be improper for this Agency to make any records pertaining to your client available pursuant to the Freedom of Information and Privacy Acts, and therefore, this office is suspending further processing. This condition can be remedied by the resolution or termination of (subject's name) fugitive status."

"This response is not a denial of records. However, if you construe this response to be a denial, you may appeal . . . "

~~SECRET~~

F O I P A  
M A N U A L

MEMO 47

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: [REDACTED] Liaison with  
Date: May 15, 1998

b7D

b7D

and the [REDACTED]

b1.

[REDACTED] (S)  
All information concerning the above foreign law enforcement agencies is to be classified "Secret" in accordance with Executive Order 12958, Sections 1.5 and 1.6(b)(5), (d)(6) and Section 3.4(6). (U)

5/15/98  
CLASSIFIED BY: SP7-CJ  
REASON: 1.5 (B,D)  
DECLASSIFY ON: X5, 6

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
EXCEPT WHERE SHOWN  
OTHERWISE

~~SECRET~~

**F O I P A**  
**M A N U A L**

**MEMO 48**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** High Visibility Electronic Communications (ECs)  
**Date:** March 31, 1998

**Purpose:** A High Visibility EC is prepared by a PLS prior to a release of documents in cases where the release is likely to result in publicity. The memo is brief in content but contains enough information to inform the OPCA Front Office and the Director's Office of possible publicity and the resulting inquiries from the press and/or public.

High visibility ECs are notices of proposed action and not requests for approval. They should include language to the effect that the release will be made upon return of the communication. Please do not include language indicating that the release will be made upon approval. The FOIPA Section Chief is to be notified upon return of the communication with an indication evidencing the fact that it has been read in the OPCA Front Office and/or the Director's Office.

**When to prepare High Visibility Communications:**

High visibility ECs are prepared whenever:

A) the requester is:

1. A current high Government official, i.e., President, Vice President, Cabinet Level official, Supreme Court Justice, House and Senate leadership, Chairman or ranking members of a committee having oversight of the FBI, the Assistant Attorney General and above in the Department of Justice and United States Attorneys.
2. Any other individual who may have personal contact with a high level FBI official.
3. Persons who may be high profile public figures, e.g., Presidential candidates, civil rights leaders, corporate or union leaders.
4. Any other requester who has received recent substantial press notoriety.

**FOIPA Numbered Memo 48**

Page 2

**High Visibility Electronic Communications (ECs)**

B) the FOIPA release may result in the accusation of improper FBI activities.

C) whenever the requester has the ability and intent to disseminate information to the public (typically requesters associated with the media, authors or journalists) and the subject matter:

1. Is or was a person in the public eye, e.g., public officials, entertainers, sports figures, persons prominently associated with a course or movement, etc.
2. Is controversial, derogatory, or shows improper activity on the part of the subject not previously known.
3. Relates to FBI internal administrative matters, e.g., use of representation funds, Office of Professional Responsibility summaries, shooting incident reports, schedules or telephone logs of high Bureau officials, or disclose the individual activities of the Director or other Bureau officials.
4. Has received recent publicity.
5. The request involves a deceased Congressman or other significant political figure. (It is OPCA's policy to contact the next of kin, advising of the release and providing a copy of the release. Therefore, one week prior to the release to the requester, a copy of the release package should be forwarded to [REDACTED] OPCA, Room 7240, for delivery to the next of kin.)

b6  
b2  
If the need for the high visibility is questionable, contact [REDACTED] for requests involving political figures on extension [REDACTED] or [REDACTED] on extension [REDACTED] for all other matters.

**Information to include in the EC:**

The EC should be limited to one or two pages and include the following:

- 1) The identity of the requester.
- 2) The subject of the request.
- 3) The date of the request.
- 4) The number of pages to be released.



**FOIPA Numbered Memo 48**

**Page 3**

**High Visibility Electronic Communications (ECs)**

- 5) A brief summary of the material processed and the type of classification, i.e., Bank Robbery, Special Inquiry, etc. (Do not include the actual file number or caption of the investigation.)
- 6) A statement on whether or not derogatory information was found in material processed and, if so, a brief description of the derogatory information.
- 7) A characterization of the exemption(s) asserted, e.g., "unwarranted invasion of personal privacy" instead of "(b)(7)(C)."
- 8) Language indicating that the release will be made once the EC is returned to the FOIPA Section.

**Approval Process for the EC:**

Prior to preparing an EC in final form, a rough draft is to be submitted to the PLS's Team Captain, Unit Chief, the Public Information Officer and the FOIPA Section Chief for any revisions.

**F O I P A**  
**M A N U A L**

**MEMO 49**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Historical Processing of FBI Documents under the FOIA  
**Date:** March 31, 1998

The policy of the FOIPA Section for processing historical FBI cases under the FOIA is governed by the guidelines as set forth in 28 CFR 50.8 and the agreement with the National Archives and Records Administration ( NARA) dated 9/4/84, which authorizes the transfer of files to NARA for permanent retention.

Any file in which the last serial is dated more than 50 years ago will be presumptively historical. It is noted that there will be cases which will qualify for historical processing well before the 50 years and approval for such processing will be given on a case-by-case basis by the Section Chief or the Public Information Officer.

In processing historical files, as defined above, **only the first clause of Exemption (b)(7)(D)** will be implemented in order to protect the identity of sources of information, including institutional sources, and/or informants with either an implied or express promise of confidentiality, but only to the extent that the information would tend to identify those individuals and/or institutions. **On rare occasions the second clause may be applied**, however, where the information would not harm or identify the source, it should be released.

Information will continue to be protected which is exempt from disclosure by another statute or which is properly classified. In addition, **Exemption (b)(2)** will only be asserted to protect permanent symbol source numbers and T-symbols in conjunction with (b)(7)(D).

**Exemption (b)(5) should not be used** to protect the internal deliberative process. Likewise, it is difficult to imagine investigative techniques, unless classified, which continue to warrant protection today; therefore, assertions of **Exemption (b)(7)(E)** is unlikely.

Requests for 50 year old documents concerning an individual for whom there is no evidence of death or notarized authorization will continue to receive third party live responses unless the individual would be more than 100 years old at the time of the request. Any individual known to be 100 years old or older will be presumed dead and should not be afforded any privacy protection under Exemptions (b)(6) or (b)(7)(C).

The privacy rules for third parties mentioned in any high profile investigation being processed under historical guidelines will be determined on a case-by-case basis. The age of the

**FOIPA Numbered Memo 49**

**Page 2**

**Historical Processing of FBI Documents under the FOIA**

document/information being processed will be a critical factor in this decision as well as if the investigation received wide publicity. The decision to release names and information pertaining to third parties mentioned in the file should be discussed between the PLS and the Team Captain and must have the approval of the Section Chief.

**F O I P A**  
**M A N U A L**

# MEMO 50

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Hoover's Official and Confidential Files (O & C Files)  
**Date:** March 31, 1998

b6 J. Edgar Hoover's Official and Confidential (O&C) files are currently preprocessed and have been the subject of litigation with FOIPA requester, [REDACTED]. The O&Cs consist of 164 "folders" on various individuals and topics. There is also a folder which contains the numerical listing of these individuals and topics.

The O&Cs are indexed to the central records system by use of file number 62-116606-1. This number corresponds to Hoover's index boxes which contain hundreds of index cards and is maintained in the Special File Room (SFR) along with the 164 folders.

When this file number appears on the search slip, it's an indication that your subject is indexed to the O&Cs. At this point, send the search slip (the same one that came back from the 190 Processing SubUnit with the 62 number listed) to the SFR with a notation that you need search results of 62-116606-1 to be listed on the attached search slip. SFR will conduct a search of 62-116606-1 and will write on the bottom of the search slip exactly what appears on the index card(s). Subsequently, the SFR will determine where your subject is located in the O&C files by using the information on the search slip and the numerical listing of the folders. Once located, the SFR will provide the pertinent folder(s) to the LT or PLS who will review the material to determine if it's identifiable to the subject matter. If the LT or PLS determines the material to be identifiable, it will be necessary to obtain a copy of and review the preprocessed O&C material located in the FOIPA Reading Room.

When determining fees to be assessed or when processing a case, it is important not to overlook 62-116606-1 because documents in the O&C file may be duplicate of regular Bureau file material or the O&C material may qualify as a main file or a main file equivalent.

**F O I P A**  
**M A N U A L**

**MEMO 51**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** House Select Committee on Assassinations  
**Date:** March 31, 1998

**House Select Committee on Assassinations**  
**(HQ File 62-117290)**

The FBI was previously in litigation with requester, Mark Allen, for all material provided to the House Select Committee on Assassinations (HSCA) concerning its investigation into the assassination of President Kennedy. The House of Representatives joined the litigation in an attempt to claim Congressional privilege for all of the material connected to the HSCA investigation. This included all correspondence between the FBI and HSCA, as well as internal FBI communications. The HSCA's position was that these materials, as well as materials concerning its investigation of the assassination of Martin Luther King, are congressional documents and not agency records. (It is noted that the HSCA investigation of the assassination of Martin Luther King was not in litigation.)

b6 Questions concerning any material contained in Bufile 62-117290, or duplicate documents which may be unrecorded in other Bureau files, should be directed to [REDACTED] prior to any disclosure of material.

**Processing of Material Pertaining to La Costa Nostra Figures**

In connection with the investigation of the HSCA, and the request of Mark Allen for information provided to the HSCA, voluminous material was released pertaining to La Costa Nostra (LCN) figures.

b6 Employees who are processing a file containing information concerning any LCN figure should contact [REDACTED] to determine if and/or obtain any material which may be in the public realm.

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Identification Records (Rap Sheets), NCIC and Interstate Identification Index (III) Printouts  
**Date:** March 31, 1998

### **Identification Records of First Party Individuals**

When processing a first party request, identification records (rap sheets), NCIC printouts and Interstate Identification Index (III) printouts located in FBI files pertaining to the requester should be released and the disclosure letter should include the following paragraph:

"The enclosed documents from our Central Records System (CRS) files contain a copy of an identification record or "rap sheet." We have released this rap sheet as it existed when it was placed in the CRS file; it may or may not reflect current information. If you want an up to date copy of the rap sheet, please comply with the instructions set forth on the enclosed copy of Attorney General Order 556-73. Fingerprint impressions are needed for comparison with records in the Criminal Justice Information Services (CJIS) Division to ensure that an individual's identification record is not disseminated to an unauthorized person."

A copy of Attorney General Order 556-73 is attached.

### **Identification Records of Third Party Individuals**

Please keep in mind that if the identification record, NCIC or III printout belongs strictly to a third party and it is not known if that person is deceased, it will be assumed he or she is living. In such cases, the identification record should automatically be withheld pursuant to Exemptions (b)(6) and/or (b)(7)(C). On the other hand, if the individual is deceased, it should be released in its entirety.

### **NCIC Message Keys and ORI Numbers**

Identification records (rap sheets), NCIC and III printouts may contain NCIC Message Keys and/or Originating Agency Identifier (ORI) numbers. These message keys and ORI numbers do not warrant protection pursuant to a FOIPA exemption.

A Message Key is a two-or three-character designator which identifies the type of entry or

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Page 2

**Identification Records (Rap Sheets), NCIC and III Printouts**

query sent. Although there are over 75 keys in present use, they will typically begin with the alpha characters "C" (Clear or Cancel), "E" (Enter), "M" (Modify), "O" (query), "X" (Clear), or "Z11" (Test). All letters in a Message Key are capital letters, and they generally appear at the beginning of a message. They often follow the entry code "MKE/", although they also appear in other places, such as in a header line, separated from the ORI by a period. (Note: the MKE/ code may also be followed by a narrative description of a message key for responses from system records.)

An ORI is a nine-character entry which identifies the agency entering the message, or another agency related to a previous NCIC message or event. ORIs begin with a two-letter state code, but may end in either a numeric or alphabetic character. They may or may not follow the entry code "ORI". They commonly appear in three places:

- 1) the beginning of a record, representing the agency requesting a record;
- 2) in the body of a record, representing the agency which entered the record; and
- 3) in an III record, following identification of an arrest event, representing the arresting agency.

Due to variances in state and federal system formats, the positions of message keys and ORIs may vary from record to record. In addition, anticipated changes in the NCIC system may create similar codes (An example is the proposed "CTI" identifier for courts issuing warrants.) The examples provided below are typical of how the codes may appear as discussed above:

- 1.) 2L0102077MJM OH DCFBIWA36 NAM/ [REDACTED]
- 2.) 7L0102077MJM  
DCFBIWA36  
THIS NCIC INTERSTATE IDENTIFICATION INDEX RESPONSE IS THE RESULT OF YOUR  
INQUIRY ON NAME/ [REDACTED] SEX/M RAC/W DOB [REDACTED]

NAME [REDACTED] FBI NO. [REDACTED] INQUIRY DATE  
10/25/90

FINGERPRINT CLASS  
PO PI CO PO PM  
PI PM 10 PI 13

ALIAS NAMES  
[REDACTED]

IDENTIFICATION DATA UPDATED 10/16/90

**FOIPA Numbered Memo 52**

Page 3

**Identification Records (Rap Sheets), NCIC and III Printouts**

THE CRIMINAL HISTORY RECORD IS MAINTAINED AND AVAILABLE FROM THE

FOLLOWING:

FBI

-FBI

b6

THE RECORD(S) CAN BE OBTAINED THROUGH THE INTERSTATE IDENTIFICATION INDEX  
BY USING THE APPROPRIATE NCIC TRANSACTION.  
END

3) QW.DCFBIWA36.NAM/BADGUY,JOHN T.DOB/010101

DCFBIWA36

NO NCIC WANT DOB/010101 NAM/BADGUY,JOHN T



# RULES AND REGULATIONS

(Order 556-73)  
PART 16-PRODUCTION OR  
DISCLOSURE OF  
MATERIAL OR  
INFORMATION

## Subpart C-Production of FBI Identification Records in Response to Written Requests by Subjects Thereof

By order dated September 24, 1973, the Attorney General of the United States directed that the Federal Bureau of Investigation, hereinafter referred to as the FBI, publish rules for the dissemination of arrest and conviction records to the subjects of such records upon request. This order resulted from a determination that 28 U.S.C. 534 does not prohibit the subjects of arrest and conviction records from having access to those records. In accordance with the Attorney General's order, the FBI will release to the subjects of identification records copies of such records upon submission of a written request, satisfactory proof of identity of the person whose identification record is requested and a processing fee of \$18.00.

Since the FBI Identification Division is not the source of the data appearing in identification records, and obtains data thereon from fingerprint cards or related identification forms submitted to the FBI by local, state, and federal agencies, the responsibility for authentication and correction of such data rests upon the contributing agencies. Therefore, the rules set forth for changing, correcting or updating such data require that the subject of an identification record make application to the original contributing agency in order to correct the deficiency complained of.

The relevant provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation and delay in effective date are inapplicable because the material contained herein relates to the interpretation of 28 U.S.C. 534 as allowing the granting of an exemption to subjects of identification records and relief of prior administrative restrictions on dissemination of such records to them. Furthermore, it is deemed in the public interest that there be no delay in effective date of availability of identification records to the subjects thereof.

By virtue of the order of the Attorney General, dated September 24, 1973, and pursuant to the authority

delegated to the Director, FBI by 28 CFR 0.85(b), Part 16 of 28 CFR Chapter I, is amended by adding the following new Subpart C:

### § 16.30 Purpose and scope

This subpart contains the regulations of the Federal Bureau of Investigation, hereafter referred to as the FBI, concerning procedures to be followed when the subject of an identification record requests production thereof. It also contains the procedures for obtaining any change, correction or updating of such record.

### § 16.31 Definition of identification record

An FBI identification record, often referred to as a "rap sheet", is a listing of certain information taken from fingerprint cards submitted to and retained by the FBI in connection with arrests and, in some instances, includes information taken from fingerprint cards submitted in connection with Federal employment, naturalization, or military service. The identification record includes the name of the agency or institution which submitted the fingerprint card to the FBI. If the fingerprint card concerns a criminal offense, the identification record includes the date arrested or received, the arrest charge, and the disposition of the arrest if known to the FBI. All arrest data included in an identification record are obtained from fingerprint cards, disposition reports and other reports submitted by agencies having criminal justice responsibilities. Therefore, the FBI Identification Division is not the source of the arrest data reflected on an identification record.

### § 16.32 Procedure to obtain an identification record

The subject of an identification record may obtain a copy thereof by submitting a written request via the U.S. mails directly to ~~the FBI Identification Division, Washington, D.C. 20537-9700, or to the nearest FBI office.~~  
~~the FBI Identification Division, Washington, D.C. 20537-9700, or to the nearest FBI office.~~  
~~the FBI Identification Division, Washington, D.C. 20537-9700, or to the nearest FBI office.~~  
~~the FBI Identification Division, Washington, D.C. 20537-9700, or to the nearest FBI office.~~  
~~the FBI Identification Division, Washington, D.C. 20537-9700, or to the nearest FBI office.~~  
accompanied by satisfactory proof of identity, which shall consist of name, date and place of birth and a set of rolled-in ink fingerprint impressions placed upon fingerprint cards or forms

commonly utilized for applicant or law enforcement purposes by law enforcement agencies.

### § 16.33 Fee for production of identification record

Each written request for production of an identification record must be accompanied by a fee of \$18.00 in the form of a certified check or money order, payable to the Treasury of the United States. This fee is established pursuant to the provisions of 31 U.S.C. 9701 and is based upon the clerical time beyond the first quarter hour to be spent in searching for, identifying, and reproducing each identification record requested as specified in § 16.10 of this part. Any request for waiver of the fee shall accompany the original request for the identification record and shall include a claim and proof of indigence.

### § 16.34 Procedure to obtain change, correction or updating of identification records

If, after reviewing his/her identification record, the subject thereof believes that it is incorrect or incomplete in any respect and wishes changes, corrections or updating of the alleged deficiency, he/she should make application directly to the agency which contributed the questioned information. The subject of a record may also direct his/her challenge as to the accuracy or completeness of any entry on his/her record to the Assistant Director of the FBI Identification Division, Washington, D.C. 20537-9700. The FBI will then forward the challenge to the agency which submitted the data requesting that agency to verify or correct the challenged entry. Upon the receipt of an official communication directly from the agency which contributed the original information, the FBI Identification Division will make any changes necessary in accordance with the information supplied by that agency.

\* FBI  
CJIS Division  
Attn: SCU, Mod. D-2  
1000 Custer Hollow Road  
Clarksburg, West Virginia 263

Published in the Federal Register on 11/28/73; amended on 10/27/78, 10/27/81, 8/8/83, 5/6/86, 5/17/91, and 1/3/95.

**F O I P A**  
**M A N U A L**

**MEMO 53**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Immigration and Naturalization Service (INS)  
**Date:** March 31, 1998

**INS Lookout and Stop Notices**  
**for NAILS And OASIS**

INS Lookout and Stop Notices regarding the National Automated Immigration Lookout System (NAILS) and the Operational Activities Specific Information System (OASIS) should be referred to INS before acknowledging the existence of this material to the requester. INS policy, in most instances, is to neither confirm nor deny the information to first and third party requesters.

**Referrals From INS Containing "Tentative Index Card" Documents**

Many referrals from the INS consist of only "TENTATIVE IDENT" index cards and the fingerprint classifications shown thereon which may or may not be identifiable with the subject of the request. Any such referrals sent to FBIHQ will be handled in RMU.

In responding to the requester concerning these INS referrals, the following two paragraphs should be utilized:

"This is in reference to your Freedom of Information-Privacy Acts (FOIPA) request sent to us from the Immigration and Naturalization Service (INS)."

"The INS referred information originating with the FBI Criminal Justice Information Services (CJIS) Division (formerly known as the Identification Division) which may or may not be identifiable with the subject of your request. In order to access CJIS Division records responsive to your request, you will have to comply with the enclosed instructions set forth in Attorney General Order 556-73. Fingerprint impressions are needed for comparison with records in the CJIS Division to insure that an individual's record is not disseminated to an unauthorized person."

In closing the case, the FOIPA computer sheet should be closed by checking the "Miscellaneous" box (item number 9) from block 17 along with the date being closed, then the notation "Ident Pitch sent" should be written in block 15.

F O I P A

M A N U A L

# MEMO 54

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Informant Files, Requests for  
Date: March 31, 1998

## Establishing an Informant

### I. Background:

An informant is defined as any person or entity who furnishes information to the FBI on a confidential basis. (MIOG Section 137-1). Although many informants are able to furnish information because they are criminals themselves or are directly involved with criminals, others, such as confidential sources, are not criminals or involved in criminal activities. Confidential sources are defined as those who provide information to the FBI on a regular basis as a result of legitimate employment or access to records, not as a result of association with persons of FBI investigative interest. [(MIOG Section 137-1.1(7)] Thus, an "informant" can be a hardened criminal, an honest office worker who happens to have access to relevant records, or a high-level official who would be appalled to learn he had been characterized as an "informant." The hardened criminal, of course, normally becomes an informant because he expects to benefit from the relationship, such as by receiving payment for information or a reduction of pending charges against him. The high-level official would likely offer his services out of a sense of duty and would probably refuse any payment for information provided.

Informants should not be confused with Cooperative Witnesses. A Cooperative Witness is an individual who, on a continuing basis and under the direction of an agent, contributes substantial operational assistance to the resolution of a case through active participation in the investigation. Although that individual's relationship with the Government is concealed until testimony is required at trial, he is treated as a witness and not opened as an informant. (MIOG Section 137-1.2.)

When a field agent recognizes that an individual has informant potential, he opens an informant file for the purpose of conducting a "suitability and pertinence inquiry." This inquiry, usually completed within 120 days, is intended to determine the suitability of the person as an informant and the pertinence of the information he is likely to provide. At the end of the inquiry, the field supervisor must make a written finding whether the individual should be converted to an operational informant. If the case is closed because the individual is not suitable for an informant, all information volunteered by the individual regarding his background and substantive matters

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### **Informant Files, Requests for**

may be retained by the field office, however, current procedures require the field office to destroy all other information regarding the individual which was obtained without his consent. [MIOG Section 137-3.1.3(2)] If the individual is certified as an operational informant, the field agent gives the informant a number of admonishments regarding his status and activities, which usually clearly indicates that the FBI considers the individual an informant. Confidential Sources are given only a few admonishments which may not clearly indicate their status.

Only a small portion of the considerable paperwork which is generated in the field will be included in the FBIHQ informant file. In general, the FBIHQ file will contain only records of an administrative nature: the opening communication, the communication which converts the individual's status to that of a certified operational informant, requests from the field for funds to operate the informant, and communications concerning problems with the informant such as unauthorized criminal activity. The field office file, on the other hand, contains not only the administrative information, but also detailed substantive information received from the informant pertaining to crimes. This substantive information, generally contained in an FD-306 or FD-209, may be summarized in a communication to FBIHQ requesting funds to pay the informant, so at least some substantive information will be found in the FBIHQ file.

In order to avoid security problems inherent in the transmittal of informant files between offices, an informant file is generally processed for FOIA purposes by the office where it is located: field office files are processed by the field and FBIHQ files are processed by FBIHQ. This procedure can be changed only in exceptional cases and with the approval of the Section Chief. The classifications which should be processed as informant type files are: 134, 137, 170 (obsolete) and 270. The PLS should be alert for any informant information in the main investigative file which is also contained and being protected in the main informant file.

### **Processing Guidelines for Informant Files**

Given the background circumstances, the processing guidelines which follow are meant to accomplish the following ends: 1) to protect the safety of informants who have submitted FOIPA requests under duress or who do not appreciate the dangers inherent in their requests; 2) to protect the viability of the informant program; 3) to protect the privacy of third parties named in informant files; 4) to protect ongoing investigations; 5) to protect the techniques involved in developing, operating, and evaluating informants; and 6) to avoid alienating confidential sources. The guidelines are not rules which must be followed even when the facts of an exceptional case require a different approach: they are some functional frameworks in which most informant file requests can be handled with the aforementioned goals in mind. Unusual cases should be referred to a FOIPA Section Supervisor and/or the substantive Division for advice.

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Informant Files, Requests for

II. First Party Requests:

A) Requester's Incarcerated:

If the requester is incarcerated and has not specifically requested his informant file

b2 [REDACTED] if the requester specifically mentioned his informant file in the request letter, the procedures in paragraph (C) should be followed after discussion with the Team Captain and/or Unit Chief.

B) Requester is Not Aware of "Informant" Status:

b2 If the requester is not incarcerated and is unaware of his status as an informant or of the existence of his informant file, [REDACTED]

[REDACTED] In essence, the requester should be treated as a Cooperative Witness: the information he furnished should be processed using the pertinent exemptions [i.e., exemptions (b)(2), (b)(7)(A), (b)(7)(C), and (b)(7)(E)] except for exemption (b)(7)(D). Determining that a requester is unaware of his status as an informant is a matter of judgment. Some factors which may lead to such a conclusion are the following: 1) the requester was never certified as an operational informant; 2) the requester never furnished any information of value; 3) the requester was never paid, or never signed anything as an informant; 4) the informant file contains only a few serials; and 5) the requester's letter does not specifically indicate a desire for his informant status, his informant file or the confidential information he provided to the FBI.

C) Requester is Aware of "Informant" Status:

If the requester is not incarcerated and is aware of his status as an informant or the existence of his informant file, the field office which operated the informant should be notified of the request.

b2 The outgoing FOIPA Section's electronic communication to the field should advise the

b2 [REDACTED] and coordinate the matter with the

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Informant Unit.

**D) Informant Status Officially Confirmed:**

If the requester is not incarcerated, is aware of his informant status/file, and he advises the request was submitted voluntarily, then a determination must be made as to whether the requester's informant status has been officially confirmed such as through testimony in open court or an official media release. When there has been no such official confirmation, the full range of applicable exemptions, to include exemption (b)(7)(D), can be used to avoid confirming the informant's status by the release. When there has been official confirmation through testimony or an official media release, the information which was publicly disclosed and which can be identified as such in FBI records is subject to release; the remaining information should be processed using the full range of relevant exemptions.

**III. Third Party Requests:**

If information about or from an informant is requested by a third party, the Case Agent handling the informant should be advised at once.

After first considering the (c)(2) exclusion, all of the potentially applicable FOIA exemptions should be considered. If an informant has been officially disclosed, only information concerning his identity as an informant and information about others which has been previously disclosed will be provided to the requester.

**IV. The Exemptions:**

In addition to the manner in which the FOIA exemptions are normally used, the following applications should be considered for informant files:

Exemption (b)(2) may be used to protect informant symbol numbers, informant code names, and the designation "informant" or its equivalent in a file. This exemption would be most useful in those situations where the requester was not yet aware that he was being considered to become an informant or when his informant status has not been officially confirmed.

Exemption (b)(7)(A) may be used if disclosure would reveal the direction of, or otherwise interfere with, a pending investigation. This may occur, for instance, when a report of an informant interview includes only some of the information furnished by the informant. The selective inclusion of information in the report may reveal the focus or direction of an investigation. Since even a thorough review of a file may not indicate whether disclosure could reasonably be expected to interfere with an investigation, it is recommended that the PLS discuss the matter with the case agent for the informant or investigation in question.

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Informant Files, Requests for

Exemption (b)(7)(C) may be used to protect the privacy rights of third parties mentioned in an informant file. Although one factor weighing in favor of disclosure is the public interest in ensuring that information is recorded properly in government files, the other side of the balance, at least where the informant receives some form of consideration or payment for the information, will include the notion that the proprietary right to that information has passed from the informant to the government. That factor, when combined with the traditional privacy concerns inherent in such information, will usually outweigh the factors favoring disclosure, especially in light of the Supreme Court decision in Reporters Committee for Freedom of the Press v. Department of Justice.

As mentioned in Section II part D of this memo, the first clause of exemption (b)(7)(D) should be used when the requester's informant status has not been officially confirmed. Thus, we would withhold any information which could reasonably be expected to disclose that the requester had been an informant. When the requester's informant status has been officially confirmed, exemption (b)(7)(D) can be used to withhold any information which could reasonably be expected to disclose that the requester had been an informant on matters which were not disclosed in the "official confirmation." Exemption (b)(7)(D) would also apply to information which had been provided by others on a confidential basis such as information provided by a local police department concerning the informant's criminal activities. It should be noted, however, that much of the substantive information provided by the requester will be withheld under exemption (b)(7)(C).

Exemption (b)(7)(E) may be used to protect FBI techniques involved in developing, operating, and evaluating informants which are not well known to the public.

Exemption (b)(7)(F) may be used to protect the physical safety of any individual, including the informant/requester.

b2 In a particularly sensitive case, additional measures [REDACTED] could be considered. Such action should only be taken after careful consideration and only with the approval of the Unit Chief and/or Section Chief personnel.

b2 Finally, the Criminal Informant (Ext. [REDACTED] Room [REDACTED] Witness Security Programs Unit (Ext. [REDACTED] Room [REDACTED] should be consulted prior to disclosing any information concerning an informant.

**F O I P A**  
**M A N U A L**

# MEMO 55

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: [REDACTED]  
Date: March 31, 1998

b2/b7E

b2  
b7E The [REDACTED] is an extremely vital and sensitive program the existence of which is protectable under Exemptions (b)(1) and (b)(7)(E). The program is further characterized in the following excerpt from a R. M. Bryant Memorandum to Mr. Baugh dated 3/28/94:

b2  
b7E "As the lead agency for counterterrorism within the U.S., the FBI has developed and implemented an [REDACTED] to reduce the threat of terrorist violence [REDACTED]. The objective of this proactive FBI project (as defined by Executive Order 12656, signed by former President Reagan on 11/18/88) is to identify [REDACTED] where necessary, and by doing so, to facilitate the protection of the U.S. infrastructure."

"Our infrastructure is defined as a system of interdependent networks [REDACTED]

b2  
b7E [REDACTED]

b2  
b7E [REDACTED]

"It is important to note that although individual assets can be advised of their designation, the comprehensive list cannot be disseminated in its entirety outside the FBI. This restriction is based on the security classification [REDACTED]

b2  
b7E

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DATE 9-2-98 BY [Signature]



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Page 2

[REDACTED]

b2/b7E

b2  
b7E

[REDACTED]

"If you have any further questions, do not hesitate to contact the Counterterrorism  
Section, Counterterrorism Planning Unit, National Security Division, at extension [REDACTED]"

b2

**F O I P A**  
**M A N U A L**

**MEMO 56**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Institutional Sources and Information Provided by Them  
**Date:** March 31, 1998

On May 24, 1993, the Supreme Court issued a ruling in the civil litigation of DOJ vs. Landano that had a significant impact in regard to the protection of confidential law enforcement sources under exemption (b)(7)(D). The Supreme Court's decision basically stated that a confidential relationship cannot be inferred with every individual or institution contacted by the FBI during the course of a criminal investigation. As such, one difficult area that was affected in the Landano ruling was the protection of institutional sources, i.e., commercial and financial institutions, especially where the information provided by such a source is of a "routine" nature.

However, there are certain circumstances in which we may be able to demonstrate implied confidentiality where the focus is on the nature of the information provided, and the proposition that, where an institution provides information that the subject would not want given out, it may be concluded that the institution was doing so with a tacit understanding of confidentiality.

The approach in this regard would be to infer that an institution providing information to a federal law enforcement agency is acting with implied assurances of confidentiality whenever it is providing information that it would not normally make available to the public. The FBI may be able to support such an approach if it can demonstrate that particular sources or categories of sources are known to have policies restricting the public dissemination of the type of information in question. In this respect, the courts may take a narrower view of implied confidentiality in this context, and may be willing to find implied confidentiality only where the information provided is of a sensitive nature. Examples of communications where we may be able to characterize as "confidential" under this theory include the following:

1. Institutions providing financial information about the subjects of investigations, other persons suspected of involvement in criminal activities, or criminal organizations or their members.
2. Institutions providing information about the activities of suspects or members of criminal organizations, e.g., specific telephone calls made by them.
3. Institutions providing derogatory information, or intimate or embarrassing personal information about any person.

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**Institutional Sources**

4. Institutions providing assessments about the character or work of employees, if the information concerns a criminal suspect or is derogatory.

In other circumstances, involving less sensitive types of information, a theory of implied confidentiality will be more difficult to justify in the absence of some indication that the source treated the information as confidential. Examples of such information include the following:

1. Information concerning vehicle registration or ownership from motor vehicle departments.
2. Information about the fact that utility services were provided at particular locations and dates.
3. Routine information from state or local prison officials, such as release dates, etc.
4. Routine information provided by employers about starting and ending dates of employment, salaries, etc.
5. Contacts in which no information was provided or, on the other hand, where innocuous/unimportant information was provided.
6. Routine law enforcement record checks or credit checks.

In all of the above examples, it should be kept in mind that the identities of persons contacted at such organizations and supplying the information to the FBI should be protected under Exemption (b)(7)(C), unless such persons are known to be deceased. In the same respect, should the information itself pertain to a third party individual, the name(s) and any identifiers concerning the individual(s) should likewise be protected pursuant to Exemption (b)(7)(C).

In applying the standards of the Landano ruling, it should be kept in mind that this only affects the application of implied confidentiality. Wherein a confidential relationship does exist by virtue of an "expressed" or "specific" request of confidentiality, exemption (b)(7)(D) will be applied to protect the identity of the source, as well as, the information provided by the source. However, if the information would not tend to identify the source, it may be released as addressed in Attorney General Janet Reno's policy of discretionary disclosure of October 1993.

The following institutional sources have requested confidentiality as indicated:

- b7D 1.) [REDACTED] Information

[REDACTED] requires a subpoena duces tecum before substantive [REDACTED] file information

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Institutional Sources

b7D [REDACTED] is released if an investigation is not related to a violation against [REDACTED]. In addition, [REDACTED] policy requires that the customer whose records are being sought must be advised of the issuance of the subpoena unless the subpoena directs [REDACTED] to refrain from notifying the customer.

b7D Therefore, information from [REDACTED] should be considered as having been furnished under a promise of confidentiality if the document containing the [REDACTED] information does not mention whether [REDACTED] notified its customer. Assume it did not and protect the information under exemption (b)(7)(D) pursuant to an "express" grant of confidentiality. However, if [REDACTED] advises the customer that it has furnished information to the FBI, [REDACTED] should be considered to have waived its confidentiality rights and the information may be released in first party requests. Privacy issues may be warranted and the appropriate exemptions asserted when the information pertains to third party individuals.

b7D 2.) [REDACTED] Checks

b7D [REDACTED] liaison for Federal Customers has requested confidentiality in criminal and civil matters for future and past information. Exemption (b)(7)(D) should be asserted to protect [REDACTED] and the information provided.

F O I P A

M A N U A L

# MEMO 57

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Interesting Case (I.C.) Memoranda Located In FBI Files  
**Date:** March 31, 1998

## Interesting Case (I.C.) Memoranda Located in Bureau Files

I.C.s were originally created by the public relations staff for the media and the public. These narratives consist of approximately 2-12 pages, span the years 1932-1972 and can be identified by the letters "I.C. file No. ..." located at the top left corner of the document. As all I.C.s have been publicly disclosed, they can be released in their entirety without redactions.

**F O I P A**  
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**M A N U A L**

**MEMO 58**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Internal Revenue Service (IRS)  
**Date:** March 31, 1998

**Social Security Account Numbers**

When referring documents or information to the IRS, it has been requested that, when known, the Social Security Account Number (SSAN) of the FOIPA requester also be furnished. Generally, the SSAN is provided on the initial FOIPA request letter of first party requesters, however, extensive file reviews should not be conducted to ascertain the number. The SSAN assists IRS in locating the original copies of the records referred by the FBI.

**F O I P A**  
**M A N U A L**

**MEMO 59**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Interview Notes; Special Agent  
**Date:** March 31, 1998

Special Agents are required to retain the handwritten notes they make during or after any interview if they anticipate the results will become the subject of testimony. These notes are usually identified as the "1A" portion of an FBI field office file.

Exercise care in processing the handwritten interview notes. Compare the typed FD-302 interview notes, normally located in a main section of the investigative file, with the handwritten notes to ensure that all applicable exemptions have been asserted and that the same information has been protected in a consistent manner. Remain alert for additional information contained in the handwritten interview notes, such as the Agent's idea of areas to be explored while questioning the interviewee, leads sent out, or information provided by the interviewee which does not appear in the typed FD-302 and process this information accordingly.

**F O I P A**  
**M A N U A L**

# MEMO 60

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Investigations Conducted by the FBI  
Date: March 31, 1998

## Compromising the Investigation of an Organization Through Disclosure of a Member's File

The purpose of this memorandum is to emphasize the importance of considering the full range of FOIA exemptions when processing material from organizational files of a security nature. For example, the FBI investigates organizations such as various mafia groups around the country and in the past, the FBI investigated various communist groups fronting as legitimate organizations. Pursuant to Attorney General guidelines, the number of domestic security investigations conducted on organizations have been reduced.

It is imperative that we process material from organizational files in a manner which will adequately protect the Bureau's penetration and the scope of the coverage. A situation which merits particular attention is a request from a member of an organization, "front," or other group for his or her individual file. The individual's file may be closed, while the investigation of the organization may be continuing and quite sensitive. Documents concerning the investigation of the organization may have been channelized into the individual member's file. This "channelization" of documents from an organizational file to an individual member's file was created so that FBI investigators could have all current investigative information concerning an investigative subject. The indication that a document has been channelized is generally determined by an analysis of the copy count area on the document. The copy count will indicate the subject name and file number of all investigative files in which a copy of the organizational document was to be placed.

In processing these types of investigative files, it is important to consider the use of the (c)(1) exclusion or the (b)(7)(A) exemption if the investigation of the organization is pending. In processing closed investigations, all applicable FOIPA exemptions should be considered.

In order to ensure that organizational investigations are not compromised and that they are adequately protected, a PLS should call the last section of an organization's file to determine whether the organization continues to be of investigative interest to the FBI. Consideration should also be given to consulting with the substantive Division if any doubt exists as to the status of the case. These same procedures should be used in FCI organizational files. In certain instances it might also be appropriate to follow these procedures in closed organization files

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HEREIN IS UNCLASSIFIED  
DATE 9-27-98 BY SP/che



**Investigations Conducted by the FBI**

where a relationship might exist between the organization which was the subject of the closed case and another organization presently under investigation.

**Investigations in Foreign Countries**

The presence of an FBI Legat in a foreign country is at the pleasure of the host government. Any disclosure indicating that an investigation was conducted in a foreign country, by or on behalf of the FBI, may jeopardize the continued operation of our Legat in that country.

In processing FBI files, the PLS will ordinarily find documents reporting information from foreign agencies or authorities, however, the PLS may encounter documents which report FBI investigative activities in foreign countries. The latter type information is often classified and in such situations, Exemption (b)(1) should be cited to protect the information. Therefore, disclosure PLSs should be certain that information of this type is reviewed by the Document Classification Unit, keeping in mind this situation may also exist in non-security investigations. If the information does not warrant classification, the PLS should consult the Foreign Government Information Classification Guide (G-1)<sup>1</sup> to determine whether or not the foreign agency requests its information be protected and whether or not the foreign agency wants its relationship with the FBI made public. Some foreign agencies or authorities request that their information be protected; however, they do not object to their relationship with the FBI being made public. In those situations, the PLS would protect the foreign agency information pursuant to Exemption (b)(7)(D), but would release the identity of the foreign agency. Other foreign agencies request that both the information and their identity remain protected, and thus, all information would be redacted pursuant to (b)(7)(D).

Documents which often report foreign agency or authority information usually originate from an FBI Legat. It is important to note that even the "From" line in a Legat-authored communication can be sensitive information because it specifically identifies the host country and when combined with the details of the communication, reveals the fact that the host country has furnished information to the FBI. Situations do arise wherein the "From" line of a Legat communication is properly classified "Secret," which is possible even in criminal cases. If the document has been classified "Secret" in its entirety that classification covers the "From" line. If the document is not classified in its entirety the "From" line is not classified unless there is a classification marking opposite that line. In all cases where the document is not classified in its entirety and there is no classification marking by the "From" line, the same procedures should be followed as above in utilizing the G-1 guide. If there are any questions concerning the

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<sup>1</sup>The G-1 Guide provides instructions on the classification of national security information pertaining to foreign government information.

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**Investigations Conducted by the FBI**

classification of the "From" line, the PLS should contact the DCU PLS who reviewed the document for classification even if the case is of a criminal nature.

If the PLS has any questions concerning the application of exemptions to Legat/foreign government information and/or the Legat's activities in a foreign country, the matter should be discussed with the Team Captain and/or Unit Chief. If a disclosure is still contemplated after that point, the matter should be discussed with personnel from the International Relations Unit.

**Multiple Subject Investigations**

If the Team Captain and/or PLS determines that the requester is carried in a multiple subject investigation, it may be appropriate to check the other names with RTSS to determine if the file has been previously processed for another requester. It is recognized that privacy interests will dictate how much information will be provided other requesters; however, the possible use of Exemptions (b)(6) and/or (b)(7)(C) may depend on whether the information was withheld or disclosed in a prior release.

Since these multiple subject cases vary in their makeup, a hard and fast rule that other subjects' names should be checked for prior processing in every instance is not necessary. However, the advantages of uniformity in processing and the time saving factors should be carefully considered, resolving any doubts in favor of checking the indices.

**F O I P A**  
**M A N U A L**

# MEMO 61

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Iran-Contra / Front Door Material  
**Date:** March 31, 1998

## Iran-Contra Investigation; Front Door Files

FRONT DOOR is the code word for the investigation conducted by the Office of Independent Counsel (OIC) relating to the Iran-Contra. Information pertaining to the Iran-Contra is filed in FBIHQ files 58-11887 and HQ 211-26.

If either of the above file numbers appear on a search slip, **DO NOT call the files and DO NOT PROCESS the files.** The Special File Room (SFR) controlled access to HQ 58-11887, but the SFR has released HQ 211-26 for review. If you should receive either of the above files, contact PLS [REDACTED] immediately. *bl*

The Office of the Independent Counsel on Iran-Contra has been disbanded and all of their material has been transferred to National Archives pursuant to Title 28, U.S.C., Section 594(k). Material indexed into 58-11887 or 211-26 will no longer be reviewed or processed by FBI PLSs and, where appropriate, the following paragraphs should be used for response to requesters:

### A.) First Party Request Which Results in Cross-references

"A search of the indices to our Central Records System files at FBI Headquarters revealed material that may or may not be identical to you in files concerning the sale of arms to Iran and the possible diversion of proceeds from those sales to Nicaraguan "Contras." This material is located at the Office of National Archives. If you have further interest in "Iran-Contra" related material, you may wish to correspond directly with the Office of National Archives."

### B.) Request for the Entire Investigation

"Reference is made to your request for material relating to the "Iran-Contra" investigation which concerns the sale of arms to Iran and the possible diversion of proceeds from those sales to Nicaraguan "Contras." This material is located at the Office of National Archives. If you have further interest in "Iran-Contra" related material, you may wish to correspond directly with the National Archives."

**F O I P A**  
**M A N U A L**

**MEMO 62**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Laboratory Notes  
**Date:** March 31, 1998

**FBI Laboratory Notes**

The Scientific Analysis Section, Laboratory Division, has advised that it has no objection to the release of Laboratory notes and reports in Bureau cases. However, if such notes from this Section, or any other Section within the Laboratory Division for that matter, contain unique Laboratory exams or possibly unknown techniques, a Laboratory examiner should be consulted, preferably the examiner who made the notes, before such releases are made. If the original examiner is not available, the particular Unit Chief should be contacted for any questions or to review the proposed release of laboratory material.

In cases where the Laboratory examination was done at the request of a local or state police agency involving a matter over which they have exclusive jurisdiction, the Landano standard of processing must be applied if a specific request for confidentiality for the material was not indicated. On rare occasions, it may be necessary to contact the law enforcement agency for assistance or for further information to complete the analysis and processing of the case.

**F O I P A**  
**M A N U A L**

# MEMO 63

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Legal Attache  
Date: March 31, 1998

## Search Procedures for Legal Attache (Legat) Files

b6  
When a request is made for a search to be conducted of the Legat files, the LT or PLS should complete and submit a search slip to the Special File Room, Room [REDACTED] to the attention of [REDACTED] b2  
Indicate on the search slip that the scope of the search is for the "Automated" Data Base only, unless the FOIPA request letter specifically asks for the "Manual" indices to be searched or if the information being requested would in itself only be found in the manual index. Also, indicate that the type of search requested is "Legat Indices," specifying which Legat is to be searched (See sample attached). If an initial FOIPA request is received in RMU for a specific Legat, the search should be completed and the copies of the file(s) obtained prior to assignment of the request to a Disclosure Unit.

## Storage of and Obtaining Legat Files

On May 23, 1984, the Legat Micrographics Program was initiated to enhance security because of the potential hazardous environment of an overseas post and to relieve overcrowded file storage conditions in the Legats.

When an investigation has been closed in the Legat for 90 days, the raw file is sent to FBIHQ to be stored or placed on microfiche. A copy of the microfiche is furnished to the Legat and a copy is maintained at FBIHQ in the Micrographics Unit, Room [REDACTED], extension [REDACTED]. The 1A and Bulky Exhibits are not microfiched, only the covers to this material. If copies of the 1A or Bulky enclosures are needed, they can be retrieved from either Pickett Street or Boyers, Pennsylvania. If a copy of the file will suffice, the Microfiche can be duplicated and sent to the LT or PLS. If the raw material is needed, it will be retrieved by the Micrographics Unit and forwarded to the LT or PLS.

## Legat ELSUR Requests

If a request has been made for a search of a specific Legat's ELSUR indices, the requester should be advised there are no ELSUR indices in the Legats. The FBI has no authority to conduct ELSUR in foreign countries, therefore an ELSUR indices is not maintained.

F O I P A

# MEMO 64

M A N U A L

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Mail Covers  
**Date:** March 31, 1998

Mail covers are placed with the Postal Service and entail the Postal Service watching for and recording the addressee and addresser of all mail written to a particular individual or organization. The existence of a mail cover is not generally protected under Exemption (b)(7)(E); however, National Security mail covers are often classified and governed by Exemption (b)(1) law.

At times, unique circumstances may exist where information pertaining to a mail cover may need to be protected, such as when the mechanics/details of the mail cover (which are not generally known to the public) are set forth in an FBI record. Should it surface, the PLS may be able to protect those aspects of the mail cover under Exemption (b)(7)(E). In other instances in which mail covers were utilized, the assertion of Exemption (b)(7)(E) should be considered for cases recently closed by administrative means and did not reach a prosecutive status. If the case has the possibility of being reopened or a "spin-off" case was involved, the release of the fact a mail cover was utilized could be a detriment to the reopening of the investigation or any related pending investigations. Contact with the field office Case Agent is recommended in these situations in order to determine if there is a "foreseeable harm" in disclosure of the information.

**F O I P A**  
**M A N U A L**

**MEMO 65**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** **Manuals, FBI**  
**Date:** March 31, 1998

The following FBI manuals have been processed and are available for release:

- Manual of Administrative Operations and Procedures (MAOP)
- Manual of Investigative Operations and Guidelines (MIOG)
- Foreign Counterintelligence Manual (FCIM)
- National Crime Information Center (NCIC) Manual
- Legal Handbook for Special Agents

b6 Inasmuch as these manuals are available for review in the FOIPA Reading Room and they undergo periodic changes, information being considered for release should be coordinated with Team Captain [REDACTED] or PLS [REDACTED] Unit 3, prior to any disclosure.

**F O I P A**

# MEMO 66

**M A N U A L**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** National Center for the Analysis of Violent Crime (NCAVC)  
**Date:** March 31, 1998

## "252" Files and Other Bureau Classifications

The National Center for the Analysis of Violent Crime (NCAVC) is managed under the auspices of the Critical Incident Response Group (CIRG), a field office entity located at the FBI Academy in Quantico, Virginia. Previously, the NCAVC has encompassed several programs and units to include:

1. The Violent Criminal Apprehension Program (VICAP) and the Criminal Investigative Analysis Program (CIAP), both of which have been administered by the Profiling and Behavioral Assessment Unit (PBAU).
2. The Missing and Exploited Children Task Force (MECTF) which has been administered by the Child Abduction and Serial Killer Unit (CASKU).

The CIRG consolidated PBAU and CASKU resources under the single descriptor, the National Center for the Analysis of Violent Crime. VICAP has become its own unit, but also functions under the NCAVC umbrella.

All NCAVC components are designed to provide assistance to federal, state and local law enforcement agencies in the detection and apprehension of violent criminal offenders, including those persons commonly referred to as "serial murderers."

The material compiled at the request of federal (non-FBI), state and local law enforcement agencies is maintained in the 252 classification. The NCAVC also provides assistance to FBI field divisions during the course of FBI criminal investigations such as kidnapping, extortion, crime on government reservation, etc. In these instances the NCAVC material will be found in the FBI investigative file classification.

The subject's name, if known, as well as that of the victim(s), is indexed in the general indices at FBIHQ. These records will appear in the indices and/or on the search slip as Universal Case files (i.e., 252-IR-12345) or the pre-Universal Case file numbering system (i.e., 252-2345).



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**National Center for the Analysis of Violent Crime**

Since April 1992, all opened and closed HQ 252 classifications have been manually maintained at Quantico as a part of the NCAVC record system (JUSTICE/FBI 015). The HQ 252 files generated prior to 1992 are maintained at Picket Street or Quantico. You should also be aware that NCAVC/VICAP manually maintains their equivalent 252 file classification and other file classifications concerning violent crimes investigated by the FBI (such as kidnapping, extortion or crime on government reservation) at Quantico.

The NCAVC is maintaining a control file, 190-IR-C-2246, for FOIPA requests involving 252 files and the other classifications, as described above. If an FOIPA search reveals that a 252 file or other classifications exists, the LT or PLS should:

- b2 1. Contact the Rotor Clerk for the NCAVC at [REDACTED] or 540-720-[REDACTED] or [REDACTED] in order to obtain the file(s) for duplication and processing.
- b2 2. EC or FAX a copy of the FOIPA request letter to the attention of the NCAVC/VICAP Unit Chief at (540)-720-[REDACTED] and the CIRG, Chief Division Counsel at (703)-640-[REDACTED]
3. Provide NCAVC with the requester's 190 file number and the FOIPA computer number.

Data concerning violent crimes is also stored in an automated data base maintained by the NCAVC in a separate FBI record system which is part of the NCAVC (JUSTICE/FBI-015). This data base contains information which is used in the overall VICAP Program. NCAVC/VICAP analyses the information in this data base to identify any common threads which might run through the various cases.

Components of the NCAVC/VICAP data base should not be searched unless the requester specifically asks that it be searched or includes information in his request letter which indicates it should be searched.

The information in the NCAVC/VICAP data base and the 252 VICAP files is exempt from access under the Privacy Act pursuant to exemption (j)(2). When processed under the Freedom of Information Act, the appropriate Exemption 7 provisions should be utilized in addition to any other applicable FOIA exemptions. In addition, contact and coordination should be made with NCAVC/VICAP when processing these cases.

Because of the sensitive nature of the techniques used by all NCAVC components in their development of unknown offender profiles, investigative recommendations, interviews and interrogation techniques, prosecutive and trial strategies, threat assessments, overall crime analysis, search warrant affidavits and expert testimony, the NCAVC should be consulted. Upon completion of the processing of the 252 file or other classification, the PLS should:

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**National Center for the Analysis of Violent Crime**

1. Provide NCAVC with a black-out copy of the proposed release for their review prior to disclosing any material to the requester.
2. Provide NCAVC with a copy of the final disclosure or denial letter. If the case is being closed administratively, notify NCAVC of this action and the reason for closing the case.

If the FBI receives an administrative appeal concerning the material from a 252 file and the DOJ/OIP attorney affirms the appeal, there is no need to advise NCAVC. If, however, the DOJ attorney suggests an amended release, consult with the NCAVC before agreeing to the release of additional material. Then provide NCAVC with copies of:

1. The requester's appeal letter.
2. The DOJ acknowledgment letter.
3. The DOJ letter advising requester of a remand or an amended release.
4. The FBI letter releasing the additional material.

If the FBI receives an appeal concerning one of the other file classifications, as described above, containing NCAVC material and the DOJ attorney affirms the appeal or the DOJ attorney recommends release of material that does not include the NCAVC material, there is no need to advise NCAVC of the appeal. However, if the DOJ attorney recommends the release of information of interest to NCAVC, consult with NCAVC before agreeing to the release of the additional material. Provide NCAVC with copies of items 1 through 4 above.

Be aware that much of the work done by NCAVC is for other federal (non-FBI), local and state law enforcement agencies, and there will be times when the FBI file is closed and the other federal, state or local investigation is still pending. The (b)(7)(A) exemption of the FOIA should be considered.

When processing a VICAP report, the PLS will release the cover page. For the report itself, the PLS will need to review the report to determine the origin of the information in the report. If the material in the report was furnished by a state or local law enforcement agency, the PLS will deny the report in its entirety citing Exemption (b)(7)(D) and if applicable Exemption (b)(7)(C). If the material in the report was furnished by a federal (non-FBI) law enforcement agency, the PLS will consult with the contributing agency.

**F O I P A**  
**M A N U A L**

# MEMO 67

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** National Crime Information Center (NCIC)  
**Date:** March 31, 1998

## NCIC Entries For Missing Children

The Missing Children Act, which was signed on 10/12/82, gives a parent, legal guardian, or next of kin of a missing child the legal right to inquire of the FBI whether data on the missing child has been entered in the NCIC Missing Person File. Such inquiries should not be processed under the Freedom of Information Act (FOIA) or Privacy Act (PA), but should be referred to the FBI field office which covers the locality involved.

Requests to verify the missing child entry which are made by anyone other than a parent, legal guardian, or next of kin must be considered FOIA requests. In most cases, such requests should be denied under Exemption (b)(7)(C).

## NCIC Message Keys and Originating Agency Identifiers (ORIs)

Identification records (rap sheets), NCIC and III printouts may contain NCIC Message Keys and/or Originating Agency Identifier (ORI) numbers. These message keys and ORI numbers do not warrant protection pursuant to a FOIPA exemption.

A Message Key is a two-or three-character designator which identifies the type of entry or query sent. Although there are over 75 keys in present use, they will typically begin with the alpha characters "C" (Clear or Cancel), "E" (Enter), "M" (Modify), "O" (query), "X" (Clear), or "Z11" (Test). All letters in a Message Key are capital letters, and they generally appear at the beginning of a message. They often follow the entry code "MKE/", although they also appear in other places, such as in a header line, separated from the ORI by a period. (Note: the MKE/ code may also be followed by a narrative description of a message key for responses from system records.

An ORI is a nine-character entry which identifies the agency entering the message, or another agency related to a previous NCIC message or event. ORIs begin with a two-letter state code, but may end in either a numeric or alphabetic character. They may or may not follow the entry code "ORI". They commonly appear in three places:

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National Crime Information Center (NCIC)

- 1) the beginning of a record, representing the agency requesting a record;
- 2) in the body of a record, representing the agency which entered the record; and
- 3) in an III record, following identification of an arrest event, representing the arresting agency.

Due to variances in state and federal system formats, the positions of message keys and ORIs may vary from record to record. In addition, anticipated changes in the NCIC system may create similar codes. (An example is the proposed "CTI" identifier for courts issuing warrants.) The examples provided below are typical of how the codes may appear as discussed above:

1.) 2L0102077MJM .QH.DCFBIWA36.NAM [REDACTED]

2.) 7L0102077MJM  
DCFBIWA36

THIS NCIC INTERSTATE IDENTIFICATION INDEX RESPONSE IS THE RESULT OF YOUR  
INQUIRY ON NAM [REDACTED] SEX/M RAC/W DOB [REDACTED]

NAME [REDACTED]

FBI NO. [REDACTED]

INQUIRY DATE  
10/25/90

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	BIRTH PLACE
M	W	[REDACTED]	5'11"	185	BRO	BRO	[REDACTED]

FINGERPRINT CLASS  
PO PI CO PO PM  
PI PM 10 PI 13

ALIAS NAMES  
[REDACTED]

IDENTIFICATION DATA UPDATED 10/16/90

THE CRIMINAL HISTORY RECORD IS MAINTAINED AND AVAILABLE FROM THE  
FOLLOWING:

FBI

-FBI [REDACTED]

THE RECORD(S) CAN BE OBTAINED THROUGH THE INTERSTATE IDENTIFICATION INDEX  
BY USING THE APPROPRIATE NCIC TRANSACTION.  
END

3) QW.DCFBIWA36.NAM/BADGUY,JOHN T.DOB/010101

b6  
b7c

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**National Crime Information Center (NCIC)**

DCFBIWA36

NO NCIC WANT DOB/010101 NAM/BADGUY,JOHN T

**Stop Index in NCIC**

The Bureau Stop Index Program was instituted in April, 1971. Essentially, it was a computerized file included in NCIC for intelligence purposes on individuals against whom warrants were not outstanding. NCIC queries by any NCIC user would result in a "No NCIC Want" response to that user, but would generate a special notice to the NCIC Control Room to notify the appropriate Field Office of the inquiry. The Program was discontinued in February, 1974.

NCIC has determined there can be no entry into NCIC except for categories of individuals or records published in the Federal Register pursuant to the Privacy Act. Consequently, language in FBI documents, especially form FD-305, such as "Stop Notice Placed with NCIC" or "Stop Notice Placed with the Bureau Stop Index" is not protectable under (b)(7)(E).

Please take the foregoing into consideration when processing documents pertaining to NCIC Stop Notices.

**F O I P A**  
**M A N U A L**

**MEMO 68**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** National Security Agency (NSA)  
**Date:** March 31, 1998

**NSA Referral Policy**

b3  
per  
NSA

When any NSA originated document or information is located in an FBI file being reviewed for release under the FOIPA, no information will be released to the requester from that file or document until a referral is made to NSA and a response is received. [REDACTED]

NSA will make reasonable efforts to respond to the referral within ten days (allow an additional ten days for mailing). Depending on the particular circumstances, NSA will advise [REDACTED]

[REDACTED] Time extensions can be arranged with NSA in those rare cases that involve voluminous referrals.

b3  
per  
NSA

[REDACTED]

Since special clearances are normally required to handle NSA documents, the following individuals who have the proper clearances will handle all NSA referrals:

Unit 1 - [REDACTED]  
Unit 3 - [REDACTED]

b6

If you locate an NSA document or NSA information in an FBI document while reviewing a file, refer the matter to the PLS listed above who is designated to handle NSA matters in your Unit. The designated PLS will review the document and instruct the PLS on how to handle the referral or, if the document contains information that is Sensitive Compartmented Information (SCI), he or she will handle the document. The NSA has requested that the FBI refer only one copy of the referred document(s). The designated PLS's name will be on all referrals as the

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**National Security Agency (NSA)**

b2 person for NSA to contact. After the referral is initialed for approval, the designated PLS will hand carry the referral to the Special File Room and an FD-501a form will be attached to the referral. The designated PLS will then hand carry the referral to the FBI's NSA Liaison Agent in Room [REDACTED]

When the referral has been returned by NSA, the designated PLS will hand carry the referral from the Special File Room and will handle the processing of the NSA information if it is SCI. If, however, the information is Top Secret (TS) or lower and not SCI, the PLS to whom the case is assigned will handle the returned referral since all FBI employees have access to TS information. The returned referral in all instances must be presented to Document Classification Unit. (See FOIPA Section numbered memorandum "Classified Material, Handling and Transmittal of" which provides instruction on handling TS/SCI information.)

**F O I P A**  
**M A N U A L**

# MEMO 69

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Personnel Files  
**Date:** March 31, 1998

## Personnel Files of Current and Former FBIHQ Employees

### A) CURRENT EMPLOYEES

Experience has shown that few deletions are made from personnel records and few employees ever request a copy of their complete file. For this reason, it is more expedient to permit the employee to review the raw file and to copy, process, and retain only those documents wherein information is being withheld. The procedures outlined below should, therefore, be followed by the PLS:

(1) Obtain the Official Personnel File (OPF). Personnel files are requested through the Automated Case Support (ACS) system. Many of the personnel files have now been separated into a main 67, a Medical Section (Sub M) and a Security Section (Sub S). If a Sub M or Sub S file exists, it will be stamped with a notation on the outside jacket of the main 67 file. If a personnel file is needed by the PLS for more than a day, it must be secured overnight in a locked cabinet.

(2) Review the entire file and identify those documents containing information to be withheld.

(3) Duplicate only those documents which contain material that requires protection from disclosure and use the duplicate as a work copy to delete the material. A final disclosure copy (black-out copy) should then be made and temporarily inserted into the file in place of the original document. (If a large amount of duplication is to be done, complete the duplication form, place the file in a messenger envelope and forward it to the Duplication Center.)

(4) Since an employee will normally be afforded the opportunity to review classified information contained in their personnel file, it is not necessary to have the file reviewed by DCU prior to review by the employee. If the employee wants a copy of a document containing classified or potentially classifiable information, only those documents that the employee wants copies of will be reviewed by DCU. The file should be submitted to DCU with the documents which warrant classification review noted on OPCA-18 form. The following are examples of information which may be found in personnel files and require DCU review: Special Agent,



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**Personnel Files**

Radio Maintenance Technician, and Special Employee files which may contain references or notations in the annual performance rating to security informants or the specific nature of FCI investigations handled by the employee; a synopsis of an FCI investigative matter handled by an employee as justification for a letter of commendation; in-service memos detailing the nature of FCI training; or material in the background investigation of the employee which may have been obtained from foreign police agencies.

(5) Prepare an addendum to the FD-488 (Privacy Act Request Form) setting forth the following: the reason for any excisions; number of pages withheld in their entirety, if any; and a description of the last document/serial in the file as of the time of processing. Since a formal disclosure letter is normally not prepared in connection with these reviews/releases, it is recommended that the employee initial the addendum as evidence of his or her understanding of the deletions made.

(6) The proposed disclosure must be reviewed by a Team Captain.

(7) Contact the employee and make an appointment to review the file. If possible, provide an appropriate location where the review can be conducted other than the PLS's work area. If the employee is not located at FBIHQ and is not in a position to review the material in the FOIPA Section, contact the Field Coordination Team to determine the appropriate procedure for the employee to review the file.

(8) Have the employee sign the lower portion of the FD-488 acknowledging the employee was given appeal rights and the right to obtain copies of reviewed material.

(9) Have copies made of any documents requested. A notation may be added to the addendum identifying documents requested by the employee.

Requests by FOIPA Section employees for access to their own personnel files will be assigned for processing by the Section's Front Office.

In addition to the OPF, personnel/performance folders are maintained by the rating official on FBI employees. At the time the employee is provided with his or her performance rating, a request may be made by the employee for access to physically review this folder. Should the employee request copies of any material maintained in this folder, he or she should be advised that a FOIPA request must be submitted in order to obtain copies of the material.

There may be particular circumstances which preclude the release of certain performance related information or documentation to the employee. These circumstances may include information or documentation which is relevant to a pending complaint, charge or internal investigation.

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**Personnel Files**

**B) FORMER EMPLOYEES**

Former employees are generally treated as members of the public. They may not review their files in the FOIPA Section space or have access to classified information. When their files contain information which may require classification, the entire file should be sent to DCU for review.

FOIPA personnel should remain alert for information located in personnel records which may require classification. This includes, but is not limited to, such items as: references to the SSG (Special Support Group); language training for certain vice training classes; various Bureau codes and systems data; some security clearance forms; and information concerning the duties or responsibilities of Radio Maintenance Technicians.

**C) MEDICAL RECORDS**

Employee medical records may be located in the following places: 1) the employee's personnel file; 2) the employee's medical folder, which is part of the personnel file but is maintained separately from it; and 3) the employee's clinical file, which is located in the Health Services Unit.

Medical folders were first established for agents in 1986 and for support personnel in 1988. Prior to the establishment of those folders, all medical records were filed in the employee's personnel file. Since the records in a personnel file were not removed and placed in a newly opened medical folder, an employee's medical record can be located in all three places mentioned above. Existence of a medical folder will be indicated by the stamp "Medical Records Filed Separately" on the personnel file. Medical folders are requested by calling the Personnel Records Unit (Ext. 4857).

Clinical files, which were first established on 1/13/86, contain the original EOD physical examination report of a current employee hired after that date and various other records. After employment ends, the documents in the clinical file are placed in the medical folder. Clinical files should be requested by calling the Supervisory Occupational Health Nurse (SOHN). If records are obtained from the clinical file for processing, an FOIPA Section employee must annotate the FD-488 Privacy Act Request to show which records were retrieved and included in the processed package.

If a release of medical records pursuant to a Privacy Act request might cause harm to the requester or another person, then those records should first be discussed with the SOHN. This can occur, for instance, when records are found concerning a psychiatric/emotional condition, or any other sensitive medical problem. If the decision is made that potential harm could occur if released directly to the requester, then the requester should be advised the material will be released pursuant to Title 5, U.S.C. §552a (f) (3). That is, the requester must provide the FOIPA

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**Personnel Files**

Section with the name and address of his or her personal physician and the records will be forwarded to the physician for release to the requester. The release of this type of information is done through the physician so the medical information can be clearly discussed and explained to the requester.

**D) SENDING PROCESSED MATERIAL TO FILE**

When a Privacy Act request involves processing of material from a 62 {Administrative Inquiry (AI)}, 67, 263 or 280 file classification, the pages containing deletions should be forwarded to the Personnel Records Section for filing into the respective 62 (AI), 67, 263 or 280 file along with the original FD-488 and/or OPCA-16 form (Disclosure letter). Please note those documents from the 67 Sub M and/or the Sub S which contain redactions are to be filed in the 67 Sub M and/or Sub S, along with a copy of the FD-488 or the OPCA-16 form, and not in the main 67 file. If processing also involves additional file classifications, then a 190 file should be opened and the processed documents from the other file classifications should be filed in the 190 file along with a copy of the FD-488 and/or OPCA-16 form. The 190 file number should be recorded in the "Miscellaneous" block on the computer sheet.

**Personnel Type Records Maintained at the FBI Academy,  
Quantico, Virginia**

Presently, there are two administrative units at the FBI Academy which maintain separate folders containing records identifiable with Special Agent (SA) personnel. The New Agents Unit maintains folders containing information compiled during New Agent's training. The Personnel Assessment Unit maintains similar folders containing information on those SA Personnel who attend the Management Aptitude Program (MAP) training sessions at the Academy.

In order to bring these records within the FBI Central Records System, a memorandum is inserted in each employee's personnel file at Headquarters at the time they go through either the New Agents or the MAP training program. This procedure was implemented in approximately November 1981.

As a result of discussion with the MAP Assessment Unit, FBI Academy, it was determined that much of the material maintained in the MAP folder is exempt from access pursuant to Exemption (k)(6) of the Privacy Act (PA) and (b)(2) of the Freedom of Information Act (FOIA), as disclosure would compromise the evaluation process.

In order to facilitate the processing of MAP materials, and to eliminate the need for the unnecessary transfer of documents from the FBI Academy to the FOIPA Section, all requests for

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**Personnel Files**

MAP documents will be reviewed personally by the Unit Chief of the Personnel Assessment Unit. The Unit Chief will remove all MAP documents previously determined to be exempt from disclosure pursuant to Exemptions (k)(6) and (b)(2). Any remaining documents will be forwarded by routing slip to the FOIPA Section for processing, setting forth the number of pages withheld pursuant to Exemption (k)(6)/(b)(2).

In the event the request for MAP documents reaches the litigation stage, the Unit Chief of the Personnel Assessment Unit will provide justification for withholding exempt material.

Documents forwarded to the FOIPA Section for processing will include, but are not limited to, the cover page of the MAP report, biographical statements filled out by the MAP candidate, the assessor rating sheets, and the post MAP documents.

The MAP report, which the MAP candidate reviews and initials upon completion of the assessment or shortly thereafter, is exempt pursuant to Exemptions (k)(6)/(b)(2). If the FOIPA requester desires a second review of this MAP report, they should be advised to contact the Unit Chief of the Personnel Assessment Unit at Quantico.

**CIA Name Checks in Suitability/Applicant Type Files**

Forms used for CIA name checks in suitability applicant files do not have to be referred to CIA if the form indicates "No Record", "No information," or "No Trace." For further information concerning the handling of these forms if any other type of response was noted, see the FOIPA Numbered Memo 8 pertaining to CIA.

**Credit Bureau Reports Contained in Personnel Files**

PLSs will often encounter credit bureau reports in personnel files. These reports are often denoted as "confidential"; however, this designation does not mean the report is classified and per discussion with personnel of Credit Bureau Reports, Incorporated, it does not denote the manner in which the reports were furnished to the FBI. Therefore, it is the policy of the FBI's FOIPA Section to release these credit bureau reports to first party requesters as well as third party requesters with proper notarized authorization to receive such information.

### Psychological Services Provided to the FBI

Doctors [REDACTED] and [REDACTED] b6

b6  
Doctors [REDACTED] and [REDACTED], who are no longer under contract with the FBI, previously provided psychological services to Bureau employees as part of the Bureau's psychological services program. As of March 1998, Dr. [REDACTED] on behalf of himself and his wife, Dr. [REDACTED] (Social Worker), requested they be given the opportunity to retain confidentiality on a case-by-case basis. Therefore, Dr. [REDACTED] requested that he or his wife continue to be notified if information provided by them is in a file being processed pursuant to the FOIPA. Dr. [REDACTED] may be contacted at the [REDACTED] [REDACTED] at telephone number [REDACTED] or [REDACTED]. Since the current work environment of Dr. [REDACTED] is not conducive to receiving telephone calls, [REDACTED] advised the message could be left with him or a message could be left at their home telephone number [REDACTED] and [REDACTED] would return the call. This notification should be done at the Team Captain level or higher.

Thus, if information provided by the Doctors is located in any document being processed by FOIPA Section employees, the doctors should be notified. Unless advised to the contrary by them, the information should be protected by FOIPA exemptions (k)(5)/(b)(7)(D) in order to protect the confidentiality of both doctors. If the information cannot be protected for some reason such as prior public disclosures, the Doctors should be contacted and notified of that fact.

### Metropolitan Psychiatric Group

b6  
Dr. [REDACTED] Metropolitan Psychiatric Group (MPG), telephone 202-452-9080, is currently providing psychological services to FBI employees. Information provided by Dr. [REDACTED] and/or any member of the MPG should be afforded protection for confidentiality purposes pursuant to FOIPA exemptions (k)(5)/(b)(7)(D). Also, should there be situations where a document being processed contains information provided by the MPG about a third party employee, not the requesting employee, the third party information should be protected in its entirety for privacy rights of the third party and the confidentiality of MPG pursuant to FOIPA exemptions (k)(5), (b)(7)(D), (b)(6), etc.

Any questions concerning the FBI's psychological services program or specific questions concerning particular cases should be directed to the Unit Chief of the Employment Assistance Program at extension 5244.

### Access to Career Board Minutes

b6 In July 1989, a 67 control file was established to maintain all information pertaining to Career Board Minutes. This file contains agenda which outlines all of the positions considered on a listing, and each agenda item is addressed separately, setting forth the position considered, the person selected and why, and all persons whose qualifications were considered. Due to the sensitivity and personal nature of the material, access to the Career Board Minutes is limited to PLS [REDACTED], Unit 1.

b6 When a request is made for Career Board Minutes pursuant to a FOIPA request, it will be assigned to PLS [REDACTED] for processing of any or all Career Board tape recordings, accompanying minutes and/or agenda. Documents that are physically contained in a personnel file which pertain to Career Board activities or information will, in most instances, be processed by the PLS to whom the case is assigned. However, the PLS should contact PLS [REDACTED] in order to verify that he does not need to process the documents.

### Informal Access Review of Personnel Files

(The request for an Informal Access review is not processed through or by the FOIPA Section or its employees. Employees have been designated from each field office and FBIHQ Division to handle these requests. This is a request only to review the personnel file and no copies of any documents are made available to the employee through the Informal Access procedures.)

In the Settlement Agreement reached in Emanuel Johnson, et. al. V. Stuart M. Gerson, Acting Attorney General, the FBI agreed to establish procedures whereby all FBI employees could access their personnel files without submitting a Privacy Act request.

With the exception of Legats, all offices including FBIHQ Divisions and offices, will be responsible for handling requests for informal access to personnel files from employees assigned to their offices. (Legats will forward requests from employees assigned to their offices to FBIHQ for handling.) Field offices will also be responsible for handling requests from employees assigned to Resident Agencies within that office's territory.

FBIHQ employees may make an informal access request by executing a request form and submitting their request to the Assistant Director (AD) or office head of their assigned division. Field office employees may execute a request form and submit their request to the Special Agent in Charge (SAC) or the Assistant Director in Charge (ADIC). The request will then be forwarded to the designated employee handling these requests for processing.

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**Personnel Files**

Fifteen and 45 day periods have been established as a time frame in which the employee's file will be available for review. This 15 and 45 day period will begin upon receipt of the employee's request by the SAC, ADIC, AD or office head.

Upon review of the file, an employee will be afforded an opportunity to submit to the respective SAC, ADIC, AD or office head a response or rebuttal to any information in their personnel file for inclusion in that file.

**F O I P A**  
**M A N U A L**

# MEMO 70

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Photograph Albums, FBI  
**Date:** March 31, 1998

## Processing under the Freedom of Information Act

A partial list of FBI Photograph Albums is published in the FBI's Privacy Act Records Systems Notices (52 Fed. Reg. 47, 237, October 5, 1993), which is included in the FOIPA Manual. Some of the Photo Albums identified in this systems notices are:

- Bank Robbery Album
- Known Check Passers Album
- Organized Crime Photo Album
- Prostitute Photo Album
- Thieves, Couriers and Fences Photo Index
- Top Burglar Album
- Truck Hijack Photo Album
- Truck Thief Suspect Photo Album
- Traveling Criminal Photo Album

Not all of the FBI's Photograph Albums are published since some of them are classified. Since it would be impractical to research and treat each of the FBI's Photograph Albums in detail, this memo will only give some general guidelines concerning processing of information from a Photograph Album.

If the Photograph Album consists of subjects suspected of criminal activity, the album is probably published in the Federal Register and will generally not require classification review. DCU should be consulted, however, if there is a potential foreign relations impact in the event information is released. For example, if the document being processed indicates the FBI received an LCN member's photo from Italian authorities, the document should be referred to DCU for classification review. Release of such information could have a negative impact upon the United States' National Security as well as the future relationship between the FBI and the Italian authorities. Documents concerning domestic and international terrorism should always be forwarded to DCU for classification review.

In addition to Exemption (b)(1), Exemptions (b)(7)(A), (b)(7)(C), (b)(7)(D) and



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**Photograph Albums, FBI**

(b)(7)(E), and Exclusions (c)(1) and (c)(3), should also be considered. The use of Exemption (b)(7)(E) should be considered to protect the criteria used to determine when a subject is of sufficient interest to be shown in a Photograph Album.

**Processing under the Privacy Act**

Information from Photograph Albums will generally be protected from disclosure under Exemptions (j)(2) or (k)(1).

**F O I P A**  
**M A N U A L**

# MEMO 71

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Polygraph Examinations  
**Date:** March 31, 1998

[REDACTED] which make the use of the polygraph an effective investigative technique. Countermeasures could be employed by an individual to defeat the procedure if the exact sequence of questions was known, along with the purpose for some of the questions and the importance placed on them by the FBI. Therefore, Exemptions (b)(2) and/or (b)(7)(E) are appropriate to withhold the following types of information concerning polygraph examinations in FBI criminal/security files:

b2  
b7E

## 1) Numerical ratings on Polygraph Charts:

Polygraph charts may be released to first party requesters with the exception of any numerical ratings. The numerical ratings usually appear at the bottom portion of the chart along with a minus (-) or plus (+) symbol. These ratings should be exempt pursuant to (b)(7)(E). In recent cases, computerized polygraph charts are being generated and the information as bracketed on **Attachment 1** should be protected pursuant to Exemption (b)(7)(E).

## 2) Polygraph Examination Worksheet (FD-497)

Exemptions (b)(2) and (b)(7)(E) should be utilized to protect the information in the boxes reporting the "Type Test, Series, Charts, and Instrument Serial No." Also, a complete list of questions asked during the polygraph examination will normally be found on the reverse side of the FD-497 or sometimes on a separate sheet of paper as original notes. If a complete list of the questions exists, redact the list entirely pursuant to Exemptions (b)(2)/(b)(7)(E). (See Attachment 2)

## 3) Polygraph Examination Report (FD-498)

The Polygraph Examination Report is releasable in first party requests, including references to the relevant questions and the examinee's answers in the "conclusion" portion of the report, unless it contains additional material exempt under some other provision of the FOIA or PA. For example, some polygraph examinations will include FCI material and will have been classified at the time of origination. In many cases, these polygraphs remain classified upon completion of Document Classification Unit's review and are withheld from disclosure in their entirety pursuant to Exemption (b)(1). (See Attachment 3)

**FOIPA Numbered Memo 71**

Page 2

**Polygraph Examinations**

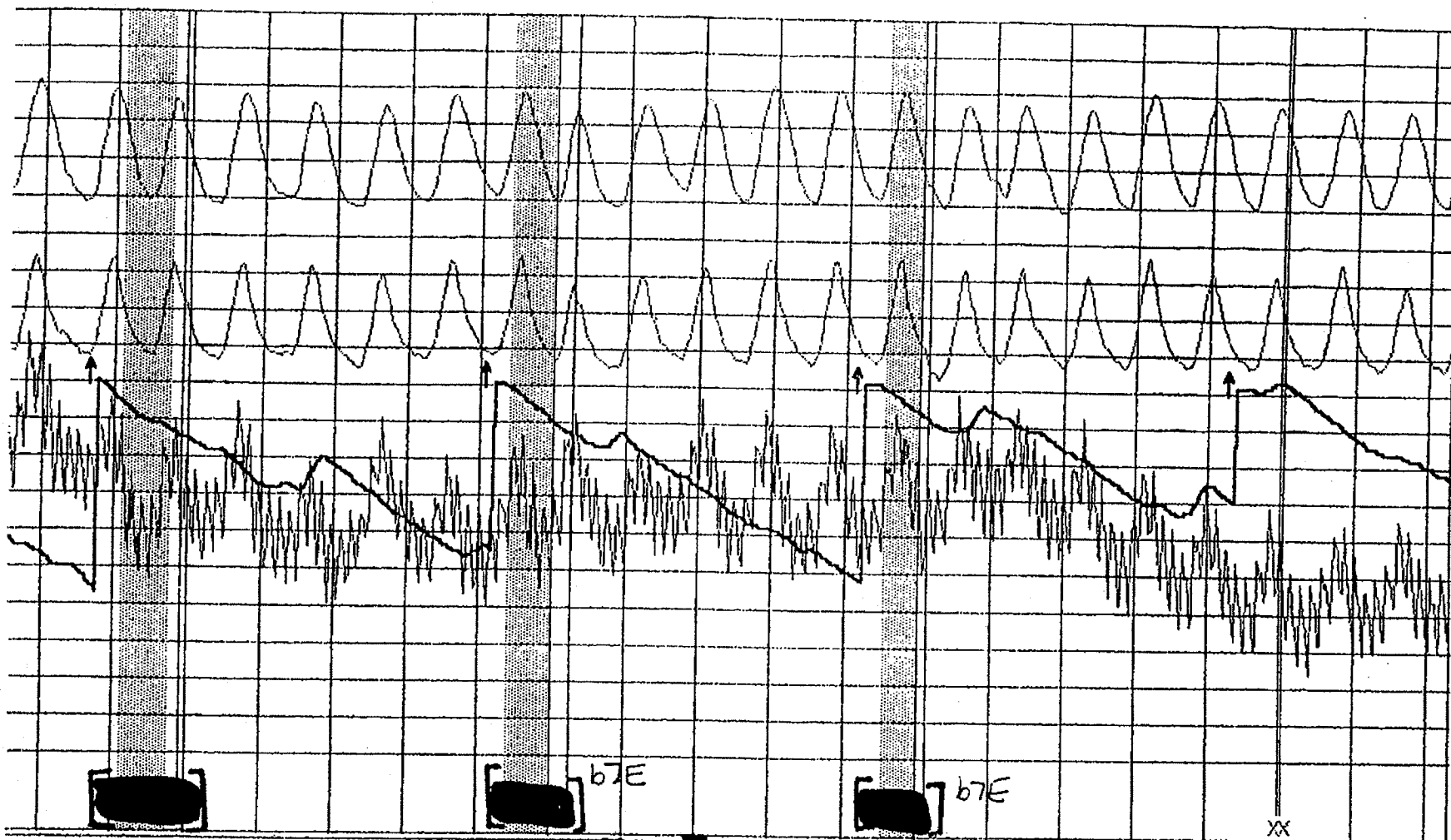
- 4) **Polygraph Zone Comparison Numerical Analysis Data Sheet (FD-524)**  
**Polygraph Review Modified General Question Test Numerical Evaluation (FD-525)**

The numerical ratings on these two forms (See Attachments 4 and 5) may be released entirely to first party requesters, however, the examiner's name should be protected pursuant to exemption (b)(7)(C).

When encountering polygraph examinations conducted on third party individuals in FBI investigatory files, who are assumed or known to be living, they should be withheld entirely applying the above exemptions as indicated in addition to exemption (b)(7)(C).

**NOTE: The same Polygraph information should be protected as outlined above when processing an applicant/background investigation or personnel type files. The appropriate Privacy Act and FOIA exemptions should be asserted for this information.**

Any questions concerning polygraph material should be directed to the Polygraph Unit, Laboratory Division, after consultation with the Team Captain and/or the Unit Chief.



b7E page 2 of 3 PF000017 Exam 1 Chart 2 HUG02 [REDACTED] b7E

Subject: [REDACTED] b7E

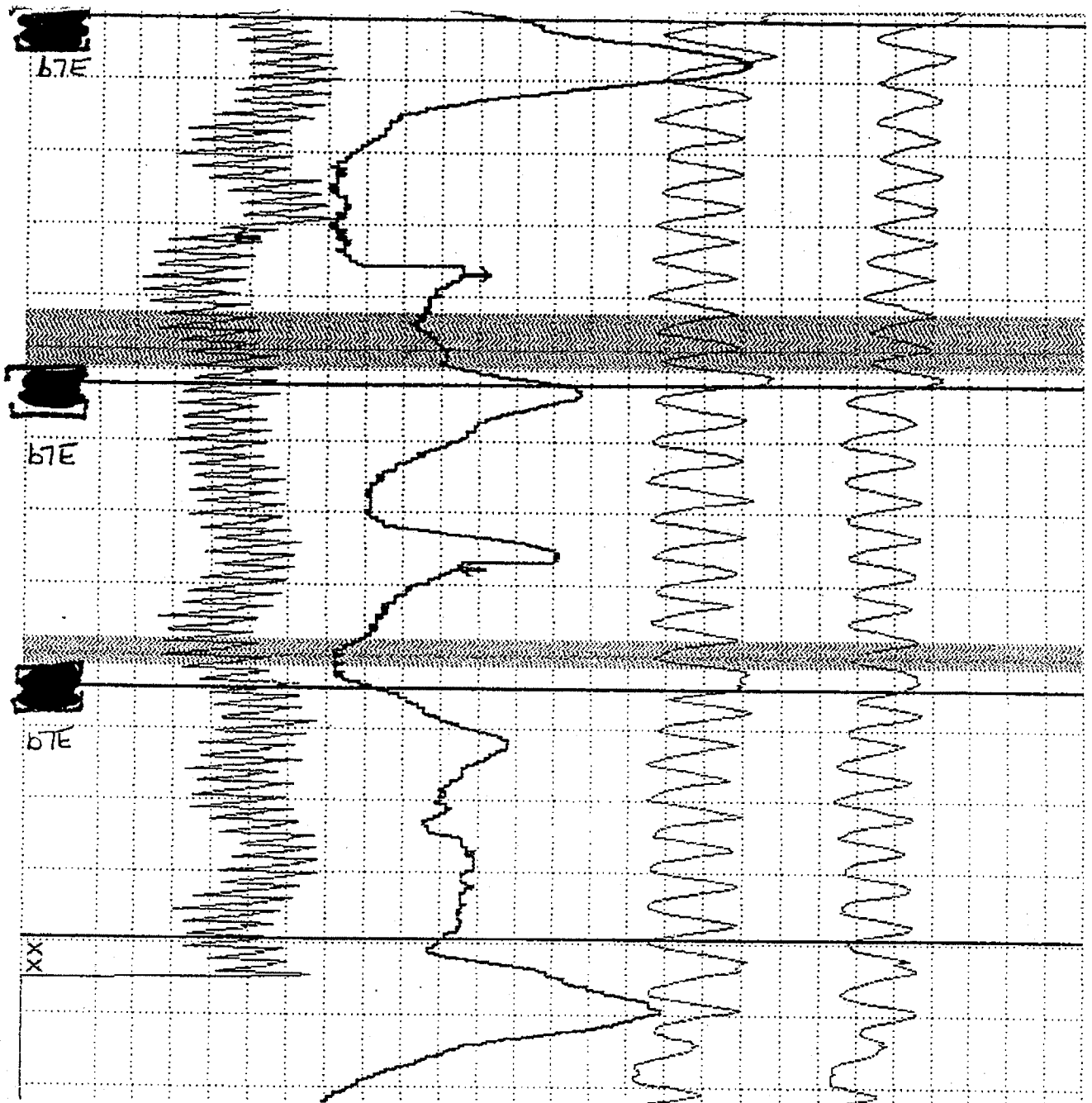
Examiner: [REDACTED] b7E

Date: Thu, May 22, 1997 View Size: Normal

Time Start: 1:29:26 PM End: 1:34:25 PM Duration: 4 min 59 sec

Cuff Pressure Start: 65 End: 64

Gains:	ID	Start	End (Recorded)	Start	End (Printed)
2.6	[REDACTED]	2.6	2.6	2.6	2.6
1.6	[REDACTED]	1.6	1.6	1.6	1.6
3.4	[REDACTED]	3.4	4.5	3.4	4.5
3.5	[REDACTED]	3.5	3.5	3.5	3.5



PF970014 Exam 1 Chart 5

Subject:

Examiner:

Date: Mon, May 5, 1997

Time: Start: 10:48:29 AM End: 10:53:16 AM

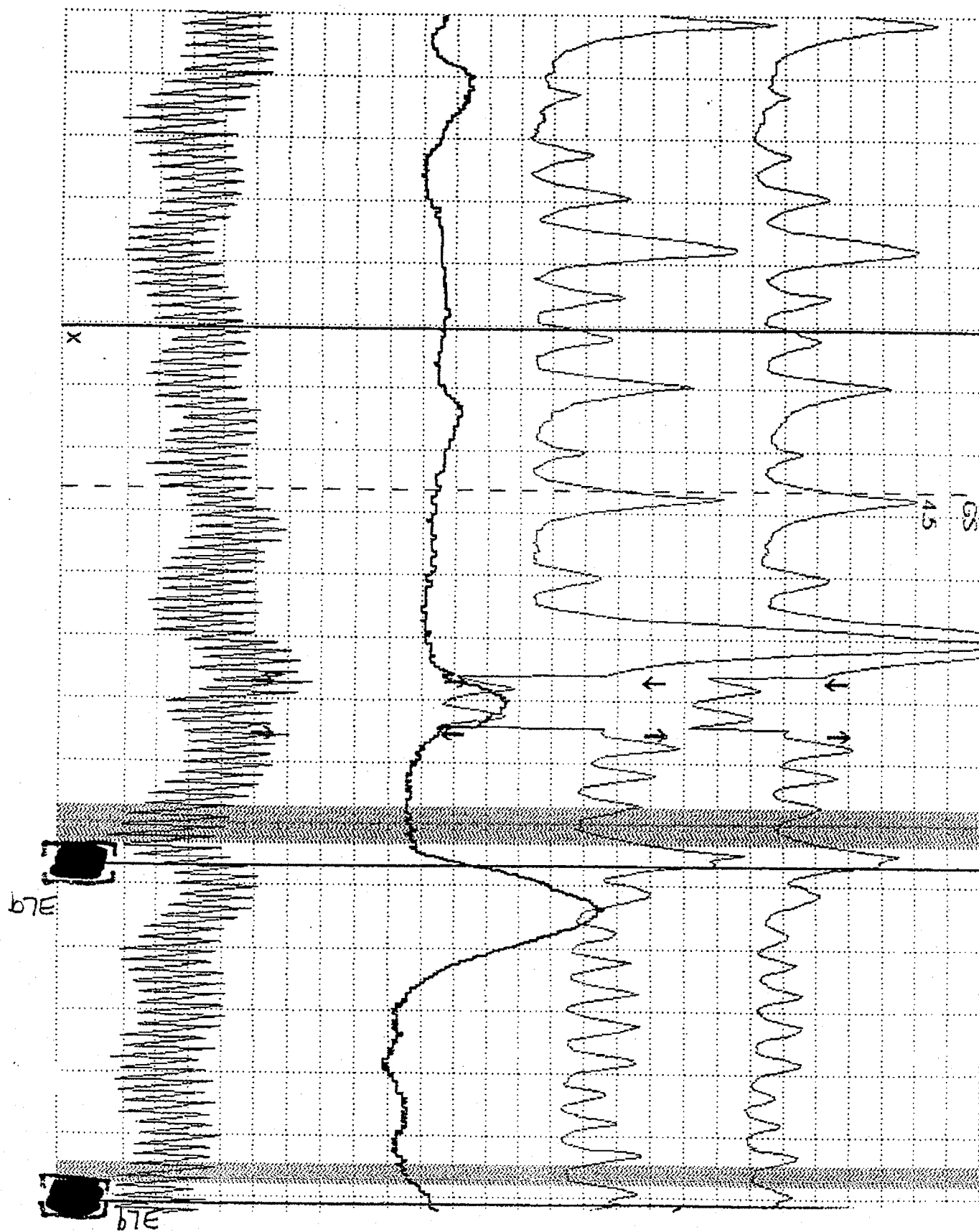
Duration: 4 min 49 sec

Cuff Pressure Start: 58 End: 60

Gains:	ID	Start	End
		6.0	6.0
b7E		4.0	4.0
		5.0	5.0
		2.5	2.5

I - 57 # 5 KJP

MEMO 71 - ATTACHMENT 1



PF970014 Exam 1 Chart 1

Subject:

Examiner:

Date: Mon, May 5, 1997

Time: Start: 10:08:41 AM End: 10:12:21 AM

Duration: 3 min 40 sec

Cuff Pressure Start: 60 End: 58

Gains: ID Start End

5.0 5.0

3.5 3.5

3.5 4.5

2.5 2.5

MEMO 71 - ATTACHMENT 1

# Polygraph Examination Worksheet

Date of Report		Date of Examination		Bureau File Number		Field File Number	
Location of Examination				Examiner Name			
Examinee Name (Last, First, Middle)						SSN	
Date of Birth		Age	Place of Birth				
HT	WT	Sex	Marital Status		Current Address		
Previous Polygraph Examination			Language During Exam		Requested By Examinee <input type="checkbox"/> Yes <input type="checkbox"/> No		
Education (Total Years _____)							

Employment History/Military

Health/Medication

Arrests/Convictions

Check One Only		FBI EMP/APP		Type of Investigation		Total Examiner Time (Include Travel)	
Subject		Special Agent		Criminal		_____ Hours	
Victim		Support		FCI			
Witness		Translator		Admin. Inquiry		Estimated Property Value	
Suspect		Contract		PSPP			
Asset		Leak Case <input type="checkbox"/> Yes <input type="checkbox"/> No		Applicant			
Informant				WITSEC			
Applicant				Other Federal			
FBI Employee							

Date(s)	Time In	Time Out	Type Test	ZOC	MGQT	R/I	POT	STIM	Total
			No. Series						
			No. Charts						
			Instrument Serial No.						

## Examination Results

DI		INC		Pretest Admission		Confession	
NDI		NO		Post Test Admission		Confession	

Comments (Name of Witness or Interpreter)



#	Questions	Ans.
	<p data-bbox="670 1526 1127 1566">MEMO 71 - ATTACHMENT 2 (BACK)</p>	

## POLYGRAPH REPORT

DATE OF REPORT	DATE OF EXAMINATION	BUREAU FILE NUMBER	FIELD FILE NUMBER
FIELD OFFICE OR AGENCY REQUESTING EXAMINATION			
AUTHORIZING OFFICIAL			DATE AUTHORIZED
EXAMINEE NAME (LAST, FIRST, MIDDLE)			

CASE TITLE

REFERENCES

CASE SYNOPSIS/EXAMINER CONCLUSION

MEMO 71 - ATTACHMENT 3

EXAMINER NAME:

## NUMERICAL ANALYSIS SHEET

#1					
PNEUMO					
GRS					
CARDIO					
SUB TOTAL					

EXAMINEE

DATE OF EXAM

#2					
PNEUMO					
GSR					
CARDIO					
SUB TOTAL					

EXAMINER

#3					
PNEUMO					
GSR					
CARDIO					
SUB TOTAL					

REVIEWER

DATE OF REVIEW

PNEUMO					
GSR					
CARDIO					
SUB TOTAL					

COMMENTS

TOTAL					
-------	--	--	--	--	--

MEMO 71 - ATTACHMENT 4

POLYGRAPH REVIEW MODIFIED GENERAL QUESTION TEST NUMERICAL EVALUATION				DATE OF EXAMINATION 12-13-83
EXAMINEE (Last, First and Middle Initial)		EXAMINER NAME (Last, First and Middle Initial)		
CHART NO. 1	Q 23	Q 25	Q 28	Q 29
PNEUMOGRAPH	0	0	0	+1
GALVANIC SKIN RESPONSE	+1	-1	+1	+1
CARDIOGRAPH	-1	0	0	0
SUBTOTAL	0	-1	+1	+2
CHART NO. 2	Q 23	Q 25	Q 28	Q 29
PNEUMOGRAPH	-1	-1	0	+1
GALVANIC SKIN RESPONSE	-1	-1	-1	+1
CARDIOGRAPH	+1	+1	0	0
SUBTOTAL	-1	-1	-1	+2
CHART NO. 3	Q 23	Q 25	Q 28	Q 29
PNEUMOGRAPH	0	+1	-1	0
GALVANIC SKIN RESPONSE	+1	+1	-1	0
CARDIOGRAPH	0	+1	0	+1
SUBTOTAL	+1	+3	-2	+1
SPOT TOTALS	0	+1	-2	+5
REVIEWER (Name)				DATE OF REVIEW

**F O I P A**  
**M A N U A L**

# MEMO 72

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Previously Processed Material, Assignments and Handling of  
**Date:** March 31, 1998

## **Assignment of Requests for Previously Processed Material**

When a request is received for records which have been previously processed, excluding those maintained in the FOIPA Reading Room, the request will be assigned to the PLS who originally processed the documents. If the PLS is no longer assigned to a Disclosure Unit, the request will be assigned to any PLS and there should be no unnecessary delay in handling the request.

**Note:** Requests for preprocessed files maintained in the FOIPA Reading Room, will continue to be handled by IPU employees.

## **Referrals Contained in Preprocessed Releases**

In order to streamline the handling of preprocessed releases, it will no longer be necessary to coordinate referrals to others government agencies that were made in the initial release. The original processed material should be copied and sent out "as is." If direct response and/or consultation referrals have been noted in the original release, please advise the requester that the referrals were not handled in response to his or her request. Language similar to the following should be used:

"The documents responsive to your request were previously processed for another requester. In order to provide the information you requested as soon as possible, we have released the FBI information as it was originally processed. We have not contacted other government agencies concerning their information in FBI files."

**F O I P A**  
**M A N U A L**

# MEMO 73

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Psychological Services for FBI Employees  
**Date:** March 31, 1998

## Psychological Services Provided to the FBI

Doctors [REDACTED] and [REDACTED] b6

Doctors [REDACTED] and [REDACTED], who are no longer under contract with the FBI, previously provided psychological services to Bureau employees as part of the Bureau's psychological services program. As of March 1998, Dr. [REDACTED] on behalf of himself and his wife, Dr. [REDACTED] (Social Worker), requested they be given the opportunity to retain confidentiality on a case-by-case basis. Therefore, Dr. [REDACTED] requested that he or his wife continue to be notified if information provided by them is in a file being processed pursuant to the FOIPA. Dr. [REDACTED] may be contacted at the [REDACTED] [REDACTED] at telephone number [REDACTED] or [REDACTED]. Since the current work environment of Dr. [REDACTED] is not conducive to receiving telephone calls, [REDACTED] advised the message could be left with him or a message could be left at their home telephone number [REDACTED], and [REDACTED] would return the call. This notification should be done at the Team Captain level or higher. b6

Thus, if information provided by the Doctors is located in any document being processed by FOIPA Section employees, the doctors should be notified. Unless advised to the contrary by them, the information should be protected by FOIPA exemptions (k)(5)/(b)(7)(D) in order to protect the confidentiality of both doctors. If the information cannot be protected for some reason such as prior public disclosures, the Doctors should be contacted and notified of that fact.

## Metropolitan Psychiatric Group

[REDACTED] Metropolitan Psychiatric Group (MPG) telephone 202-452-9080, is currently providing psychological services to FBI employees. Information provided by Dr. [REDACTED] and/or any member of the MPG should be afforded protection for confidentiality purposes pursuant to FOIPA exemptions (k)(5)/(b)(7)(D). Also, should there be situations where a document being processed contains information provided by the MPG about a third party employee, not the requesting employee, the third party information should be protected in its b6

**FOIPA Numbered Memo 73**

Page 2

**Psychological Services to FBI Employees**

entirety for privacy rights of the third party and the confidentiality of MPG pursuant to FOIPA exemptions (k)(5), (b)(7)(D), (b)(6), etc.

Any questions concerning the FBI's psychological services program or specific questions concerning particular cases should be directed to the Unit Chief of the Employment Assistance Program at extension 5244.

**F O I P A**  
**M A N U A L**

# MEMO 74

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Reading Room, FOIPA  
**Date:** March 31, 1998

## Reading Room Appointments

The FOIPA Reading Room is open from 8:00 a.m. to 2:30 p.m., by appointment only, Monday through Friday, except holidays. Appointments can be made by requesters calling (202) 324-8057 forty-eight hours in advance. It is staffed by employees assigned to the Initial Processing Unit (IPU).

If you receive a request to view previously processed material that is not on the Reading Room list, please prepare the package and provide the documents to Reading Room personnel before advising the requester to schedule an appointment. All appointments will be made by Reading Room personnel to insure the Reading Room is not over booked.

## Adding Previously Processed Material to the Reading Room

Consideration should be given to adding previously processed material to the FOIPA Reading Room if the following applies: the material is processed in such a fashion as to make it releasable to the general public in its excised form; the release could be of interest to a large segment of the general public; and it is anticipated that many additional requests for the information will be received. However, prior to the submission of any material considered for the Reading Room, all direct and/or consultation referrals to other government agencies should have been sent and a response received with the material processed accordingly.

In order to assist in the maintenance of a neatly organized system of Reading Room materials, PLSs are requested to submit their processed materials to their Unit Chief. The material should be placed on a file back with a file cover on top containing notations which accurately describe the material contained therein (i.e., subject matter, file number, number of pages). In voluminous cases, each section should be assembled as described above. Each PLS is responsible for insuring the copy count on the previously processed material is correct and should furnish a copy of the disclosure letter along with the material to Reading Room personnel. The PLS should also prepare an electronic communication (EC) to the Reading Room Subunit describing the material the PLS is forwarding to the Public Reading Room.



**FOIPA Numbered Memo 74**

**Page 2**

**Reading Room, FOIPA**

Attached hereto are two examples of the EC.

If additional information is being released on Reading Room subjects as a result of reprocessing, appeals or litigations, the Reading Room package should be updated through coordination with Reading Room personnel.

(12/31/1995)

## FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 11/23/1997

To: IPU/Public Reading Room Subunit

From: [REDACTED], Acting Unit Chief  
Disclosure Unit One  
Contact: [REDACTED] Ext. [REDACTED]

Approved By: [REDACTED]

Drafted By: [REDACTED]:crw

Case ID #: 190-4

Title: PLACING FOIA PREPROCESSED MATERIAL  
INTO THE READING ROOM

Synopsis: Preprocessed material pertaining to Jackie Robinson is available for placement in the FOIPA Reading Room.

Enclosures: Black-out package consisting of 131 pages and disclosure letter.

Details: The late Jackie Robinson was the first African-American to play major league baseball in the United States. His career spanned ten seasons which began in 1947 until his retirement from the game in 1956. He was elected to the Baseball Hall of Fame in his first year of eligibility, 1962. Mr. Robinson later became an executive in numerous businesses and a member of the New York State Athletic Commission. While serving as a board member of the National Association for the Advancement of Colored People and being associated with many such groups, he was an outspoken civil rights activist who publicly defended the Black Panthers organization. He testified before the House Committee on Un-American Activities in 1949. Mr Robinson died in 1972.

The preprocessed material consists of FBIHQ files 100-428850, 9-24780, 9-20570 and three cross-references. A Department of State document is contained in this package as declassified and excised by that agency. The original processed copies are located in HQ file 190-43620 and 190-62179.

CC: 1 - [REDACTED] Room 6941  
1 - [REDACTED] Room 6941  
1 - Disclosure Unit One (Attn: [REDACTED]), Room 6927  
ATB:crw (5)

MEMO 74 - ATTACHMENT 1 (SAMPLE 1)

(12/31/1995)

## FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 11/23/1997

To: IPU/Public Reading Room Subunit

From: [REDACTED], Acting Unit Chief  
Disclosure Unit One

Contact: [REDACTED] Ext. [REDACTED]

Approved By: [REDACTED]

Drafted By: [REDACTED]:jsb

Case ID #: 190-4

Title: PLACING FOIA PREPROCESSED MATERIAL  
INTO THE READING ROOM

Synopsis: Preprocessed material pertaining to Peter Lorre is available for placement in the FOIPA Reading Room.

Enclosures: Black-out package consisting of 180 pages and disclosure letter.

Details: Peter Lorre was a major motion picture actor during the 1940's and 1950's. He associated with many people who were involved in left-wing activities. Lorre signed petitions, appeared at gatherings and sent his written support for leftist causes. He was the subject of a FBI investigation because of his fringe involvement. His name appeared in a 1951 Report of the Senate Fact-finding Committee on Un-American Activities in California. Peter Lorre died in 1964.

The preprocessed material consists of FBIHQ files 100-351116 (one section) and approximately 100 cross-references. Completed consultation referrals are incorporated into the package. The original processed copies are located in HQ 190-25650 and 190-36269.

CC: 1 - [REDACTED] Room 6941  
b6 1 - [REDACTED] Room 6941  
1 - Disclosure Unit One (Attn: [REDACTED], Room 6927  
ATB:jsb (5)

♦♦

MEMO 74 - ATTACHMENT 1 (SAMPLE 2)

**F O I P A**  
**M A N U A L**

**MEMO 75**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Referrals; General Policy (Federal Government Only)  
**Date:** March 31, 1998

**Protection of Sensitive Information in Referral Documents**

This is to remind all FOIPA Section personnel of the necessity to protect sensitive information located in FBI documents referred to other government agencies.

When referring Bureau documents containing other government agency information for consultation or direct response to the requester, be alert for documents which may contain particularly sensitive information, such as the true identity of an informant or classified information. In certain situations, neither the FBI informant's identity nor the classified information is needed by the other agency to process their material. Therefore, in these sensitive situations, the information should be redacted prior to referring the FBI document to another agency for review of their information.

**FBI Documents Which Contain Other Agency  
Information Which Can Be Segregated from FBI Material**

b2  
When processing FBI documents pursuant to the FOIPA, the documents will often contain other Federal Government agency information which, in many instances, is separate or easily segregated from the FBI material. In view of lengthy delays at some agencies in responding to FBI consultations, the document may be prepared for release to the requester with the exception of the other agency information. This procedure applies only where the other agency information is segregable and does not require FBI information that is exempt from disclosure in order to process their information. When referrals are handled in this manner, the requester will be advised of the referral [REDACTED] and that the other Government agency will be requested to process their information and make a direct release to the requester. The other agency will be requested to forward a copy of their response to the FBI. In the event of an appeal and/or litigation, the PLS may be required to contact and follow-up with the other agency if copies of their response have not been forwarded to the FBI.

It should be noted that a copy of the request letter should always be sent to the other agency when a referral is made.

### **Consultation Referrals Returned from Other Government Agencies**

When FBI consultation referrals are returned to the FBI following review by the other agency, they sometimes contain changes in classification. Regardless of whether the classification changes, all consultation referrals returned from other government agencies containing classified information must be returned to DCU for annotation of classification markings desired by the other government agency. The returned referral documents are being treated as walk-ups by the DCU, thus eliminating needless administrative requirements and delays.

### **Credit for Direct Response Referrals**

Effective 7/1/95, PLSs will receive credit for reviewing documents originated by other government agencies. Therefore, the pages referred to other agencies for direct response are to be counted as reviewed pages by the PLS.

When referring documents originated by the other agency, refer only one copy of the document with any FBI information which needs protected blacked out except for the following:

1. CIA - Send two copies of the document (1 black out copy and 1 clean copy)
2. DOJ/Civil Rights Division - Send two copies of the document (1 black out copy and 1 clean copy)
3. DOJ/Criminal Division - Highlight or bracket information to be protected and cite exemption (Do not black out)
4. NSA - Coordinate with PLS assigned to the Unit which handles referrals to NSA

**F O I P A**  
**M A N U A L**

**MEMO 76**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Selective Service System  
**Date:** March 31, 1998

**Draft Board Information**

Effective 2/14/91, Mr. Henry Williams, Selective Service System, advised Draft Board information pertaining to an individual of a first party request may be released to that individual. Likewise, Draft Board information concerning a deceased individual may also be released to third party requesters. Therefore, **DO NOT refer** Draft Board information to Selective Service concerning deceased individuals.

**F O I P A**  
**M A N U A L**

# MEMO 77

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Special Agent and Support Applicant Interview Forms/Testing Material  
**Date:** March 31, 1998

## Special Agent Interview Forms

Effective 7/14/93, there is no longer a need to protect any information in the captioned forms listed below, since they are not being used in the current Special Agent selection system.

FD-190	Special Agent Interview Form
FD-511	Special Agent Dimension Evaluation Work Sheet
FD-510	Special Agent Applicant Interview Board Background Interview Form

Since the implementation of the new Special Agent selection system in August of 1994, no testing material of any kind is being maintained in the applicant's personnel record (67 classification). This material is securely stored in Personnel Resources Unit (PRU) for a time period of one year, at which time, it is transferred to an off-site location for an additional year. At the end of this two-year period, all testing material on a Special Agent Applicant is destroyed. When processing a personnel file, if it appears that any testing material from the Special Agent selection process is included in the background portion of the file, contact the Unit Chief of the PRU immediately on extension 4991. **DO NOT PROCESS OR RELEASE** any of this material.

"Checklists" of the material contained in testing packages are occasionally found in the Special Agent applicant file. One such "checklist" is the **Checklist for Health Fraud Written Simulation** form. If this check list is found in the applicant file, the PLS should cite the appropriate exemption for testing material. Other "checklists" of testing packages found in the applicant file should be reviewed for disclosure on a case-by-case basis.

The FBI started audio taping the interview process of Special Agent applicants during 1995. The applicant is advised of this before the start of the interview. If the cassette tape is located in the personnel file during processing, contact the Unit Chief of PRU on extension 4991. **DO NOT PROCESS OR RELEASE** this tape.

### Support Applicant Interview Forms

If the LT/PLS finds the Support Applicant Interview Form (FD-190a) in the background portion of a personnel file with a revision date prior to 9/4/96, the form is to be released in its entirety with the exception of any FBI employees names which should be protected pursuant to the appropriate FOIPA exemptions. Currently, the 9/4/96 revised version contains specific interview questions, responses and ratings which, if released, would give an unfair advantage to future support employee applicants. Therefore, this information on the current version of the FD-190a should be exempted as testing material. If the current version of this form is found in the personnel file during processing pursuant to an FOIPA request, the form should be removed and sent to PRU at Room PA-750. A copy of the FD-190a dated prior to 9/4/96 is attached.

In addition, any Clerical Selection Battery (CSB) interview documents (e.g., FD-799 and FD-800) should not be contained in any personnel files since field offices are instructed to send these to the PRU for maintenance and destruction (after two years). However, PRU is aware that the CJIS Division in West Virginia made copies of all their interviews and included them in packages submitted to the Applicant Unit for background investigations. These interviews are removed from the files as detected, but there are of some CSB documents that remain in the personnel files. In the event these documents are found in personnel files when processing pursuant to an FOIPA request, they should be removed and sent to PRU at Room PA-750.

During 1997, the FBI started audio taping the interview process of support applicants. The applicant is advised of this fact before the interview is started. If the cassette tape is located in the personnel file at the time of processing, the tape should be removed from the file and sent to PRU at Room PA-750. DO NOT PROCESS OR RELEASE this tape.

bl When the FBI receives a Privacy Act request for material related to the Special Agent or clerical applicant testing and interview process, IPU personnel will place a note (copy attached) in the request folder confirming they advised PRU of the existence of the request. When processing such a request, the PLS should contact either [REDACTED] Unit 2, extension 4-[REDACTED] or [REDACTED] Unit 3, extension 4-[REDACTED] who have been designated as liaisons to review this restricted material. These individuals will verify that the material is responsive, provide a page count and advise as to the releasability of the material.



**F O I P A**

**M A N U A L**

# MEMO 78

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Special Agent and Support Employee Names and Initials  
**Date:** March 31, 1998

## INITIALS OF FBI EMPLOYEES

Effective May 6, 1997, the initials of FBI employees, both handwritten or typed, will no longer be deleted as a routine practice, but rather handled on a case-by-case basis. Consideration should be given to the age and type of investigation as well as the likelihood of retribution by the requester or others involved in the investigation. If it is determined that there is a foreseeable harm in the release of the initials and the decision is made to protect them, Exemptions (b)(2) and/or (b)(7)(F) should be cited.

## NAMES OF FBI EMPLOYEES

In general, names of FBI personnel should continue to be withheld pursuant to Exemptions (b)(6) and/or (b)(7)(C). However, in processing documents for release, the names of high level FBI officials (Section Chief level and above) should be released. Additional exceptions to releasing FBI names other than high level officials would be: 1) if a case involved reporting of the news media and wide publicity was given to the case and the FBI employee; 2) if the FBI employee is deceased; or 3) the requester has provided sufficient information which would make withholding the name impossible to justify if challenged in Court.

## FBI Employee Names Located in Personnel Files

In accordance to Section policy, the applicant background portion of personnel files is to be exempted from the Privacy Act pursuant to (k)(2). Therefore, when processing this portion of the personnel file, the names of FBI employees who are operating in their official capacity (other than high level officials) should be protected pursuant to exemption (b)(7)(C).

FBI employee names located in the "on board" portion of personnel files should be released in most instances unless a clearly unwarranted invasion of personal privacy exists. If a privacy factor is warranted, the withheld information should be identified as "third party"

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**Page 2**

**Special Agent and Support Employee Names and Initials**

information along with Exemptions (b)(6) and/or (b)(7)(C) being cited. The following language should also be included on the disclosure letter:

"The documents responsive to your request contain personal information about other individuals, without whose written consent release to you is precluded by the Privacy Act, Title 5, United States Code, § 552a(b). This information is exempt under the Freedom of Information Act, Title 5, United States Code, § 552 (b)(6) and/or (b)(7)(C). This information was not used by the FBI to make any determination about you.\*"

\*The last sentence may not be appropriate for every release; use it at your discretion.

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: Special File Room  
Date: March 31, 1998

**Procedures for FOIPA and DCU Access to Material  
Maintained in the Special File Room (SFR)**

Material maintained in the SFR is considered extremely sensitive for a number of reasons; consequently, access to this material must be limited and strict controls maintained.

Recognizing the need to process such material in accord with the FOIPA and the necessary classification reviews in connection therewith, the following procedures for access to this material must be followed:

(1) When the LT/PLS calls a file that is maintained in the SFR, he/she will be advised that the file is **permanently charged out** or a **PCO**. When this happens, the LT/PLS should wait for the SFR to advise him/her to pick up the file(s) in Room [REDACTED] b2

(2) The handling of the material while charged out from the SFR must be restricted only to those employees having a "need to know." If the file(s) is kept out of the SFR overnight, it must be secured in a safe-like cabinet.

(3) If the material needs to be processed through the DCU, the LT/PLS should fill out the OPCA-18 form listing the file(s) needing review and indicate after the file number "**file is in the SFR, June Mail folder or Top Secret folder.**" The LT/PLS will return the file/folder to the SFR. **The file/folder maintained in the SFR can not be transferred from person-to-person or office-to-office.** The DCU employee handling the classification review will obtain the file/folder from the SFR for their review. Upon completion of the classification review, DCU will forward the OPCA-18 form with their addendum to the LT/PLS and return the file/folder to the SFR.

(4) When it is necessary to duplicate SFR material for FOIPA processing, the material must be returned to the SFR with OPCA-19 form (formerly 4-690), duplication form, attached indicating exactly what is to be duplicated. The SFR will call the LT/PLS when the duplication is completed.

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**Page 2**

**Special File Room**

(5) If copies are made for processing, the copies must also be secured overnight in a safe-like cabinet.

(6) When the PLS closes a case which includes a copy of material from the SFR, the PLS should hand carry the disclosure letter and all of the processed documents to the SFR for filing. If the PLS referred a copy of a document(s) maintained in the SFR to another Federal Government agency and is attaching a copy of the referred document(s) to the yellow of the referral form, the referral with enclosure must also be sent to the SFR for filing. This also applies to any referral response enclosing a copy of a document(s) maintained in the SFR. All other FOIPA mail should be sent to the 190 Processing Subunit in IPU.

(7) All material from the SFR must be hand carried to and from the SFR.

**Review of Special Compartmentalized Information (SCI) Material**

Special security clearances are required to review or handle certain "Top Secret" files or documents which contain SCI material. If the LT/PLS is notified by the SFR that he/she does not have the appropriate clearance to review the classified material requested, one of the following PLSs should be contacted to conduct the review. It is recommended that the individual contacted be from the same unit as the PLS handling the case.

**Disclosure Units:**

[REDACTED] Unit 1  
[REDACTED] Unit 4

[REDACTED] - Unit 3

**Litigation Unit:**

[REDACTED]

**Help Desk:**

[REDACTED]

b6

**DCU:**

All Team Captains in DCU are afforded SCI clearances. However, should there be any questions concerning classification matters on a case prior to DCU review, the LT or PLS should initially contact the DCU Administrative Team Captain.

**RMU:**

Currently, there are no RMU employees with an SCI clearance. If an RMU employee has been advised by the SFR that they do not have the proper clearance to review the file material, they should contact one of the Disclosure PLSs listed above.

**F O I P A**  
**M A N U A L**

**MEMO 80**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Subpoena Duces Tecum  
**Date:** March 31, 1998

**Attorney General Notification to Agent Personnel in Response to  
Issuance of Subpoena Duces Tecum**

By memorandum dated 6/21/82, the Office of Information and Privacy (OIP), Department of Justice advised that it was no longer necessary for the FBI to refer to OIP for processing copies of routine notifications sent from the Attorney General to SACs and/or Agents concerning their appearance in a local court in response to a Subpoena Duces Tecum. Generally these notifications are in the form of a teletype from the AG to a named SAC and specified Agents within the Field Office who have been requested to appear in a local court to testify about and/or produce information contained in Departmental files, including those of the FBI. The AG's teletype states that if the AUSA is unsuccessful in quashing the subpoena, the Agent(s) is authorized to appear pursuant to the subpoena, but directs that they respectfully refuse to testify or produce any documents in compliance with Departmental Order 381-67.

Referral of these notifications need not be made to OIP so long as they contain no other substantive information and the only material being deleted is the name of a Special Agent.

**Subpoena Duces Tecum Statements**

At times, FBI documents may contain information obtained from sources such as financial or commercial institutions which may not be generally available to the public. In these instances, the source (i.e., financial institution, etc.) may provide the information to the FBI, however, may use the disclaimer to the effect that "this information may not be released to the public in general without the issuance a subpoena duces tecum." When this statement or a statement similar to this appears in an FBI document, the information and the source should be protected pursuant Exemption (b)(7)(D) and be considered as an expressed grant of confidentiality.

**F O I P A**  
**M A N U A L**

**MEMO 81**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Substantial Equivalents of Main Files  
**Date:** March 31, 1998

Pursuant to the searching procedures established by the Initial Processing Unit (IPU) in February 1997, "main file equivalents" will be listed on the search slips.

A "substantial equivalent of a main file" exists when the subject matter of a FOIPA request is included in, or indexed as, the subject of a serial or reference in one or more of the following classifications or files:

All - 0s	105-7
All - 62s	105-16424
All - 63s	105-70374
64-32001	105-93124
65-69260	105-99938
All - 66s	105-174254
All - 94s	105-190290
100-3-Sub 104	121-1
100-358086	140-1
100-434445	157-6-Subs
100-436291	157-9
100-446533	174-1
100-448006	174-2
100-449698	174-3
105-1	

These are serials or references which, by their nature, could logically establish a main file on their own. It should be noted that the nature of the information in the document, not the method of filing it, determines whether or not it is a "substantial equivalent."

When the search slip contains what appears to be a "cross-reference" in one of the above-listed classifications or files, it must be reviewed and determined if it is responsive to the subject of the FOIPA request. If the serial/reference meets the above criteria and is responsive to the request, it will be processed for disclosure as a main file.

**F O I P A**  
**M A N U A L**

# MEMO 82

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Telephone Application  
**Date:** March 31, 1998

b2  
b7E  
The Telephone Application (TA), formerly known as the Computerized Telephone Number File (CTNF), supports FBI investigative squads in collecting, analyzing and processing telephone data obtained during investigations. [REDACTED]

The main value of using the TA is the ability [REDACTED]

b2  
b7E

When processing a FOIPA request that contains information which refers to TA or the former CTNF, the mere mention of these systems should be protected pursuant to Exemption (b)(7)(E) since they are not systems of records and their use is not generally known to the public. In addition, all FBI information or documents that reflect or denote what information or the type of information that has been entered into these systems such as the FD-450 (Attachment 1) should be denied from public disclosure pursuant to the same exemption.

(Best Copy Available)

FD-450 (Rev. 10-25-73)

OPTIONAL FORM NO. 10  
MAY 1962 EDITION  
GSA GEN. REG. NO. 27

5010-108

UNITED STATES GOVERNMENT

# Memorandum

COMPUTERIZED TELEPHONE NUMBER FILE (CTNF) - ENTRY AND SEARCH REQUEST

TO : Director, FBI  
Attn: Data Processing Section

DATE:

FROM : SAC

SUBJECT:

1. Subject's Name \_\_\_\_\_

Field Office \_\_\_\_\_ Field File # \_\_\_\_\_

Actions: ☐ Add to file Area Code \_\_\_\_\_ Telephone # \_\_\_\_\_  
☐ Modify Record (Indicate modifications under "Remarks" below; always list current CTNF telephone number.)  
☐ Delete from file Area Code \_\_\_\_\_ Telephone # \_\_\_\_\_

By: Subordinate's: \_\_\_\_\_ Telephone Located at: Of different from subscriber?

## 2. Process in CTNF:

- ☐ Telephone data enclosed, or ☐ sent under separate cover
- a. ☐ Telephone Data Analysis - ☐ billing statements ☐ phone toll tickets ☐ other (specify) \_\_\_\_\_  
☐ Telephone data for period (including month and year) \_\_\_\_\_  
☐ Billing number(s) including area code, city and state \_\_\_\_\_
- b. ☐ Telephone Number Check (If just one or more phone numbers to be searched against CTNF, insure area code and end/or city and state included.)

Remarks:

MEMO 82 - ATTACHMENT 1

☐ Enclosure

FOR FBI HEADQUARTERS' USE ONLY

☐ RETURN TO SAC, \_\_\_\_\_ Date \_\_\_\_\_

- ☐ MY LIST - ☐ Attached ☐ Forwarded under separate cover \_\_\_\_\_ File  
☐ "TO AND BILLING NUMBER" LISTINGS - ☐ Attached ☐ Forwarded under separate cover  
☐ TELEPHONE NUMBERS MARKED BY \*\*\* ON BILLING STATEMENT not processed because  
☐ ILLEGIBLE ☐ INSUFFICIENT DATA  
☐ ACTION TAKEN - ☐ Add ☐ Delete ☐ Record modified ☐ Telephone data analysis  
☐ BILLING NUMBER - ☐ Included ☐ Not included in CTNF

☐ Enclosure



**F O I P A**

**M A N U A L**

# MEMO 83

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Third Party Requests/Third Party Information  
**Date:** March 31, 1998

## Third Party Requests/Information

If a person makes a request for information concerning himself, this is referred to as a "first party" request. If a person makes a request for information about another person, an organization, or incident, this is referred to as a "third party" request. Personal information concerning someone other than the requester, whether in files responsive to first or third party requests, may be described as third party information. Third party requests and third party information should be processed pursuant to the following instructions.

## Third Party Requests

If a person makes a request for the records of a third-party and the requester provides proof of death or the authorization (privacy waiver), IPU will acknowledge the receipt of the third-party request, conduct a search for records and handle accordingly.

If IPU receives a request for records concerning a widely acknowledged investigation concerning a third party (i.e., O.J. Simpson), and the requester does not provide proof of death or the authorization (privacy waiver), IPU will send a letter to the requester advising that the FBI needs either proof of death or the authorization from the subject of their request, and without either one or the other, only public source material such as court records, newspaper clippings, etc., will be processed for release. The requester is also advised to let the FBI know in writing if public source material is desired (See Attachment 1).

If a person makes a request for records concerning an investigation pertaining to a third party that is not widely acknowledged, and neither proof of death nor the authorization are provided, IPU will send a letter to the requester advising that either proof of death or the authorization must be submitted. The letter also advises the requester that without either of the above, such records, if they exist, are exempt from disclosure pursuant to Exemptions (b)(6) and (b)(7)(C) of the FOIA, Title 5, United States Code, Section 552 (See Attachment 2).

**Third Party Requests/Third Party Information**

**Proof of Death**

The guidelines concerning the proof needed before processing and releasing records about a subject whom the requester asserts is dead are as follows:

1. The subject of a third party request should be presumed to be alive unless there is a record confirming death. The record of death can be a death certificate, obituary, or recognized reference source (e.g., Who Was Who in America).
2. A mere assertion by a requester that a subject is dead is not sufficient proof of death.
3. Death can be presumed if the requester asserts the subject is dead, and there is proof that the subject is at least 100 years old.
4. If our own records establish death, then that is satisfactory.

**Waivers of Privacy**

Waivers of privacy require careful analysis, since there is significant potential for an inadvertent violation of the Privacy Act's disclosure prohibitions if a waiver is interpreted inaccurately or if a waiver is insufficient. A waiver does not authorize anything more than what is stated in the waiver itself. The waiver should be compared with the request letter to ensure that a limited waiver is not misquoted by the requester. If any aspect of the waiver is not clear, the request should be brought to the attention of supervisory personnel for additional review.

Waivers of personal privacy must be signed by the person waiving privacy, preferably in the presence of a notary, must specifically identify the person waiving privacy (including full name, date of birth and present address), and must be specifically directed to the FBI, permitting the FBI to release personal information (about the person executing the waiver) from its files. The waiver should be dated within a reasonable time period preceding the request, and the original copy of the waiver must be provided to the FBI.

**Third Party Information**

Information in FBI files concerning third parties which has not been provided by the requester, and which is not outweighed by a public interest in disclosure, should be denied pursuant to Exemption (b)(7)(C). An exception to this general standard will involve historical processing, wherein substantive information concerning third parties may be considered for released.

**FOIPA Numbered Memo 83**

Page 3

**Third Party Requests/Third Party Information**

Information in FBI files concerning third parties which has been provided by the first party requester will be processed to protect the identity of the third parties pursuant to Exemption (b)(7)(C). This may require the redaction of the third party's name, or it may require the redaction of significant portions of the substantive information, if an identifiable profile would otherwise be revealed. Although considerable flexibility and judgement will be required to determine how much information can be released without identifying the third party, the standard should be to protect all information which would identify the third party to a member of the public who does not have inside information about the case. The special knowledge of an individual requester should not be considered. This balances the right of a first party requester to know what information a governmental agency may have recorded from his own statements to that agency, while still protecting the privacy interests of persons who have been mentioned in or been the subject of an investigation.

Third party information in government files being processed pursuant to a first or third party request must be weighed between the public's right to know and the individual's right to privacy. In balancing the public interest in disclosure against personal privacy rights of individuals, the reviewer should first determine that a right of privacy exists. Unless the information at issue can significantly contribute to a public understanding of government operations and activities, the privacy interest should prevail and disclosure of more than public source information in widely acknowledged cases would be unwarranted. For additional information concerning the balancing of interests in personal information, see FOIA Update, Vol. X, No. 2, Spring 1989 edition, published by the Office of Information and Privacy, U.S. Department of Justice (See Attachment 3).



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535

Request No. \_\_\_\_\_

Re: \_\_\_\_\_

Dear Requester:

The records responsive to your Freedom of Information Act (FOIA) request pertain to the investigation of third party individuals. In order to process any records other than public source material, we need either proof of death or the authorization (privacy waiver) from them. The only information subject to processing under the FOIA without either of the above would be public source material (court records, newspaper clippings, etc.). Such material may or may not be contained in our records.

If you want us to search for any releasable public source information responsive to your request, please let us know in writing. In addition, to ensure an accurate search of our indices, please provide the complete name, as well as the date and place of birth of the subject or subjects involved in the investigation if you have not already done so.

Proof of death can be a copy of a death certificate, obituary, or a recognized reference source. We ask that waivers of personal privacy be notarized. Waivers must specifically identify the person waiving privacy (including full name, date and place of birth, and present address), and must be specifically directed to the FBI, permitting the FBI to release personal information from its files about the person executing the waiver. The waiver should be dated within a reasonable time period preceding the request, and the original copy of the waiver must be provided to the FBI.

Without proof of death or appropriate authorization, the disclosure of law enforcement records or information about another person is considered an unwarranted invasion of personal privacy. Such records are exempt from disclosure pursuant to exemptions (b) (6) and/or (b) (7) (C) of the FOIA, Title 5, United States Code, Section 552.

You may submit an appeal from any denial contained herein by writing to the Co-Director, Office of Information and Privacy, U. S. Department of Justice, Suite 570, Flag Building, Washington, D. C. 20530, within 30 days from receipt of this letter. The envelope and letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIA request number assigned to your request so that it may be easily identified.

Sincerely yours,

J. Kevin O'Brien, Chief  
Freedom of Information-Privacy  
Acts Section  
Office of Public and  
Congressional Affairs

U.S. Department of Justice



Federal Bureau of Investigation  
935 Pennsylvania Ave., N.W.

Washington, D.C. 20535-0001

Subject of Request: \_\_\_\_\_

FOIPA No.: \_\_\_\_\_

Dear Requester:

A copy of your letter asking for information maintained by the FBI under the Freedom of Information Act (FOIA) concerning another individual(s) is being returned to you.

Before we commence processing your request for records pertaining to another individual(s), we ask that you submit to the FBI either proof of death or a privacy waiver from that person. Proof of death can be a copy of a death certificate, obituary or a recognized reference source. Death is presumed if the birth date of the subject is more than 100 years ago. Without proof of death or a privacy waiver, the disclosure of law enforcement records or information about another person is considered an unwarranted invasion of personal privacy. Such records, if they exist, are exempt from disclosure pursuant to Exemptions (b)(6) and/or (b)(7)(C) of the FOIA, Title 5, United States Code, Section 552.

Enclosed is a Privacy Waiver and Certification of Identity form. (You may make additional copies if you are requesting information on more than one individual.) The subject of your request should complete this form and then sign it, preferably in the presence of a notary. The original privacy waiver must be provided to the FBI.

In order to ensure an accurate search of our records, please provide your subject's complete name, date of birth and place of birth, if you have not already done so.

Once you have provided us with the necessary information, as described above, we will conduct a search of our records and advise you of the results.

This response should not be considered an indication of whether or not records responsive to your request exist in FBI files.

You may submit an appeal from any denial contained herein by writing to the Co-Director, Office of Information and Privacy, U.S. Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001, within 30 days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIA number assigned to your request so that it may easily be identified.

Sincerely yours,

Chief  
Freedom of Information-  
Privacy Acts Section  
Office of Public and Congressional Affairs

**All Attached Correspondence Must Be Returned To The FBI With This Letter**

Enclosure

MEMO 83 - ATTACHMENT 2

**Privacy Waiver and Certification of Identity**

Full Name: \_\_\_\_\_

Current Address: \_\_\_\_\_

Date of Birth: \_\_\_\_\_ Place of Birth: \_\_\_\_\_

Under penalty of perjury, I hereby declare that I am the person named above and I understand that any falsification of this statement is punishable under the provisions of Title 18, United States Code (U.S.C.), Section 1001 by a fine of not more than \$10,000 or by imprisonment of not more than five years, or both; and that requesting or obtaining any record(s) under false pretenses is punishable under the provisions of Title 5, U.S.C., Section 552a (i)(3) as a misdemeanor and by a fine of not more than \$5,000. I hereby waive my right to privacy, and I authorize the FBI to release any and all information relating to me

to: \_\_\_\_\_  
(Attorney or other Designee)

Your Signature: \_\_\_\_\_

Subscribed and sworn to before me, this \_\_\_\_\_ day of \_\_\_\_\_,  
year of 19 \_\_\_\_\_

Signature of Notary: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

Notary Seal or Stamp

## FOIA Counselor

MEMO 83 - ATTACHMENT 3

# Exemption 6 and Exemption 7(C): Step-by-Step Decisionmaking

The Supreme Court's decision in Department of Justice v. Reporters Committee for Freedom of the Press, 109 S. Ct. 1468 (1989), greatly affects the protection of personal privacy interests under the Freedom of Information Act. The new guiding principles set forth in Reporters Committee, which are applicable to Exemption 6 and Exemption 7(C) of the Act alike, alter the mechanics of the basic "balancing process" by which privacy-protection decisions are to be made under these exemptions. Below is a step-by-step guide to the decisionmaking process that now should be followed under both Exemption 6 and Exemption 7(C):

## STEP ONE: DETERMINE WHETHER A PERSONAL PRIVACY INTEREST IS INVOLVED.

The first step in considering the possible applicability of Exemption 6 or Exemption 7(C) (once its threshold requirement is passed) is to determine whether disclosure would threaten a personal privacy interest. There first must be a viable privacy interest in the requested information for any further consideration of privacy-exemption protection to be appropriate. See, e.g., FOIA Update, Summer 1986, at 3-4. Remember: To qualify, the information must involve the privacy interest of an identifiable, living person. See FOIA Update, Sept. 1982, at 5. Possible Result: If no personal privacy interest is involved, then the privacy exemptions do not apply.

## STEP TWO: DETERMINE WHETHER A PUBLIC INTEREST IS INVOLVED.

Once a viable personal privacy interest is identified, the inquiry shifts over to the "public interest" side of the balance. Here, full consideration should be given to how disclosure would benefit the general public, but only in light of the content and context of the information in question. Remember: The requester's particular purpose, circumstances, and proposed use no longer are to be considered; this means that a requester's own "socially useful purpose" now receives no special attention. 109 S. Ct. at 1480-81 & n.20. Possible Result: If disclosure to the general public would serve no public interest at all, then any identified privacy interest should be protected under the applicable privacy exemption.

## STEP THREE: DETERMINE WHETHER AN IDENTIFIED PUBLIC INTEREST QUALIFIES FOR CONSIDERATION.

The next step, required now for the first time under Reporters Committee, is to determine whether an identified public interest actually

qualifies for balancing under the new Reporters Committee public interest standard. See 109 S. Ct. at 1482. Remember: Only if an identified public interest falls within the Act's "core purpose" of "shed[ding] light on an agency's performance of its statutory duties," does it qualify for inclusion in the balancing process. *Id.* at 1481-83. Information that "reveals little or nothing about an agency's own conduct" does not meet this narrowed public interest standard. *Id.* at 1481. Possible Result: If disclosure would serve no "core purpose" interest, then any identified privacy interest should be protected under the applicable privacy exemption.

## STEP FOUR: BALANCE THE PERSONAL PRIVACY INTEREST AGAINST ANY QUALIFYING PUBLIC INTEREST.

Lastly, if it is determined that a public interest qualifying under the Reporters Committee standard is present, then that interest should be balanced against the personal privacy interest identified at the outset. This balancing process necessarily requires some assessment and comparison of the relative magnitudes of the two interests. See, e.g., FOIA Update, Winter 1986, at 4. Remember: At this stage, the decisionmaking process becomes the same as the one traditionally employed under the Act's privacy exemptions. See FOIA Update, Spring 1988, at 3. Possible Results: If the privacy interest is greater, then it should be protected under the applicable privacy exemption; if the public interest is greater, then the privacy exemptions do not apply.

## Additional Considerations

In following this step-by-step decisionmaking process, certain additional considerations, which will apply in some cases, should be kept in mind. First, any public availability of the information in question will disqualify it from privacy protection only where it fails the new "practical obscurity" standard. See 109 S. Ct. at 1485. Second, the redaction of all identifying information sometimes will be sufficient to protect privacy interests, sometimes not, depending upon the nature of the records in full context of the request. See, e.g., Carter v. Department of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987); see also FOIA Update, Spring 1986, at 2. Finally, some information, as with the "rap sheets" sought in Reporters Committee itself, may be appropriate for "categorical" withholding. See 109 S. Ct. at 1483-85; see also FOIA Update, Spring 1989, at 6.



**F O I P A**  
**M A N U A L**

**MEMO 84**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Undercover Operations  
**Date:** March 31, 1998

The recording of an undercover contact is usually made on an FD-302 by the office responsible for the undercover operation and since the targets/subjects may reside or work anywhere in the country, copies of the FD-302 may appear in substantive files of other field offices. The contact with the subject may have been productive or unproductive; prosecution may have ensued or the investigation of the individual may have been closed. The undercover operation which generated the contact, however, could still be operative.

The FD-302 may be prefaced in the following manner: "On (date) SA (Name), using the undercover name (Name), contacted (Subject) at (Address), etc." References to the contact, however, could appear in any format or communication.

An unintentional disclosure of information regarding the contact to the subject could jeopardize an ongoing operation and the agents who are in contact with other individuals known to the subject of the closed case.

To prevent this possibility, the Undercover Operations Unit, Division 6, as well as the office responsible for the undercover operation, should be contacted to determine if the operation is still functional and if disclosure of the document in question would jeopardize the operation.

**F O I P A**  
**M A N U A L**

**MEMO 85**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Visual Investigation Analysis (VIA) Chart  
**Date:** March 31, 1998

**Visual Investigation Analysis (VIA) Chart**

The VIA chart, which is prepared by the VIA Group of the Criminal Investigative Division, is one continuous roll of paper and its size is determined only by the complexity of the case. It is utilized in rather large cases, especially white-collar investigations, to show all important events in a case.

For example, during the processing of a field office file pertaining to a kidnaping investigation, a VIA chart measuring 1½ feet in width by 35 feet in length was located. Neither the field office, nor FBIHQ, had a machine capable of reproducing a document of this size. At the suggestion of the VIA Group, a memo was written from Division 4 to Division 6 requesting reproduction of the chart. Thereafter, the chart was reproduced by the VIA Group at another Government agency having a machine capable of photocopying this document. The duplication fee incurred by FBIHQ was 39 cents per foot, which was passed on to the requester. Since the chart required the assertion of FOIPA exemptions, a second copy was prepared in excised form which was feasible for maintaining in the 190 file.

In the past, the VIA charts were retained by the VIA Group. However, they are now being incorporated into FBIHQ files and may be encountered by PLSs as a bulky enclosure to the main file. These charts are merely a recapitulation of information contained elsewhere in the file, are difficult to reproduce, and may contain exempt material. PLSs who receive requests for VIA charts or who locate one of the charts while processing either FBIHQ or field office files are to ensure that the Disclosure Unit Chief and/or the FOIPA Section Chief is notified prior to any processing. In most instances, it may be more practical to first advise the requester of the duplication fees involved, since there could be an exorbitant charge, or there may be no additional substantive information available for release on the chart.

**F O I P A**  

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**M A N U A L**

**MEMO 86**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** White House Referrals and Consultations  
**Date:** March 31, 1998

The following is the full text of a memorandum sent by Associate Attorney General Webster L. Hubbell to the principal FOIA administrative and legal contacts at all federal agencies on November 3, 1993, regarding the FOIA consultation procedures required for any White House-originated record or information found in agency files:

"The purpose of this memorandum is to set forth the procedures to be followed by all federal agencies for the handling of any White House-originated record or information that is found responsive to an access request made under the Freedom of Information Act, 5 U.S.C. § 552 (1988).<sup>1</sup>"

"In processing FOIA requests, agencies searching for responsive records occasionally find White House-originated records (or records containing White House-originated information) that are located in their files. These records raise special concerns, including questions of executive privilege, and require special handling--particularly in light of the White House's unique status under the FOIA."

"By its terms, the FOIA applies to "the Executive Office of the President," 5 U.S.C. §552(f), but this term does not include either 'the President's immediate personal staff' or any part of the Executive Office of the President 'whose sole function is to advise and assist the President.' Meyer v. Bush, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974)); see also, e.g., Soucie v. David, 448 F. 2d 1067, 1075 (D.C. Cir. 1971). This means, among other things, that the parts of the Executive Office of the President that are known as the 'White House Office' are not subject to the FOIA; certain other parts of the Executive Office of the President are."

"In coordination with the Office of the Counsel to the President, the Department of Justice has determined that agencies should implement the following FOIA procedures regarding all White House related records or information found in their files. Please note that these procedures prescribe 'consultations,' which do not involve a transfer of administrative responsibility for

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<sup>1</sup>This memorandum supersedes the Department of Justice's January 28, 1992 memorandum on this subject.

**FOIPA Numbered Memo 86**

Page 2

**White House Referrals and Consultations**

responding to a FOIA request, as distinct from complete record 'referrals.'<sup>2</sup> In all instances involving White House records or information, your agency will be responsible for responding directly to the FOIA requester once the process of consultation is completed."

"1. Records originating with any part of the 'White House Office'<sup>3</sup> should be forwarded to the Office of the Counsel to the President for any recommendation or comment it may wish to make, including any assertion of privilege, prior to your response to the FOIA requester. Please be sure to advise the White House Counsel's Office of any sensitivity that these records have from the perspective of your agency and whether you believe any FOIA exemption applies. If after considering the possibility of discretionary disclosure in accordance with the Attorney General's FOIA Memorandum of October 4, 1993, you believe that a FOIA exemption applies, you should mark each record accordingly to facilitate review by the Counsel's Office of your proposed response."

"All such consultation communications should be forwarded to the White House Counsel's Office at the following address:

Office of the Counsel to the President  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

"Please note that many records originating with the White House Press Office, such as "Press Briefings" and "White House Talking Points" (unless they are marked as, or appear to be drafts), are in the public domain and thus may be disclosed without consultation. Questions concerning records likely to be in the public domain should be referred to the White House

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<sup>2</sup>"See FOIA Update, Summer 191, at 3-4 ('OIP Guidance: Referral and Consultation Procedures') (further discussing differences between these two procedures).

<sup>3</sup>"The 'White House Office' includes, among other components, the Offices of the President, Cabinet Affairs, Chief of Staff, Communications, First Lady, Counsel to the President, Intergovernmental Affairs, Legislative Affairs, Management and Administration, Operations, Political Affairs, Presidential Personnel, Public Liaison, Scheduling and Advance, Staff Secretary, Correspondence, Visitors, Policy Development, Domestic Policy Council, Environmental Policy, Council of Economic Advisors, National Economic Council, Assistant to the President for National Security Affairs and Deputy Assistant to the President for National Security Affairs, Assistant to the President for Science and Technology, and the Presidents Foreign Intelligence Advisory Board. The White House Office also includes task forces and working groups created by the President or an official in the White House, and reporting to the President or an official in the White House, including, for instance, the National Performance Review."

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**White House Referrals and Consultations**

Counsel's Office as well."

"It is possible that a record originating in the White House Office (or in the Office of the Vice President--see below) will be one over which the White House Office (or the Office of the Vice President) has retained control, in which case it will not be an 'agency record' subject to the FOIA even though it is located by a federal agency in response to a FOIA request. Accord, e.g., Goland v. CIA, 6707 F.2d 339, 345-48 (D.C. Cir 1978) (honoring 'retention of control' by non-FOIA entity), cert. denied, 445 U.S. 927 (1980; see also Paisley v. CIA, 712 F.2d 686, 692-94 (D.C. Cir. 1983); Holy spirit Ass'n v. CIA, 636 F.2d 838, 840-042 (D.C. Cir. 1981). Any such records should be identified for special handling."

"2. Any record originating with the Office of the Vice President or any of its component offices, offices which likewise are not subject to the FOIA, should be forwarded for consultation purposes to the Office of the Counsel to the Vice President, Old Executive Office Building, Room 269, Washington, D.C. 20501."

"3. All records originating with other offices within the Executive Office of the President (EOP--including the Office of Administration; the Office of Management and Budget; the Office of Science, Technology and Space Policy; the Office of the U.S. Trade Representative; the Council on Environmental Quality; and the Office of National Drug Control Policy--should be forwarded to the FOIA officers of the relevant individual EOP offices. This, again, is for consultation purposes only; agencies remain responsible for responding directly to the FOIA requester once these EOP consultations have been completed. For your convenience, a contact list for these EOP offices is attached."

"4. Responses to FOIA requests for any classified White House records or records originating with the National Security Council should be coordinated with Ms. Nancy V. Menan of the National Security Council at the following address:

Director of Information Disclosure  
Office of Information Disclosure  
National Security Council  
Old Executive Office Building, Room 392  
Washington, D.C. 20506

Records originating with the Assistant to the President for National Security Affairs or his deputy should continue to be treated as records originating in the White House Office (see footnote 3 above)."

"If any question arises regarding these procedures, either generally or in any particular case, please do not hesitate to contact Margaret Ann Irving, Acting Deputy Director of the Justice

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**White House Referrals and Consultations**

Department's Office of Information and Privacy, at (202) 514-4251."

**"Executive Office of the President--Agencies Subject to the FOIA"**

Council on Environmental Quality  
Deputy General Counsel  
722 Jackson Place, N.W., Room 31  
Washington, D.C. 20006

Office of Administration  
Director, Administrative Services Division  
Old Executive Office Building, Room 350  
Washington, D.C. 20500

Office of Management and Budget  
Deputy Assistant Director for Administration  
New Executive Office Building, Room 9026\*  
Washington, D.C. 20503

Office of National Drug Control Policy  
FOIA Officer  
750 17th Street, N.W., 8th Floor  
Washington, D.C. 20500

Office of Science, Technology and Space Policy  
Executive Director  
726 Jackson Place, N.W., Room 5013  
Washington, D.C. 20500

Office of the U.S. Trade Representative  
FOIA Officer  
600 17th Street, N.W., Room 222  
Washington, D.C. 20506

\* OMB requests that records be forwarded to the attention of Darrell A. Johnson at this address.

F O I P A

M A N U A L

# MEMO 87

To: All FBI FOIPA Personnel  
From: J. Kevin O'Brien  
Subject: **Witnesses - Protection of Information Provided in Confidence to the FBI by Persons Who Subsequently Testify in Criminal Trials**  
Date: March 31, 1998

FBI records, such as FD-302s, often contain information provided on a confidential basis by persons who subsequently testify in criminal trials. The issue to be considered is whether Exemptions (b)(7)(C) and (b)(7)(D) protect the information provided by confidential sources who later testify in open court.

Exemption (b)(7)(C) protects information compiled for law enforcement purposes which, if disclosed, could reasonably be expected to constitute an unwarranted invasion of personal privacy. The personal privacy interests inherent in that information must be balanced against the public interest in disclosure. Several courts have found, however, that there is no reasonable expectation of privacy in matters of a public record. Since testimony in open court becomes a public record, personal information given in testimony in open court may not be withheld under exemption (b)(7)(C). See, e.g., Kiraly v. FBI, 728 F.2d 273, 280 (6th Cir. 1984); Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981); Cooper v. IRS, 450 F. Supp. 752, 754 (D.D.C. 1977).

An obvious problem in applying this rule is that FBI records may not reflect what testimony was given during a trial. If FBI records do not include a trial transcript, Exemption (b)(7)(C) may apply because there is no way for a PLS to determine from FBI records which information is in the public record.

b2 [REDACTED]

It should be noted that in applying the balancing test under Exemption (b)(7)(C), the interest of the general public must be served by disclosure and not the personal interest of the defendant/requester. Convicted requesters often make FOIPA requests in the hope of overturning their convictions: they argue that the public interest to be served by disclosure is the maintenance of the integrity of our criminal justice system. Courts have generally held that such a naked assertion is too uncertain to warrant the invasion of another's personal privacy rights. Brown, supra, 658 F.2d at 75.

As for exemption (b)(7)(D), the general rule is that "subsequent disclosure of information originally given in confidence does not render nonconfidential any of the information originally provided." Lame V. United States Department of Justice, 654 F.2d 917, 925 (3rd Cir. 1981);

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**Witnesses - Protection of Information**

accord Lesar v. United States Department of Justice, 636 F.2d 472 (D.C. Cir. 1980). However, there can be a waiver of confidentiality, either explicit or implicit, by the source. DOJ policy at this time is that a waiver will be found as to information which is given in testimony in open court. Once again, though, if FBI records do not include a trial transcript, Exemption (b)(7)(D) may apply because there is no way to determine from FBI records which information is in the public record.

Another point which needs to be made is that Exemption (b)(7)(D) does not depend on a balancing test or on the information provided: "Exemption (b)(7)(D) differs from other FOIA exemptions in that its applicability depends not on the specific factual contents of a particular document; instead, the pertinent question is whether the information at issue was furnished by a 'confidential source' during the course of a legitimate criminal law enforcement investigation." Once this question has been answered in the affirmative, it must be determined if it was provided under an expressed or implied promise of confidentiality and reviewed as such for any discretionary disclosure of information.

Finally, PLSs should be aware that under certain circumstances, Exemption (b)(7)(F) may be used even though (b)(7)(C) and (D) are inapplicable.



**F O I P A**  
**M A N U A L**

**MEMO 88**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** World War II Censorship Documents  
**Date:** March 31, 1998

By letter dated 11/14/77, the National Archives and Records Administration (NARA) transmitted guidelines which are set out below, to be used by our agency and other agencies to review and process World War II censorship documents or documents that contain information taken from censorship documents. It is not necessary to refer censorship documents to NARA. We process them using the following NARA guidelines.

**Guidelines for Declassification and Release  
of World War II Censorship Documents**

1. Coverage: These guidelines may be applied to:

(a) Censored communications and information derived therefrom whether from mail, cable, radio or other means of communications, passing between the United States and its territories or possessions and any foreign country or touching the territory of the United States at any point while in transit from one foreign country to another.

(b) Censorship activities carried on by the War and Navy Departments from December 8, 1941 and the Office of Censorship from March 15, 1942 through August 15, 1945.

(c) Except for those portions of RG 216 (Records of the Office of Censorship) which were placed under seal by President Truman in 1945, these guidelines may be applied to all censored communications and related documents and/or information derived therefrom in documents found in government agency records and in donated historical materials.

2. Security-classified information: All national security-classified information in censored communications covered by this guideline which was originated by the military departments or the Office of Censorship is automatically declassified unless it contains information categorized under paragraphs (a), (b), and (c) of this section. Information in these three categories will be referred to the Director, Records Declassification Division, National Archives and Records Service, for further action.

(a) Information concerning communications intelligence or cryptography and their

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**World War II Censorship Documents**

related activities.

(b) Information concerning the intelligence method of secret writing, microphotography and their detection.

(c) Information concerning foreign governmental censorship activities as disclosed by U.S. liaison with foreign censorship agencies and not previously declassified and released.

3. Unclassified and declassified information in censorship intercepts and similar documents: Information in censored communications and related documents covered by this guideline that clearly identifies living individuals or organizations will normally be exempted from release in those cases where its disclosure would constitute a clearly unwarranted invasion of personal privacy [cf. 5 U.S.C. 552 (b)(6) and/or (b)(7)(C)]. Reviewers of documents covered by this portion of the guideline should determine whether the document contains information about a living individual which reveals details of a highly personal nature which the individual could reasonably assert a claim to withhold from the public to avoid a clearly unwarranted invasion of privacy. Such information may be disclosed, however, to the individuals who were parties to the communication or their authorized representatives. Further, segregated portions of a record document requested under the Freedom of Information Act shall be provided to any person requesting such record after deletion of the portions which are exempt under this guideline. Information which may be exempted from such release may be further defined as:

(a) Information clearly identifying living individuals or organizations whose communications were intercepted, were the object of surveillance or were of particular interest to the intelligence agencies of the United States or its Allies, including the following:

(1) Originals, photocopies, transcripts or extracts from intercepted communications;

(2) Daily reports (also known as "Dayreps") which were Office of Censorship messages to stations providing background information on persons and organizations of interest to the Office of Censorship;

(3) Special watch instructions (also known as SWIs) which were instructions or supplemental information on particular persons, addresses, organizations, etc., whose communications are to be intercepted;

(4) Watch lists/flash lists which are lists of persons, organizations, addresses, etc., with indicator of subject interest, whose communications are to be intercepted, including proposed entries and deletions;

(5) White lists which are names of persons whose communications were to be bypassed without examination including entries and deletions;

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**World War II Censorship Documents**

(6) Border watch/flash lists which includes names of persons whose communications across the U.S. borders were of particular interest to a local censorship station, including entries and deletions thereto.

(b) Information clearly identifying living individuals or organizations involved in either complaints or recommendations arising out of such complaints about carrying out the specific provisions of the Code of Wartime Practices for the American Press and Broadcasters and not previously wholly releasable.

**F O I P A**  
**M A N U A L**

**MEMO 89**

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** COINTELPRO (Counter-Intelligence Program)  
**Date:** March 31, 1998

**Description of COINTELPRO**

The FBI's Counterintelligence Program, widely referred to as COINTELPRO, was the overall name for numerous programs of disruption, dirty tricks, and other projects undertaken by the FBI against individuals and organizations under investigation by the FBI. One such organization was the Communist Party USA. Through a variety of techniques, such as anonymous letters and mailings, these activities caused unexpected consternation and disruption among the members. At times, the more sophisticated techniques and activities exposed and neutralized the communists and caused defections or expulsions within the Party ranks. COINTELPRO activities were formalized in 1956 and was discontinued in 1971.

In 1978, the Department of Justice, Office of Professional Responsibility completed the COINTELPRO Notification Program which sought to notify 527 individuals (61 of whom the program failed to locate) that they could receive information on COINTELPRO actions against them, however, many people besides the 527 were targeted under COINTELPRO.

**Procedures on Handling FOIPA Requests Involving COINTELPRO**

When a COINTELPRO action was conducted against an individual or organization, appropriate correspondence was inserted in one of the COINTELPRO files. A copy of the correspondence may, or may not, have been designated for the main substantive file on the individual or organization. The name of the individual or organization may, or may not, have been indexed depending on the circumstances and the action of the employee processing the mail.

As there are an estimated 50,000 or more pages in the twelve COINTELPRO files, it would be impractical to conduct a page-by-page review for a particular subject. Therefore, when a FOIPA requester indicates in the request letter that the subject of the request was a target of COINTELPRO activities, our search of FBIHQ files should be limited to a review of: 1) the main substantive file of the requesting individual or organization and 2) any main file equivalents which indicate the individual or organization has been indexed in any one of the twelve COINTELPRO files. The twelve main file equivalent COINTELPRO files are:

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Page 2

**COINTELPRO (Counter-Intelligence Program)**

Communist Party	Bufile: 100-3-104
Socialist Workers Party	Bufile: 100-436291
White Hate	Bufile: 157-9
Black Nationalist	Bufile: 100-448006
New Left	Bufile: 100-449698
Special Operations	Bufile: 105-174254
Soviet-Bloc	Bufile: 65-69260
Border Coverage	Bufile: 100-434445
Yugoslav	Bufile: 105-190290
Cuban	Bufile: 105-99938
Puerto Rican	Bufile: 105-93124
Hoodwink	Bufile: 100-446533

If a "no record" response is going to be given to a requester who has indicated he may have been the target of a COINTELPRO action, the following language should be used:

"A review of the appropriate records pertaining to COINTELPRO actions was conducted and no indication that you were ever the target of a COINTELPRO action was located."

**NOTE:** If FBI records indicate a COINTELPRO action was not reviewed in accordance with the Attorney General's notification program regarding COINTELPRO activities, then notice should be sent to the attention of the Counsel, Office of Professional Responsibility, Room 4304 - MJB at the Department of Justice.

**CLASSIFICATION MATTERS CONCERNING**  
**COINTELPRO MATERIAL**

During a review of previously processed material located in the FBI FOIPA Reading Room, it was determined that there were some instances where the Reading Room copy and the original file copy were marked differently as to classification.

In order to ensure that COINTELPRO material processed under FOIPA, litigation or any other purpose, is consistent with material previously released and currently located in the FBI FOIPA Reading Room, a memorandum is being placed as a "Top Serial," not to be serialized, in each of those original COINTELPRO files. PLSs processing material from these files are placed on notice that the Reading Room copy must also be reviewed to insure both are marked in a consistent manner. When such a review is completed, a notation must be made on the original that it has been compared to the Reading Room copy.

F O I P A

# MEMO 90

M A N U A L

**To:** All FBI FOIPA Personnel  
**From:** J. Kevin O'Brien  
**Subject:** Department of the Army  
**Date:** March 31, 1998

## Army Intelligence Agency (AIA)

This following instructions set forth procedures for the handling of referrals to the Army Intelligence Agency (AIA) in which classified information is involved.

(1) If documents classified "Top Secret" or "Secret" are to be referred to the AIA, receipts should be attached indicating among other required information the name and telephone number of the FBI employee involved. Receipt forms are maintained by the Document Classification Unit (DCU).

(2) Regarding Army documents in FBI files referred to the Army for handling and direct response to the requester, the PLS should specifically request in the referral letter that the FBI be notified of any classification changes. Upon receipt of the Army's notice of a classification change, the material should be forwarded to DCU where the changes will be noted on the FBI file copies of the Army documents. After those changes are noted, the photocopied material furnished by the Army should be destroyed.



FEDERAL BUREAU OF INVESTIGATION

**FREEDOM OF  
INFORMATION AND  
PRIVACY ACTS  
REFERENCE MANUAL**

**PART 8 OF 9**

# **CORRESPONDENCE GUIDE**



FOIPA  
CORRESPONDENCE GUIDE

4/26/88

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LIBRARY CONTROL NUMBER 972-3P(1)

NO RECORD PITCH

A search of the indices to our central records system files at FBI Headquarters revealed no record responsive to your Freedom of Information-Privacy Acts request.

NOTE: A search of indices, conducted under approved procedures, located no main files or see references.

8/15/89

LIBRARY CONTROL NUMBER 972-3P(2)

NO RECORD - ELSUR

A search of the FBI's electronic surveillance indices revealed no record responsive to your Freedom of Information-Privacy Acts (FOIPA) request.

A search of the indices to our central records system files at FBI Headquarters revealed no records responsive to your FOIPA request. If you believe records of interest to you are located in the files of an FBI field office and were not reported to Headquarters, you may write directly to that field office for those materials.

NOTE: Use the second sentence in paragraph two when the field office has been specifically requested or when appropriate based on the request letter.

8/15/89

LIBRARY CONTROL NUMBER 972-3P(3)

NO RECORD - FIELD OFFICE PITCH

A search of the indices to our central records system files at FBI Headquarters revealed no record responsive to your Freedom of Information-Privacy Acts request. If you believe records of interest to you are located in the files of an FBI field office and were not reported to Headquarters, you may write directly to that field office for those materials.

NOTE: Use the second sentence when the field office has been specifically requested or when appropriate based on the request letter.

8/15/89

LIBRARY CONTROL NUMBER 972-3P(4)

This is in reference to your Freedom of Information-Privacy Acts (FOIPA) request to the (a) \_\_\_\_\_ . Contained in their records was material which originated with the FBI. This material was received by this Bureau on (b) \_\_\_\_\_ , with the request that the FBI determine its releasability.

As a result of the large number of FOIPA requests received by the FBI, some delay may be encountered in processing this material. The FBI has allocated substantial resources, including personnel, to insure that delays in responding to FOIPA requests are minimized.

Prior to the processing or release of the referred material which may pertain to you, please submit your notarized signature. This procedure is designed to insure that information concerning an individual is released only to that person.

Your request has been assigned number (c) \_\_\_\_\_ , which you are asked to use in any further correspondence concerning this matter.

1/8/87



LIBRARY CONTROL NUMBER 972-3P(6)

FEE ESTIMATE WHERE CHARGES EXCEED \$25

Documents which appear to be responsive to your Freedom of Information-Privacy Acts (FOIPA) request consist of approximately (a) \_\_\_\_\_ pages. If all pages are determined to be releasable, duplication costs of \$(b) \_\_\_\_\_ could result, representing a charge of ten cents per page. No fees are assessed for the first 100 pages of duplication. It is emphasized that this is only an estimate; and that the actual charges, after completion of processing of these records, will most likely be less. No duplication fees will be charged for pages that are withheld in their entirety pursuant to any FOIPA exemptions.

Department of Justice regulations (Title 28, Code of Federal Regulations, Sections 16.10 and 16.47) require notification to a requester when anticipated charges exceed \$25. This letter constitutes such notification.

Please indicate in writing your willingness to pay the estimated fees so that further action can be taken on your request. No payment should be submitted at this time. If you wish to reduce the scope of your request to meet your needs at a lower cost, please advise this office at your earliest convenience.

NOTE FOR ANALYST: In estimating fees, round off page estimates to nearest 100 pages.

2/15/89

LIBRARY CONTROL NUMBER 972-3P(6a)

FEE ESTIMATE WHERE CHARGES EXCEED \$250  
(25% Deposit Requested)

Documents which appear to be responsive to your Freedom of Information-Privacy Acts (FOIPA) request consist of approximately (a) \_\_\_\_\_ pages. If all pages are determined to be releasable, duplication costs of \$(b) \_\_\_\_\_ could result, representing a charge of ten cents per page. No fees are assessed for the first 100 pages of duplication. It is emphasized that this is only an estimate; and that the actual charges, after completion of processing of these records, will most likely be less. No duplication fees will be charged for pages that are withheld in their entirety pursuant to any FOIPA exemptions.

Department of Justice regulations (Title 28, Code of Federal Regulations, Sections 16.10 and 16.47) require notification to a requester when anticipated charges exceed \$25. This letter constitutes such notification.

Please indicate in writing your willingness to pay the estimated fees so that further action can be taken on your request. Department of Justice regulations further provide that, where the anticipated fee exceeds \$250, an advance payment of an amount up to the estimated fee may be required. A 25% deposit of \$(c) \_\_\_\_\_ is hereby requested. Your check or money order should be made payable to the Federal Bureau of Investigation. Include the FOIPA request number with your payment. If you wish to reduce the scope of your request to meet your needs at a lower cost, please advise this office at your earliest convenience.

NOTE FOR ANALYST: When charges will exceed \$250, the above pitch should be used, unless the requester has a history of prompt payment. In estimating fees, round off page estimates to nearest 100 pages.

2/15/89

LIBRARY CONTROL NUMBER 972-3P(6b)

FEE ESTIMATE WHEN WAIVER REQUESTED  
(Justification Provided)

Documents which appear to be responsive to your Freedom of Information-Privacy Acts (FOIPA) request consist of approximately (a) \_\_\_\_\_ pages. If all pages are determined to be releasable, duplication costs of \$(b) \_\_\_\_\_ could result, representing a charge of ten cents per page. No fees are assessed for the first 100 pages of duplication. It is emphasized that this is only an estimate; and that the actual charges, after completion of processing of these records, will most likely be less. No duplication fees will be charged for pages that are withheld in their entirety pursuant to any FOIPA exemptions.

Department of Justice regulations (Title 28, Code of Federal Regulations, Sections 16.10 and 16.47) require notification to a requester when anticipated charges exceed \$25. This letter constitutes such notification.

A determination has not been made with respect to your request for a waiver of fees. If you are willing to pay the estimated fees in the event your fee waiver request is denied or only reduced, please advise us in writing. Your agreement to pay will not affect our decision with respect to your fee waiver request, but will allow us to proceed further with the review and processing of the documents while the fee waiver determination is pending. If you wish to reduce the scope of your request to meet your needs at a lower cost, please advise this office at your earliest convenience.

NOTE FOR ANALYST: In estimating fees, round off page estimates to nearest 100 pages.

LIBRARY CONTROL NUMBER 972-3P(6c)

FEE ESTIMATE WHEN WAIVER REQUESTED  
(Insufficient Justification)

Documents which appear to be responsive to your Freedom of Information Act (FOIA) request consist of approximately (a) \_\_\_\_\_ pages. If all pages are determined to be releasable, duplication costs of \$(b) \_\_\_\_\_ could result, representing a charge of ten cents per page. No fees are assessed for the first 100 pages of duplication. It is emphasized that this is only an estimate; and that the actual charges, after completion of processing of these records, will most likely be less. No duplication fees will be charged for pages that are withheld in their entirety pursuant to any FOIA exemptions.

Department of Justice regulations (Title 28, Code of Federal Regulations, Section 16.10) require notification to a requester when anticipated charges exceed \$25. This letter constitutes such notification.

Department of Justice regulations implementing the fee waiver provisions of the Freedom of Information Reform Act of 1986 provide that fee waiver requests be considered on a case-by-case basis and be "based upon information provided by a requester in support of a fee waiver request or otherwise made known to the component."

Your request for a fee waiver will be considered in accordance with Title 28, Code of Federal Regulations, Section 16.10. This section provides that requested information will be furnished without charge if the disclosure of the requested information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government. The determination of whether the fee waiver requirement is met is governed by the following four factors in sequence:

- (i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government."
- (ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.

LIBRARY CONTROL NUMBER 972-3P(6c)

FEE ESTIMATE WHEN WAIVER REQUESTED  
(Insufficient Justification)  
(continued)

- (iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."
- (iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

It is necessary for you to respond in writing to each of the criteria listed above before your fee waiver request is considered. Also, make reference to any prior articles or books published; and if under contract to publish, provide the publisher's name. A copy of the pertinent section of the regulations is enclosed for your assistance.

If you are willing to pay the estimated fees in the event your fee waiver request is denied or only reduced, please include a statement to this effect along with the requested information. Your agreement to pay will not affect our decision with respect to your fee waiver request, but will allow us to proceed further with the review and processing of the documents while the fee waiver determination is pending. If you wish to reduce the scope of your request to meet your needs at a lower cost, please advise this office at your earliest convenience.

NOTE FOR ANALYST: In estimating fees, round off page estimates to nearest 100 pages.

LIBRARY CONTROL NUMBER 972-3P(6d)

FEE ESTIMATE FOLLOWING PARTIAL WAIVER OF FEES

Documents which appear to be responsive to your Freedom of Information-Privacy Acts (FOIPA) request consist of approximately (a) \_\_\_\_\_ pages. If all pages are determined to be releasable, duplication costs with a (b) \_\_\_\_\_ % reduction in fees would amount to \$(c) \_\_\_\_\_. This represents a charge of (d) \_\_\_\_\_ cents per page. No fees are assessed for the first 100 pages of duplication. It is emphasized that this is only an estimate, and that the actual charges, after completion of processing, will most likely be less. No duplication fees will be charged for pages that are withheld in their entirety pursuant to any FOIPA exemptions.

Department of Justice regulations (Title 28, Code of Federal Regulations, Section 16.10) require notification to a requester when anticipated charges exceed \$25. This letter constitutes such notification.

Please indicate in writing your willingness to pay the estimated fees so that further action can be taken on your request. No payment should be submitted at this time. If you wish to reduce the scope of your request to meet your needs at a lower cost, please advise this office at your earliest convenience.

If you disagree with the decision regarding your fee waiver, or from any other denial contained herein, you may appeal in writing to the Assistant Attorney General, Office of Legal Policy (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D. C. 20530, within 30 days from receipt of this letter. The envelope and letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

NOTE FOR ANALYST: In estimating fees, round off page estimates to nearest 100 pages.

10/8/87

LIBRARY CONTROL NUMBER 972-3P(6e)

FEE ESTIMATE FOLLOWING PARTIAL WAIVER OF FEES WITH DEPOSIT

Documents which appear to be responsive to your Freedom of Information-Privacy Acts (FOIPA) request consist of approximately (a) \_\_\_\_\_ pages. If all pages are determined to be releasable, duplication costs with a (b) \_\_\_\_\_ % reduction in fees would amount to \$(c) \_\_\_\_\_. This represents a charge of (d) \_\_\_\_\_ cents per page. No fees are assessed for the first 100 pages of duplication. It is emphasized that this is only an estimate, and that the actual charges, after completion of processing, are most likely to be less. No duplication fees will be charged for pages that are withheld in their entirety pursuant to any FOIPA exemptions.

Department of Justice regulations (Title 28, Code of Federal Regulations, Section 16.10) require notification to a requester when anticipated charges exceed \$25. This letter constitutes such notification.

Please indicate in writing your willingness to pay the estimated fees so that further action can be taken on your request. An advance deposit of \$(e) \_\_\_\_\_ is also requested in accordance with the above regulations. Your check or money order should be made payable to the Federal Bureau of Investigation. Include the FOIPA request number with your payment. If you wish to reduce the scope of your request to meet your needs at a lower cost, please advise this office at your earliest convenience.

If you disagree with the decision regarding your fee waiver, or from any other denial contained herein, you may appeal in writing to the Assistant Attorney General, Office of Legal Policy (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D. C. 20530, within 30 days from receipt of this letter. The envelope and letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

NOTE FOR ANALYST: In estimating fees, round off page estimates to nearest 100 pages.

10/8/87

LIBRARY CONTROL NUMBER 972-3P(7)

This is to acknowledge receipt of your Freedom of Information-Privacy Acts request.

Your request is currently being reviewed to determine if we have the records you are seeking. You will be advised at the earliest possible date concerning the results of this review.

Should you find it necessary to correspond with us concerning this matter prior to release of any documents, please refer to number (a) \_\_\_\_\_, which has been assigned to your request.

10/14/83



LIBRARY CONTROL NUMBER 972-3P(8)

If you have not already requested a current search of our Identification Division records for any arrest record that might pertain to you and wish to do so, please comply with the enclosed instructions set forth in Attorney General Order 556-73. Fingerprint impressions are needed for comparison with records in the Identification Division to insure that an individual's record is not disseminated to an unauthorized person.

Effective January 17, 1983, the combined NCIC-CCH file was discontinued. Information which formerly was contained in the NCIC-CCH file now is maintained in the Identification Division records system. However, to obtain this information you must comply with the attached instructions.

10/8/87

LIBRARY CONTROL NUMBER 972-3P(8a)

If you have not already requested a current search of our Identification Division records for any arrest record that might pertain to you and wish to do so, please comply with the enclosed instructions set forth in Attorney General Order 556-73. Fingerprint impressions are needed for comparison with records in the Identification Division to insure that an individual's record is not disseminated to an unauthorized person.

10/8/87

LIBRARY CONTROL NUMBER 972-3P(8b)

This is in response to your request for records pertaining to (a).

The information you have requested is exempt from disclosure under the Freedom of Information Act (FOIA) because release of our Identification Division records could reasonably be expected to constitute an unwarranted invasion of personal privacy pursuant to exemption (b)(7)(C) of the FOIA.

You have 30 days from receipt of this letter to appeal to the Attorney General from any denial contained herein. Appeals should be directed in writing to the Attorney General, Attention: Freedom of Information Appeals Unit, Washington, D. C. 20530. The envelope and letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal."

6/24/88

LIBRARY CONTROL NUMBER 972-3P(9)

Should you desire a check of our field office files, it will be necessary for you to direct your requests to the appropriate field offices.

10/14/83

LIBRARY CONTROL NUMBER 972-3P(10)

Background investigations for military and nonmilitary security clearances are conducted by many different Government agencies. The FBI conducts such background investigations in only a limited number of areas but does not issue security clearances. You may write directly to the agency which you believe initiated the background investigation or issued the security clearance.

10/14/83

LIBRARY CONTROL NUMBER 972-3P(13)

Your request for information concerning yourself has been considered in light of the provisions of both the Freedom of Information Act (FOIA) (Title 5, United States Code, Section 552) and the Privacy Act of 1974 (Title 5, United States Code, Section 552a). Any documents which are found to be exempt from disclosure under one law will also be processed under the provisions of the other law. Through these procedures you receive the greatest degree of access authorized by both laws.

10/27/87

LIBRARY CONTROL NUMBER 972-3P(14)

FEE WAIVER DENIAL - FIRST PARTY REQUEST

Your request for a waiver of fees has been denied. Title 5, United States Code, Section 552(a)(4)(A)(iii), provides that documents shall be furnished without charge or at a reduced charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester." Our decision in this matter is based on the statutory standard and the fee waiver guidelines issued by the Department of Justice, a copy of which is enclosed. We have concluded that your interest in these records is personal in nature and that the information pertains primarily to you. Disclosure of this material will not contribute to the understanding of the public at large and, therefore, a waiver of fees is inappropriate.

If you disagree with the decision regarding fee waiver, or from any other denial contained herein, you may appeal in writing to the Assistant Attorney General, Office of Legal Policy (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D. C. 20530, within 30 days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

10/8/87

LIBRARY CONTROL NUMBER 972-3P(14a)

FEE WAIVER DENIAL - FIRST PARTY REQUEST BASED ON INDIGENCY

Your request for a waiver of fees has been denied. Title 5, United States Code, Section 552(a)(4)(A)(iii), provides that documents shall be furnished without charge or at a reduced charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester." Our decision in this matter is based on the statutory standard and the fee waiver guidelines issued by the Department of Justice, a copy of which is enclosed. We have concluded that your interest in these records is personal in nature and that the information pertains primarily to you. Disclosure of this material will not contribute to the understanding of the public at large and, therefore, a waiver of fees is inappropriate. Your indigency was only one factor considered in making this decision and alone was not sufficient to require a waiver of fees.

If you disagree with the decision regarding fee waiver, or from any other denial contained herein, you may appeal in writing to the Assistant Attorney General, Office of Legal Policy (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D C. 20530, within 30 days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

10/8/87



LIBRARY CONTROL NUMBER 972-3P(14b)

Fee Waiver Denial - Third Party Request

Your request for a waiver of fees has been considered in accordance with the provisions of Title 5, United States Code, Section 552 (a)(4)(A) which permits an agency to waive or reduce fees in the public interest "because furnishing the information can be considered as primarily benefiting the general public." The principal question is whether release of the particular information you have requested will benefit the general public. We have concluded that it will not and, therefore, your request for a waiver of fees is being denied. In reaching this decision, a number of factors were considered, including the public interest in the subject matter of the records requested; the nature of the information contained in the FBI files and whether the releasable portions of the records will meaningfully contribute to the public's understanding of the subject matter; whether any of the information in our files is already in the public domain; your qualifications, ability and intentions to disseminate the information to the general public; and whether the material is personal in nature or serves only your private interests. We will reconsider our decision on your fee waiver request if, upon processing the records, it is evident that we have understated the potential public benefit of the released information.

If you disagree with the decision regarding fee waiver, or from any other denial contained herein, you may appeal in writing to the Assistant Attorney General, Office of Legal Policy (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D. C. 20530, within thirty days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

1/31/85

LIBRARY CONTROL NUMBER 972-3P(14c)

Partial Fee Waiver - Third Party Request

Your request for a waiver of fees has been considered in accordance with the provisions of Title 5, United States Code, Section 552 (a)(4)(A) which permits any agency to waive or reduce fees in the public interest "because furnishing the information can be considered as primarily benefiting the general public." The principal question is whether release of the particular information you have requested will benefit the general public. We have determined that a (a) \_\_\_\_\_ percent reduction in duplication fees is appropriate in this instance in view of the limited amount of useful and substantive information contained in the releasable portions of the records and the extent to which this information will meaningfully contribute to the public's understanding of the subject matter. Other factors considered included the public interest in the subject matter of the records requested; whether any of the information in our files is already in the public domain; your qualifications, ability and intentions to disseminate the information to the general public; and whether the material is personal in nature or serves only your private interests. We will reconsider our decision on your fee waiver request if, upon processing the records, it is evident that we have understated the potential public benefit of the information contained in the records released to you.

If you disagree with the decision regarding fee waiver, or from any other denial contained herein, you may appeal in writing to the Assistant Attorney General, Office of Legal Policy (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D. C. 20530, within thirty days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

7/29/86

LIBRARY CONTROL NUMBER 972-3P(15)

As a result of the large number of FOIPA requests received by the FBI, delay may be encountered in processing your request. The FBI has allocated substantial resources, including personnel, to insure that delays in responding to FOIPA requests are minimized. We solicit your patience and assure you that your request will be processed as soon as possible.

8/29/86

LIBRARY CONTROL NUMBER 972-3P(15a)

FOIPA No. (a) \_\_\_\_\_

Reference is made to your pending Freedom of Information-Privacy Acts (FOIPA) request concerning (b) \_\_\_\_\_.

Additional delay may be encountered before the processing of your request can be completed. Every effort is made to handle requests in the approximate order of their receipt consistent with sound administrative practices. The time required to process a request, however, will vary depending upon such factors as the volume and complexity of the material requested, the need to consult with other government agencies as to information originated by them, and in many instances, a classification review. While it is not possible to furnish an exact date when your request will be completed, I want to assure you that it is being processed, and that all documents which can be released will be made available as soon as possible.

I regret the delay incurred in complying with your request and solicit your continued patience.

Sincerely yours,

Emil P. Moschella, Chief  
Freedom of Information-  
Privacy Acts Section  
Records Management Division

6/27/84

LIBRARY CONTROL NUMBER 972-3P(15b)

FOIPA No. (a)

Reference is made to your pending Freedom of Information-Privacy Acts (FOIPA) request concerning (b).

Documents pertaining to your request have been located; however, before release can be made, they must be reviewed to ascertain if they warrant classification under current standards. Due to the heavy volume of requests received, our personnel handling classification matters have accumulated a backlog of work. Please be assured that your request will be handled in turn, and we will notify you of the results as expeditiously as possible.

I regret the delay encountered in complying with your request and again solicit your patience and understanding.

Sincerely yours,

Emil P. Moschella, Chief  
Freedom of Information-  
Privacy Acts Section  
Records Management Division

2/11/87

LIBRARY CONTROL NUMBER 972-3P(15c)

FOIPA No. (a) \_\_\_\_\_

This is to advise you of the status of your pending Freedom of Information-Privacy Acts (FOIPA) request for documents pertaining to (b) \_\_\_\_\_.

You have previously been informed that documents responsive to your request must be reviewed to ascertain if they warrant classification under current standards and that our personnel handling classification matters have accumulated a backlog of work.

We are still experiencing delays of several months in the classification process; however, I want to assure you that your request will receive attention as soon as possible. You will be advised when the classification review has been completed. Your continued patience and understanding are appreciated.

Sincerely yours,

Emil P. Moschella, Chief  
Freedom of Information-  
Privacy Acts Section  
Records Management Division

7/31/87

LIBRARY CONTROL NUMBER 972-3P(15d)

FOIPA No. (a) \_\_\_\_\_

Reference is made to my letter dated  
(b) \_\_\_\_\_, advising you of the status of your  
Freedom of Information-Privacy Acts (FOIPA) request for  
documents pertaining to (c) \_\_\_\_\_.

The classification review process has been completed  
and the documents responsive to your request will now be  
examined for release in accordance with the provisions of the  
FOIPA. All nonexempt information will be made available to  
you.

Sincerely yours,

Emil P. Moschella, Chief  
Freedom of Information-  
Privacy Acts Section  
Records Management Division

7/31/87

LIBRARY CONTROL NUMBER 972-3P(16)

In order to obtain records of other Government agencies, you must write directly to the agency where you believe the records are maintained.

5/1/87



LIBRARY CONTROL NUMBER 972-3P(17)

You may submit an appeal from any denial contained herein by writing to the Assistant Attorney General, Office of Legal Policy (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D. C. 20530, within thirty days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

10/14/83

LIBRARY CONTROL NUMBER 972-3P(18)

If you know of any matter in which your name may have been recorded by the FBI and can identify the matter in sufficient detail, including approximate time frame and location, a further search will be made.

10/14/83

LIBRARY CONTROL NUMBER 972-3P(19)

Enclosed are copies of documents from our files. Excisions have been made from these documents, and other documents have been withheld in their entirety in order to protect materials which are exempt from disclosure by the following subsections of Title 5, United States Code, Section 552:

- (b)(1) (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;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

LIBRARY CONTROL NUMBER 972-3P(20)

- (b) (7) 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 a 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;
- (b) (8) 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; or
- (b) (9) geological or geophysical information and data, including maps, concerning wells.

LIBRARY CONTROL NUMBER 972-3P(21)

A portion of the documents from our files has been processed in accordance with Title 5, United States Code, Section 552a (Privacy Act of 1974), and the material withheld are exempt from disclosure by the following subsections of this statute:

Enclosed are copies of documents from our files. Excisions have been made from these documents, and other documents have been withheld in their entirety in order to protect materials which are exempt from disclosure by the following subsections of Title 5, United States Code, Section 552a:

- (d)(5) information compiled in reasonable anticipation of a civil action or proceeding;
- (j)(1) information maintained by the Central Intelligence Agency;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law, including efforts to prevent, control, or reduce crime or apprehend criminals, except records of arrest;
- (k)(1) information which is currently and properly classified pursuant to Executive Order 12356 in the interest of the national defense or foreign policy;
- (k)(2) material compiled for law enforcement purposes, other than criminal, which would reveal the identity of an individual who furnished information pursuant to a promise that his or her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056.

1/10/90

LIBRARY CONTROL NUMBER 972-3P(22)

- (k) (4) required by statute to be maintained and used solely as statistical records;
- (k) (5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of an individual who furnished information pursuant to a promise that his or her identity would be held in confidence;
- (k) (6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service, the release of which would compromise the testing or examination process;
- (k) (7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his identity would be held in confidence.

LIBRARY CONTROL NUMBER 972-3P(25)

THIRD PARTY PITCH

(Investigation is known to public, public source information exists)

This is in response to your request for records pertaining to another individual(s), (a)\_\_\_\_\_.

Disclosure of most of the records you requested could constitute an unwarranted invasion of the privacy of the other individual(s). Access is denied pursuant to exemptions (b)(6) and/or (b)(7)(C) of the Freedom of Information Act (FOIA) unless you can obtain the notarized authorization of the other individual(s) involved and furnish the original of such authorization to us.

The collection, maintenance and disclosure of the records to which you seek access, like the records of all Federal agencies, are governed by the provisions of the Privacy Act (5 U.S.C. 552a). This Federal law prohibits disclosure of such records in the absence of written authorization from the individual to whom the records pertain, unless, among other things, disclosure is required by the FOIA.

The records you have requested contain other information generally available to the public, such as court records, newspaper clippings, official publications, etc. If you request in writing copies of these records, we will release them to you.

(APPEALS PITCH)

1/11/88

LIBRARY CONTROL NUMBER 972-3P(25a)

THIRD PARTY PITCH  
(Investigation not publicly known)

This is in response to your request for records pertaining to another individual(s), (a)\_\_\_\_\_.

We can neither confirm nor deny the existence of the records you are seeking. The disclosure of the records to which you seek access is governed by the provisions of the Privacy Act (5 U.S.C. 552a) and the Freedom of Information Act (FOIA) (5 U.S.C. 552). The Privacy Act prohibits disclosure of such records in the absence of a written authorization of the other individual(s), which we require to be notarized and the original furnished to us.

Also, the Privacy Act allows for the release of documents pertaining to an individual if disclosure is required by the FOIA. In this regard, we have determined that, if records exist, disclosure of the FBI's investigative interest in the subject(s) of your request could constitute an unwarranted invasion of personal privacy, and as such, would be exempt from disclosure pursuant to exemptions (b)(6) and/or (b)(7)(C) of the FOIA.

(APPEALS PITCH)

NOTE FOR ANALYST: Where the request is for a record of a non-citizen or alien not admitted for permanent residence, reference to the Privacy Act must be deleted.  
(See Pitch 25c)

1/11/88



LIBRARY CONTROL NUMBER 972-3P(25b)

THIRD PARTY PITCH

(Investigation publicly known--but no public source into)

This is in response to your request for records pertaining to another individual(s), (a).

The collection, maintenance and disclosure of the records to which you seek access, like the records of all Federal agencies, are governed by the provisions of the Privacy Act (5 U.S.C. 552a). This Federal law prohibits disclosure of such records in the absence of written authorization of the other individual(s), which we require to be notarized and the original furnished to us.

Also, the Privacy Act allows for the release of documents pertaining to an individual if disclosure is required by the Freedom of Information Act (FOIA). In this regard, we have determined that disclosure of the records you have requested could constitute an unwarranted invasion of personal privacy, and as such, would be exempt from disclosure pursuant to exemptions (b)(6) and/or (b)(7)(C) of the FOIA.

(APPEALS PITCH)

1/11/88

LIBRARY CONTROL NUMBER 972-3P(25c)

THIRD PARTY PITCH -- SUBJECT IS NON-CITIZEN OR

ALIEN NOT ADMITTED FOR PERMANENT RESIDENCE

(THIRD PARTY LIVE - INVESTIGATION NOT OFFICIALLY ACKNOWLEDGED)

This is in response to your Freedom of Information Act (FOIA) request for records pertaining to (an)other individual(s), (a)\_\_\_\_\_.

We can neither confirm nor deny the existence of the records you are seeking. The FOIA (5 U.S.C. 552) contains provisions to protect information pertaining to other individuals which could, if it exists, constitute an unwarranted invasion of personal privacy, namely:

(b) (6) (language)

and

(b) (7) (C) (language)

Confirmation of any information pertaining to the subject(s) of your request can only be made, if it exists, upon receipt of an original, notarized written authorization from (b)\_\_\_\_\_.

(APPEALS PITCH)

6/18/87

LIBRARY CONTROL NUMBER 972-3P(26)

A preliminary review of the index to the central records system files at FBI Headquarters discloses references to a name similar to (a) . Since we have reviewed only the index to our records, and not the actual records themselves, we do not know at this point if the records pertain to your request.

Your request is being handled as equitably as possible and all documents which can be released will be made available at the earliest possible date. Every effort is made to handle each request in the approximate order of receipt to the extent consistent with sound administrative practices.

10/14/83

LIBRARY CONTROL NUMBER 972-3P(27)

Client, Background and Notary

This is in reference to your Freedom of Information-  
Privacy Acts request on behalf of your client,  
(a) \_\_\_\_\_.

Based on the limited information you provided  
concerning your client, it is not possible to make an accurate  
search of our records. To insure an accurate search of our  
records, please furnish (b) \_\_\_\_\_  
complete name, date and place of birth, and any specific data,  
such as aliases, prior addresses or employments, that would  
permit us to locate the documents (c) \_\_\_\_\_  
seeks.

Before we can commence processing for release any  
documents which may pertain to your client, it will be  
necessary for (d) \_\_\_\_\_ to submit a  
notarized statement authorizing us to release documents  
concerning (e) \_\_\_\_\_ to you.

Upon receipt of your client's additional personal  
information and notarized authorization, we will review the  
index to our central records system files at FBI Headquarters  
and advise you of the results.

11/1/88

LIBRARY CONTROL NUMBER 972-3P(28)

Records maintained in the FBI central records system, to the extent they are subject to exemption pursuant to Title 5, United States Code, Section 552a (j) and (k), are exempt from the amendment provisions of the Privacy Act, as described in Title 28, Code of Federal Regulations, Part 16.96 (b)(2). However, even though the records are exempt, it is the policy of this Bureau to consider each request on an individual basis in order to reach an equitable determination consistent with the best interests of both the individual and the Government. Where amendment is appropriate, such action will be considered; where not appropriate, the exemption will be justification for denial of the request.

Should you make a request for correction or amendment of information in our records, your letter of request should indicate the particular record involved, the nature of the correction sought and the justification for the correction or amendment. Your request should be submitted to FBI Headquarters and should be clearly marked "Privacy Correction Request."

1/15/87

LIBRARY CONTROL NUMBER 972-3P(32)

Your recent Freedom of Information-Privacy Acts (FOIPA) request to our (a) \_\_\_\_\_ Office was referred to FBI Headquarters for handling.

In an effort to be fair, each request is handled in the approximate order of receipt. As a result of the large number of FOIPA requests received by the FBI, delay may be encountered. We solicit your patience and assure you that your request will be processed at the earliest possible date.

Please use the number (b) \_\_\_\_\_, which has been assigned to your request, in all correspondence concerning this matter.

4/1/87

LIBRARY CONTROL NUMBER 972-3P(32a)

Your recent Freedom of Information Act (FOIA) request concerning (a) \_\_\_\_\_ to our (b) \_\_\_\_\_ Office was referred to FBI Headquarters for handling.

In an effort to be fair, each request is handled in the approximate order of receipt. As a result of the large number of FOIA requests received by the FBI, delay may be encountered. We solicit your patience and assure you that your request will be processed at the earliest possible date.

Please use the number (c) \_\_\_\_\_, which has been assigned to your request, in all correspondence concerning this matter.

4/1/87

LIBRARY CONTROL NUMBER 972-3P(33)

Your recent Freedom of Information-Privacy Acts (FOIPA) request to our (a) \_\_\_\_\_ Office was referred to FBI Headquarters for handling. This is to advise you of our determination to comply with your request pursuant to Title 5, United States Code, Section 552(a)(6)(A)(i) and other applicable Federal statutes and regulations. Additional information, if needed by us in this matter, will be requested of you by separate letter.

A search of the indices to our central records system files at FBI Headquarters will be made in an effort to determine if we have the information you seek. If the search fails to indicate the existence of any record(s) pertaining to the subject matter of your request, you will be notified. In the event the search reveals the existence of any record(s) responsive to your request, it will be retrieved and processed pursuant to the provisions of the FOIPA at the earliest possible date.

Your request has been assigned number (b) \_\_\_\_\_, which you are asked to use in any further correspondence concerning this matter.

10/14/83



LIBRARY CONTROL NUMBER 972-3P(34)

We are currently searching the indices to our central records system files at FBI Headquarters for any documents which may pertain to your request. Upon completion of this search you will be notified of the results.

10/14/83

LIBRARY CONTROL NUMBER 972-3P(35)

Before we can commence processing for release any documents which may pertain to you, it will be necessary for you to submit your notarized signature. This procedure is designed to insure that documents are released only to an individual having a right of access to the information.

10/14/83

LIBRARY CONTROL NUMBER 972-3P(36)

Sincerely yours,

J. Kevin O'Brien, Chief  
Freedom of Information-  
Privacy Acts Section  
Information Management Division

10/1/90

LIBRARY CONTROL NUMBER 972-3P(37)

REQUESTS TOO VAGUE TO SEARCH

The Freedom of Information Act provides for access to Government records where the records sought are "reasonably described" (Title 5, United States Code, Section 552(a)(3)). Your letter does not contain enough descriptive information to permit a search of our records.

In accordance with Title 28, Code of Federal Regulations, Part 16.3(b), we are requesting that you provide more specific information to enable us to locate the records with a reasonable amount of effort. This should include the names of individuals, organizations or events, and the approximate time frame, if known.

10/14/83

LIBRARY CONTROL NUMBER 972-3P(38)

RESPONSE FOR REQUESTS TO INSPECT RECORDS  
PRIOR TO PAYMENT OF DUPLICATION COSTS

To permit you to inspect the records you requested prior to the payment of duplication costs would be tantamount to a waiver of fees, as the records still must be processed under the applicable statutes and duplicated for your review. Your request for inspection prior to the payment of duplication fees must be denied.

10/14/83

LIBRARY CONTROL NUMBER 972-3P(39)

READING ROOM APPOINTMENT

In the event that you are in the Washington, D.C. area, you may at no charge, review this material in our FOIPA Reading Room at FBI Headquarters by making an appointment 48 hours in advance by calling (202) 324-3386.

6/28/90

LIBRARY CONTROL NUMBER 972-3P(40)

AGGREGATE FEES

The records and subject matters of interest to you are considered a series of related requests, and as such, are subject to aggregate fees as provided by Title 28, Code of Federal Regulations, Sections 16.10 and 16.47. Accordingly, there will be a copying charge of 10¢ per page for all documents released to you. No charge will be assessed for the first 100 pages of duplication or if the aggregate duplication fee for the remaining documents does not exceed \$8.

5/1/87

LIBRARY CONTROL NUMBER 972-3P(40a)

No fees are assessed for the first 100 pages of duplication or if the search and duplication costs for the remaining pages do not exceed \$8. Therefore, the enclosed documents are being forwarded to you at no charge.

7/31/87



LIBRARY CONTROL NUMBER 972-3P(42)

DUPLICATION DOCUMENTS - FIELD OFFICE

Numerous documents in the field office file(s) that were processed pursuant to your request were found to be duplicative of those contained in the file(s) at FBI Headquarters, which have also been processed. To minimize costs to both you and the Federal Bureau of Investigation, these duplicate documents have not been considered for release unless additional information was included on the duplicate document.

12/16/83

LIBRARY CONTROL NUMBER 972-3P(43)

Preprocessed  
MONEY LETTER

The records which you requested have been previously processed under the provisions of the Freedom of Information Act for another requester. The documents available for release consist of (a) \_\_\_\_\_ pages.

Pursuant to Title 28, Code of Federal Regulations, Section 16.10, there is a fee of ten cents per page for duplication. No fees are assessed for the first 100 pages. Upon receipt of your check or money order payable to the Federal Bureau of Investigation in the amount of \$(b) \_\_\_\_\_, the documents will be copied and forwarded to you. Please place your request number on your check or money order.

7/5/88

LIBRARY CONTROL NUMBER (44)

CITIZEN'S GUIDE RESPONSE

This is in response to your inquiry about obtaining Government records under the Freedom of Information Act and/or the Privacy Act. The Committee on Government Operations of the House of Representatives has released a report intended to serve as a general introduction to both Acts. This report discusses how to make a request, the various exemptions included in the Acts, administrative appeal procedures, and judicial review.

This publication, "A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records" is available for \$2.75. Send prepayment (check or money order) to Superintendent of Documents, PO Box 371954, Pittsburgh, PA 15250-7954, stock number 052-071-00999-0; or to order with VISA or MasterCard, phone (202) 783-3238.

8/24/93

LIBRARY CONTROL NUMBER 972-3P(45)

Commercial Use Request - Designation

Your request has been designated as a "commercial use" request. This refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade or profit interests of the requester. As such, it is subject to search, review and duplication fees.

For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee is \$2.25. Where a search and retrieval cannot be performed entirely by clerical personnel - for example, where the identification of records within the scope of the request requires the use of professional personnel - the fee is \$4.50 for each quarter hour for search time spent by professional personnel. Where the time of managerial personnel is required, the fee is \$7.50 for each quarter hour of time spent by such managerial personnel.

It is estimated that a search for the records you seek will take approximately (a) \_\_\_\_\_ hours at a rate of \$(b) \_\_\_\_\_ per hour.

If you advise us of your willingness to pay search fees, we will conduct a search of records.

If this check of our records reveals documents pertinent to your request, you will be advised of review and duplication fees.

Should you disagree with the designation of your request as a "commercial use" request, you may respond by furnishing the reason(s) you believe that the results of your request will not, in fact, further your commercial, trade or profit interest.

7/28/88

LIBRARY CONTROL NUMBER 972-3P(46)  
Commercial Use Request - Review Cost

Reference is made to our letter to you dated (a) \_\_\_\_\_  
pertaining to your Freedom of Information Act request regarding  
(b) \_\_\_\_\_.

It has been determined that for each quarter hour spent by clerical personnel in preparing the documents for review, the fee is \$2.25 per quarter hour and in reviewing a requested record for possible disclosure, the professional fee is \$4.50 per quarter hour, except that where the time of managerial personnel is required, the fee is \$7.50 for each quarter hour spent by such managerial personnel.

It is estimated that a review of the records found to be pertinent to your request will take approximately (c) \_\_\_\_\_ hours at the rate of \$(d) \_\_\_\_\_ per hour, approximately (e) \_\_\_\_\_ hours at the rate of \$(f) \_\_\_\_\_ per hour, and approximately (g) \_\_\_\_\_ hours at the rate of \$(h) \_\_\_\_\_ per hour.

• In addition to this, all documents found to be releasable will be subjected to a duplication cost of 10 cents per page which may amount to approximately \$(i) \_\_\_\_\_.

If you advise us of your willingness to pay review and duplication fees, these documents will be processed.

11/1/88

LIBRARY CONTROL NUMBER 972-3P(47)  
Commercial Use Request - Fee Letter

Subject of Request: (a)  
FOIPA No.: (b)

Reference is made to our letter of (c).  
The records which you requested have been processed, and the documents are available for release.

Pursuant to Title 28, Code of Federal Regulations, Sections 16.10 and 16.47, fees were assessed at the following rates:

Hourly Rate X Number of Hours = Fee for Service

Search Fees: (\$)                     (\$)                    

Review Fees:

Clerical (\$)                     (\$)                    

Professional (\$)                     (\$)                    

Managerial (\$)                     (\$)                    

Number of Pages X 10 cents per page

Duplication Fees:                      (\$)                    

Total accumulated fees (\$)                    

Upon receipt of your check or money order, in the amount of \$(d), payable to the Federal Bureau of Investigation, the releasable documents will be forwarded to you.

11/1/88

Commercial Use Request - Fee Letter  
(continued)

To insure proper identification of your request, please return this letter or include the above referenced FOIPA request number with your payment.

(e) See Continuation Page for additional information.

LIBRARY CONTROL NUMBER 972-3P(48)

REFERRAL LETTER  
(Response to other agency)

Date: NOTE: Operator, typed date must be spelled out.  
To: NOTE: Operator, FOIPA will attach preprinted 7-line label here. Delete this message, but do not delete blank lines between "To" and "From."

From: Emil P. Moschella, Chief  
Freedom of Information-  
Privacy Acts (FOIPA) Section  
Federal Bureau of Investigation

Subject: FOIA/PA REQUEST OF (a) \_\_\_\_\_  
FBI FOIPA NO. (b) \_\_\_\_\_  
(c) \_\_\_\_\_ No. (d) \_\_\_\_\_  
Re: (e) \_\_\_\_\_

This is in response to your letter dated  
(f) \_\_\_\_\_, requesting the FBI to make a  
disclosure determination regarding the bracketed information  
contained in the attached (g) \_\_\_\_\_ document(s).

After reviewing the information, we recommend that:

\_\_\_\_\_ all of the information be disclosed.  
\_\_\_\_\_ all of the information be withheld pursuant to  
subsection(s) (h) \_\_\_\_\_ of Title 5,  
United States Code, Section 552.  
\_\_\_\_\_ part of the information, highlighted in yellow,  
should be withheld pursuant to subsection(s) (i) \_\_\_\_\_  
of Title 5, United States Code,  
Section 552. The remainder of the information may  
be disclosed.

(j) \_\_\_\_\_ : \_\_\_\_\_ (4)

9/28/88



REFERRAL LETTER (Response to other agency)  
(continued)

(k) \_\_\_\_\_

Please call (l) \_\_\_\_\_ of my staff at  
(202) 324-(m) \_\_\_\_\_ if you have any questions.

Enclosure(s)

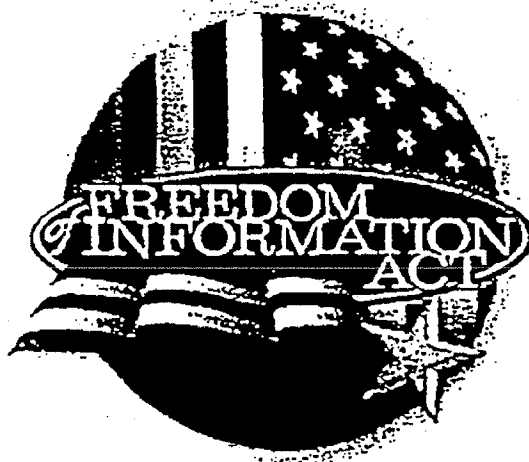
REMARKS: (n) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

LIBRARY CONTROL NUMBER 972-3P(49)

REFERENCES ("Cross" References)

The above fee estimate does not include references which may be identifiable with your request. A reference is a mention of the subject of your request in the file of another individual, organization, or activity. A further description of any such references will be made at a later date.

2/15/89



FEDERAL BUREAU OF INVESTIGATION

**FREEDOM OF  
INFORMATION AND  
PRIVACY ACTS  
REFERENCE MANUAL**

**PART 9 OF 9**

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SECRET

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1. FOIPA Section Numbered Memos	M
2. Privacy Act	PA
3. Freedom of Information Act	FOIA
4. Code of Federal Regulations	CFR
5. Manual of Investigative Operations and Guidelines	MIOG
6. DOJ Guide to the Freedom of Information Act (FOIA)	GF

If a citation in the index pertains to a particular issue, that issue will be shown in parentheses next to the citation. All GF citations, of course, will pertain to the FOIA.

Any suggestions for inclusion of additional items should be submitted in writing to the Training, Research and Field Coordination Unit.

304,185

Classified by [REDACTED]

Declassify on: OADR  
12-6-90

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 12-6-90 BY [REDACTED]

SECRET

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Declassify on: OADR

2-3-92 304,185

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4/1/91

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
EXCEPT WHERE SHOWN  
OTHERWISE

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