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NATIONAL LABOR RELATIONS BOARD

Freedom of Information Act Manual

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APPENDIX

I. Purpose of Manual

This manual has been prepared, as updated, by the General Counsel to furnish guidance to Agency employees in making determinations concerning the public release of Agency records under the Freedom of Information Act ("FOIA"), as amended,[1] and in litigating FOIA-based lawsuits. The Manual provides a basic review of the FOIA and its exemptions, as well as operational guidance on how to process a FOIA request—including threshold procedural issues, case assignment, creation of a FOIA Docket and File, search procedures, preparation of responsive documents for release, and assessment of charges.

This Manual does not constitute a final determination by the General Counsel or the Board concerning the availability of any document; nor does it create legally binding obligations to release or withhold documents. Similarly, these guidelines are not intended to be and should not be viewed as binding procedural rules; nor should they be construed as creating any legally enforceable rights on the part of FOIA requesters. This manual is offered solely for the convenience and assistance of Agency employees who are called upon to process and litigate FOIA requests.

All requests should be viewed as potentially raising issues that will be raised on appeal or in litigation. Accordingly, while strict compliance with these guidelines is not always necessary or possible, in all cases the processing office should have a system in place that permits it to exactly reconstruct what documents were considered responsive and what documents were or were not produced and in what form, should an appeal or litigation result from a FOIA determination. In this regard, although the level of compliance with the guidelines may vary, the

[1] The FOIA is found at Title 5 of the United States Code, Chapter 5, Subchapter II at Section 552 (5 U.S.C. § 552) (*see* Appendix). Certain definitions applicable to Subchapter II, including the FOIA, are contained at Section 551.

processing office as well as requesters should strictly adhere to the Agency's rules and regulations, 29 C.F.R. § 102.117.

This guide supersedes the following Operations-Management FOIA memoranda, which are hereby rescinded:

- OM 99-76 "Operational Changes and Direction in FOIA Practices Regarding Discretionary Disclosure and Confidentiality Assurances for Reluctant Witnesses"
- OM 99-9 "FOIA Manual & Appendices"
- OM 00-26 "FOIA Manual"
- OM 00-59 "Addition to FOIA Manual"
- OM 00-70 "Electronic Submission of FOIA Decision Letters"
- OM 03-114 "FOIA release of data from certain CATS fields"
- OM 05-76 "FOIA Tracking Database"
- OM 05-78 "Extensions of Time for FOIA Responses and Requests for Commerce Questionnaires"

II. Introduction

The core purpose of the FOIA is to "shed[] light on an Agency's performance of its statutory duties."[1] The FOIA has two automatic disclosure provisions—5 U.S.C. § 552(a)(1) and (a)(2).[2] The first provision requires the publication in the Federal Register of information regarding how an agency transacts its business, including its rules and regulations, its organization and functions, and statements of procedure.[3] The second automatic disclosure provision requires the creation of conventional and electronic reading rooms, where certain categories of documents are routinely made available for public inspection and copying, unless the materials are promptly published and copies offered for sale.[4]

The FOIA's other disclosure provision, 5 U.S.C. § 552(a)(3), allows any person to obtain copies of those records that are not automatically disclosed, as just discussed, and that are not otherwise exempt under one of the nine specific exemptions or three exclusions.[5] Requests under subsection (a)(3) require search, including by electronic means, and review by agency personnel prior to disclosure to the requester. Moreover, this subsection requires that an agency make reasonable efforts to disclose records in the form or format preferred by the requester, including electronic format, where the records are readily reproducible in that format. This

[1] *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

[2] For a complete overview of the FOIA, *see* Appendix.

[3] 5 U.S.C. § 552(a)(1).

[4] 5 U.S.C. § 552(a)(2). Reading room documents consist of: final opinions and orders made in the adjudication of cases, agency statements of policy and interpretations that are not published in the *Federal Register*, administrative staff manuals and instructions that affect the public, copies of records that have been disclosed in response to a FOIA request and that have become or are likely to become the subject of subsequent FOIA requests, and a general index of frequently requested documents. Indeed, all of these documents must be indexed to facilitate public inspection.

[5] 5 U.S.C. § 552(b)(1)-(9). The legal principles to be utilized in the application of the specific FOIA exemptions are the focus of this manual. It is the Agency's burden to justify its reliance on any exemptions claimed to support non-disclosure. 5 U.S.C. § 552(a)(4)(B). Further, certain "exclusions" set forth in 5 U.S.C. § 552(c)(1), (2), and (3) relate only to criminal investigations, generally have no application to NLRB practice, and will not be addressed herein.

subsection also requires that each agency promulgate administrative regulations regarding the time, place, fees, and procedures to be followed in making a FOIA request.

The NLRB has promulgated Subpart K, Section 102.117 of its Rules and Regulations, which sets forth the Agency's administrative FOIA procedures. Subparagraphs (c) and (d) set forth the administrative procedures that a FOIA requester must follow in making a FOIA request to the Agency, filing an administrative appeal, and exhausting administrative remedies within given time constraints. They also provide for fee category placement, assessment of costs, and the standards for determining whether a fee waiver will be granted. Subparagraph (e) incorporates the nine FOIA exemptions by reference and grants to the General Counsel and the Board the right to make discretionary FOIA disclosures. Finally, the FOIA provides that upon complaint,[6] United States District Courts have jurisdiction to enjoin an agency from withholding agency records. An agency's answer to the complaint is due within 30 days,[7] and the court's review of the matter is de novo. If a requester substantially prevails, reasonable attorneys' fees and costs may be awarded.[8]

In 2005, Executive Order 13,392, entitled "Improving Agency Disclosure of Information," was issued.[9] Executive Order 13,392 establishes a "citizen-centered" and "results-oriented" policy for improving the FOIA's administration throughout the Executive Branch. Executive Order 13,392 provides for an overall policy of responding to FOIA requests

[6] 5 U.S.C. § 552(a)(4)(B). There is no statute of limitations for the filing of a FOIA request. However, once a FOIA plaintiff has exhausted his administrative remedies, he must file suit within the six–year general federal statute of limitations, 28 U.S.C. § 2401(a). *See Spannaus v. U.S.Dep't of Justice*, 824 F.2d 52, 55-56 (D.C. Cir. 1987).

[7] 5 U.S.C. § 552(a)(4)(C).

[8] 5 U.S.C. § 552(a)(4)(E).

[9] 70 Fed. Reg. 75,373 (Dec. 14, 2005).

"courteously and appropriately" and in ways that permit FOIA requesters to "learn about the FOIA process," including "about the status of a person's FOIA request."[10]

On December 31, 2007, the President signed into law the "Openness Promotes Effectiveness in our National Government Act of 2007," or the "OPEN Government Act of 2007."[11] These amendments to the FOIA address a range of procedural issues impacting FOIA administration, including the codification of numerous provisions of Executive Order 13,392. No changes to the nine exemptions of FOIA were made with these amendments.

[10] Exec. Order No. 13,392, Sec. 1(b). The Agency's Improvement Plan Under Exec. Order No. 13,392 is available on the Agency's web site.

[11] Pub. L. No. 110-175, 121 Stat. 2524 (2007).

III. Related Statutes

A. The Privacy Act

Because most of the Agency's documents, including those in Regional Office Files, are covered by the Privacy Act of 1974,[1] the FOIA and the Privacy Act each play a role in the Agency's response to requests for documents. Set forth below are: (1) a brief explanation of Privacy Act requirements and their impact upon requests for Agency documents, and (2) two simple rules to follow when responding to requests.

1. Privacy Act Requirements and Impact

a. Privacy Act Requirements

For the Privacy Act to apply, a document must be a "record," "about an individual," and must be "contained in a system of records" "from which information is retrieved by the name of the individual."[2] The Agency now has 32 different Privacy Act "systems of records," including the Agency's various electronic case tracking systems and their associated paper files (*e.g.*, CATS and Associated Regional Office Files, JCMS-PCL and Associated Headquarters files, JCMS-eRoom, and others).[3] Our paper files are an integrated part of the Privacy Act case tracking systems of records because information (such as case numbers) is retrieved from the electronic systems in searches by individuals' names and that information is then used to retrieve and disclose portions of the paper files containing information about that individual.

[1] 5 U.S.C. § 552a.

[2] *See* 5 U.S.C. § 552a(a)(4) and (5); *see* also *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1460 (D.C. Cir. 1996).

[3] See 71 Fed. Reg. 74941 (Dec. 13, 2006) (notices of the electronic case tracking systems of records); see also 72 Fed. Reg. 38778 (July 16, 2007) (accompanying final rule exempting some of the electronic case tracking systems from certain Privacy Act requirements).

These documents are available online at *http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/06-9683.pdf* (notice of systems of records); and *http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-13684.pdf* (final rule). A listing of all other Agency systems of records can be found at http://www.nlrb.gov/privacy_act_systems.aspx.

The Privacy Act has two major requirements that generally impact disclosure of agency records. The first major requirement is to not disclose records (5 U.S.C. § 552a(b)), except with either consent from the "covered individuals" to whom the records pertain (that is, whose names can be used to retrieve information),[4] or pursuant to certain significant statutory exceptions. The most important exception to the non-disclosure rule is that the Privacy Act permits disclosure without consent of the covered individual when the disclosure is *required* by the FOIA (that is, when there is no applicable FOIA exemption) (5 U.S.C. § 552a(b)(2)).

The second major requirement is for the Agency to provide Privacy Act "covered individuals" certain rights of access to and amendment of their records.[5] This rule too has significant exemptions. The two most relevant Privacy Act exemptions from the access and amendment rights of covered individuals are Exemptions (k)(2) and (d)(5), 5 U.S.C. §§ 552a(k)(2), (d)(5). Exemption (k)(2) overrides the Privacy Act access right for records that are "investigatory material compiled for law enforcement purposes." This means that there is no enforceable Privacy Act access right for covered individuals to much of the Agency's case tracking systems, including the entirety of CATS, RAILS (used by the Division of Advice), and ACTS (used by the Office of Appeals), as well as the paper files associated with these electronic systems (including the Regional Office C-case and R-case Files). Exemption (d)(5) also overrides the Privacy Act access right of covered individuals for records that have "information compiled in reasonable anticipation of a civil action or proceeding," including the Agency's

[4] Each system has particular "covered individuals" who have Privacy Act rights. Whether an individual is "covered" depends upon whether information may be retrieved from the system by the individual's name. The notice of systems of records lists the "covered individuals" for each of the Agency's systems, and can be found at http://www.nlrb.gov/privacy_act_systems.aspx under the title "Categories of individuals covered by the system."

[5] The Board's Rules and Regulations for requesting such access and amendment are located at Section 102.119, 29 C.F.R. § 102.119.

unfair labor practice and representation proceedings. Unlike FOIA Exemption 7(A), both of these Privacy Act exemptions apply even after a case is closed.[6]

b. Privacy Act Impact on Requests for Documents

Notwithstanding the complicated manner in which the Privacy Act interacts with the FOIA, the Agency's determination that the Privacy Act covers most of the Agency's case files does not actually change FOIA processing for most cases, with the following exceptions.

i. For all FOIA requests for documents in a Privacy Act system of records,[7] there may be no *ad hoc* discretionary FOIA disclosures—that is, if a FOIA exemption applies, it must be claimed. Discretionary disclosures may be made only as specifically permitted by the Agency's discretionary disclosure policy, set forth in Chapter XVII. Agency Release Policies. The Agency has exercised its right to designate these few important disclosures as "routine uses" under the Privacy Act, which is another exception to the non-disclosure requirement (see 5 U.S.C. §§ 552a(a)(7), 552a(b)(3)).

ii. For requests from a Privacy Act "covered individual"[8] for any information about that individual, such requests must be considered under the Privacy Act access rights as well as under the FOIA, regardless of which statute is relied upon in the request.[9] In order to withhold information about the Privacy Act "covered individual" requester, both a Privacy Act exemption

[6] *See Irons v. Bell*, 596 F.2d 468, 471 (1st Cir. 1979).

[7] If there is any question about whether a particular requested document is part of a Privacy Act system of records, please contact the Special Litigation Branch.

[8] The FOIA processor should determine whether the requester is a "covered individual" making a first-party request by looking to the relevant system of records at issue in the FOIA request. *See* n.4, *supra*. For example, an individual charging party's request for records about that charging party in his ULP Regional Office File would qualify as a Privacy Act "covered individual" making a first-party request. In contrast, a request from a witness who is not a party to the ULP case would not require Privacy Act consideration because that witness is not a Privacy Act "covered individual" for the CATS/Regional Office File system of records because information may not be retrieved from CATS by a witness' name.

[9] *See Blazy v. Tenet*, 979 F. Supp. 10, 16 (D.D.C. 1997) ("[d]ocument requests therefore must be analyzed under both Acts"), *summary affirmance granted*, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998).

and a FOIA exemption must apply.[10] However, as set forth above, (k)(2) does exempt from Privacy Act access the entirety of CATS, RAILS, and ACTS, as well as the paper files associated with these electronic systems (including the Regional Office Files). Accordingly, there is no meaningful impact from application of the Privacy Act to individuals' requests for documents from these particular systems of records.[11]

2. Rules to Follow

The end result of the above discussion can be summarized in these two rules:

(a) For all FOIA requests for documents in a Privacy Act System of Records, there may be no *ad hoc* discretionary FOIA disclosures—that is, if a FOIA exemption applies, it must be claimed, except as specifically permitted by the Agency's discretionary disclosure policy, set forth in Chapter XVII. Agency Release Policies.

(b) For requests from individuals for information about them contained in CATS and Associated Regional Office Files, ACTS and Associated Headquarters (Appeals) Files, or RAILS and Associated Headquarters (Advice) Files, analyze the request under the FOIA only and disclose only documents or portions of documents that are required to be disclosed under the FOIA. Contact the Special Litigation Branch for assistance with all other such individual requests—that is, for documents that are NOT in CATS/Regional Office Files, ACTS/Appeals files, or RAILS/Advice files.

[10] See 5 U.S.C. § 552a(t)(1), (2) (FOIA exemption cannot defeat access under Privacy Act, and Privacy Act exemption cannot defeat access under FOIA); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987) ("In order to withhold these documents from [the requester's] twin Privacy Act/FOIA request, [the government agency] must demonstrate that the documents fall within some exemption under *each* Act."); *Viotti v. U.S. Air Force*, 902 F. Supp. 1331, 1336-37 (D. Colo. 1995) ("If the records are accessible under the Privacy Act, the exemptions from disclosure in the FOIA are inapplicable."), *aff'd*, 153 F.3d 730 (10th Cir. 1998) (unpublished).

[11] As described in Chapter XII. First-Party Requesters, for purposes of assessing fees, the FOIA processor must determine whether documents are being disclosed pursuant to the FOIA or the Privacy Act. Practically, however, in most cases, disclosures to first-party requesters will be made pursuant to the FOIA because a large number of the Agency's documents (such as information from CATS and Regional Office Files) are exempt from the Privacy Act's access requirement under Privacy Act Exemption (k)(2). In such cases, there is no need to analyze the request under the Privacy Act in order to determine fees.

Please contact the Special Litigation Branch with any questions on this topic.

B. The Federal Records Act

The records creation, management, and disposal duties of Federal agencies are set out in a collection of statutes known as the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101-2119, 2901-2910, 3101-3107, and 3301-3324.[12] Unlike the FOIA, which controls the disclosure of agency records, the FRA controls whether an agency is required to maintain particular records and whether they may be disposed of. The FRA is intended to assure, among other things, "[a]ccurate and complete documentation of the policies and transactions of the Federal Government," "[c]ontrol of the quantity and quality of records produced by the Federal Government," and "[j]udicious preservation and disposal of records."[13]

A portion of the FRA, the "Records Disposal Act,"[14] requires agencies to create "schedules" for the disposal of their records having no "sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government," and to obtain the approval of those schedules from the Archivist of the United States.[15] The schedules are created in accordance with National Archives and Records Administration regulations. Pursuant to these provisions, the Agency has obtained approval from the Archivist for the disposition of Agency records. For example, official case files should be transferred to a Federal Records Center two years after the "cutoff" of the file, which occurs at the close of the calendar year during which the case was closed. The Federal Records Center then destroys the files six years after the cutoff. Certain records, however, may be designated for "permanent retention."[16] A complete

[12] *See Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 36 (D.C. Cir. 1983); *Armstrong v. Bush*, 924 F.2d 282, 284 n.1 (D.C. Cir. 1991).

[13] 44 U.S.C. § 2902.

[14] 44 U.S.C. §§ 3301-3324.

[15] *See* 44 U.S.C. §§ 3303(3), 3303a.

[16] Between one and three percent of Agency case files are selected for permanent retention. These files "illustrate significant developments in the administration of the National Labor Relations Act or otherwise represent

listing of the Agency's "Disposition Standards" can be found in Appendix I of the Files Management and Records Disposition Handbook, issued by the Library and Administrative Services Branch.

The FRA defines what constitutes an agency "record." That definition includes "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them."[17] Only those documents that meet this definition of "record" are subject to the requirements of the FRA and the Agency's retention and disposal schedules.[18] For a related discussion, *see* section on Agency Records.

However, a separate, generally broader definition of "agency record" has developed under FOIA law (*see* Chapter IV. Agency Records and Electronic FOIA). Thus, while Agency

the most important cases considered by the Board in a given year." Administrative Policy and Procedures Manual (APPM), Records Management Program, Chapter REC-2(A) at 17.

[17] 44 U.S.C. § 3301.

[18] *See Armstrong v. Executive Office of the President, Office of Admin.*, 1 F.3d 1274 (D.C. Cir. 1993) (examining obligations of government agencies under the Federal Records Act and finding that e-mails meet definition of record). Under the Federal Records Act, the Agency is under an obligation to maintain electronic records. Thus, the Agency E-Mail Records Retention Policy in the Administrative Policy and Procedures Manual (APPM), Chapter REC-5, effective May 25, 2005, directs Agency employees to preserve e-mail messages if they meet the definition of records contained in the FRA, 44 U.S.C. § 3301.

schedules may not require that particular documents be retained, the documents, if they exist, nonetheless may be subject to disclosure pursuant to a FOIA request if they meet the definition of “agency record” under the FOIA.

IV. Agency Records and Electronic FOIA

A. Agency Records Subject to Potential Disclosure

Only agency records are subject to disclosure under the FOIA.[1] Generally, whether a document is an agency record depends on the circumstances surrounding the creation, maintenance, and use of each document, and such determinations must be made on a case-by-case basis, according to a careful weighing of all considerations.

As discussed more fully below, the first step in analyzing whether a document is an agency record is to determine whether the document was created or obtained by the NLRB. If it was not, it is not an agency record. If it was, the next step is to determine whether the Agency "controls" the document under the test outlined below under (1), or whether the document is a personal record, as outlined below under (2). If the Agency does not control the record or if it is a personal record, it is not an agency record subject to disclosure under the FOIA. The control and personal records tests are distinct, containing separate 4-prong tests and standards for determining whether they are satisfied. Each is outlined below.

1. Control Test

Although the FOIA does not define the term "agency record," the Supreme Court has articulated a two-prong test.[2] For a requested record to qualify as an agency record,

[1] Since electronic records are treated the same as ordinary records under the FOIA, the same considerations that govern whether ordinary records are "agency records" subject to disclosure govern electronic records. Tangible, evidentiary objects, such as union buttons, hats, nails, and other like non-reproducible items are not Agency records. *See Nichols v. United States*, 325 F. Supp. 130, 135-136 (D. Kan. 1971).

[2] The requirement that materials sought by a private party be "agency records" is jurisdictional. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980); *Goldgar v. Office of Admin., Executive Office of the President*, 26 F.3d 32, 35 (5th Cir. 1994). Accordingly, a federal court has authority to compel disclosure only when an agency improperly withholds an agency record. *See id.*; *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1488 (D.C. Cir. 1984).

an agency must (1) either "create or obtain" the requested materials, and (2) "be in control of the requested materials at the time the FOIA request is made."[3]

The Supreme Court defined "control" in this context, explaining that "[b]y control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties."[4] The District of Columbia Circuit has articulated four necessary factors to examine to determine whether the "control" prong of the *Tax Analysts* agency record test is satisfied. These factors are "(1) the intent of the document's creator to retain or relinquish control over the records, (2) the ability of the agency to use and dispose of the record as it sees fit, (3) the extent to which agency personnel have read or relied upon the document, and (4) the degree to which the document was integrated into the agency's record system or files."[5] Under this D.C. Circuit test, all four factors must be present for the requested document to be an agency record.[6]

2. Personal Records

The Supreme Court clarified that the term "'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency."[7] The D.C. Circuit established a "totality of the circumstances test to distinguish 'agency records' from personal records."[8] The test

[3] *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Indeed, "[t]he FOIA's structure and legislative history make clear that agency control over requested materials is a 'prerequisite to triggering any duties under the FOIA.'" *Tax Analysts*, *Id.* at 148 n.9 (quoting *Kissinger*, 445 U.S. at 151) (emphasis in original).

[4] *Id.* at 145.

[5] *See Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd*, 492 U.S. 136 (1989); *Burka v. HHS*, 87 F.3d 508, 514 (D.C. Cir. 1996); *see also Baizer v. U.S. Dep't of Air Force*, 887 F. Supp. 225, 228 (N.D. Cal. 1995) ("If an agency integrates material into its file and relies on it in decision making, then the agency controls the material [for purposes of the agency record test]").

[6] *See Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d at 1069.

[7] *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. at 145.

[8] *See Consumer Fed'n of Am. v. USDA*, 455 F.3d 283, 287 (D.C. Cir. 2006).

"focus[es] on a variety of factors surrounding the creation, possession, control, and use of the document by an agency."[9] Specifically, based on *Kissinger*, the D.C. Circuit test is "whether the document [1] was generated within the agency, [2] has been placed into the agency's files, [3] is in the agency's control, and [4] has been used by the agency for an agency purpose."[10]

Where documents have been obtained by an agency from an outside source, "control or possession" by the withholding agency is the critical factor in the personal record analysis.[11] But where documents have been created within the agency, "use of the document" becomes more important in determining whether a document created by an agency employee is a personal record.[12]

Accordingly, some documents physically located within an agency may be considered personal records of an employee rather than agency records, even where the documents relate to an employee's work or were created on agency time with agency resources. Thus, in *Gallant*, the D.C. Circuit held that letters sent by a former Board member in an attempt to secure her reappointment were "personal records" of the Board member, rather than agency records. The letters were created with the "purely personal objective of retaining [the Board member's] job," and there was a lack of reliance on the correspondence by the Board member and other agency employees to carry out the business of the agency. The Court noted that while records may relate to an employee's

[9] *Id.* (quoting *Bureau of Nat'l Affairs v. U.S. Dep't of Justice*, 742 F.2d at 1490).

[10] *Bureau of Nat'l Affairs v. U.S. Dep't of Justice*, 742 F.2d at 1494; *see also Consumer Fed'n of Am. v. USDA*, 455 F.3d at 288. In *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. at 157, the Supreme Court held that Secretary Kissinger's papers were personal records not subject to disclosure under the FOIA because they were not in the agency's control at any time, were not generated by the agency or entered into the agency's files, and were not used by the agency for any purpose.

[11] *Gallant v. NLRB*, 26 F.3d 168, 172 (D.C. Cir. 1994); *Bureau of Nat'l Affairs v. U.S. Dep't of Justice*, 742 F.2d at 1490.

work, the FOIA does not "sweep into . . . reach personal papers that may 'relate to' an employee's work . . . but which the individual does not rely upon to perform his or her duties . . . ."[13]

Similarly, in *American Federation of Government Employees, Local 2782 v. U.S. Department of Commerce*, the district court found that handwritten logs were personal records of the employee who created the logs, even though they were kept in notebooks that contained agency records. The court noted that "personal notes which are not intended for distribution through normal agency channels and which cannot be said to be within the 'control or dominion' of an agency are ordinarily considered to be beyond the scope of the FOIA." Accordingly, while the logs were work-related, they were "a voluntary piece of unofficial scholarship of an employee who wished only to facilitate her own performance of her duties" and were found not to be agency records.[14]

[12] *Id.*; *see also Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 480 (2d Cir. 1999) (weighing the agency's actual and potential use of a document "cannot be overestimated" when determining whether a document is an agency record or a personal record).

[13] *Gallant*, 26 F.3d at 171 (quoting *Bureau of Nat'l Affairs*, 742 F.2d at 1493).

[14] 632 F. Supp. 1272, 1277 (D.D.C. 1986), *aff'd*, 907 F.2d 203 (D.C. Cir. 1990). *See also Kalmin v. U.S. Dep't of the Navy*, 605 F. Supp. 1492, 1494-1495 (D.D.C. 1985) (notes containing observations about a co-worker not agency records where the notes were made for the sole purpose of refreshing the writers' memories, were maintained at their homes or in private files at work, or in chronological logs or diaries, and were never circulated); *Fortson v. Harvey*, 407 F. Supp. 2d 13, 15-16 (D.D.C. 2005), *appeal dismissed*, 2005 WL 3789054 (notes compiled by an employee investigating equal opportunity allegations are personal notes because the investigator never intended to relinquish control of them, they were not integrated into official files, and they were not read or relied on by the decisionmaker); *Bloomberg v. SEC*, 357 F. Supp. 2d 156, 163-164 (D.D.C. 2004) (former SEC chairman's appointment calendar was a personal record because it was created for the chairman's and his limited staff's use only, and there was no evidence of the chairman's significant reliance on the calendar in the course of his duties); *Consumer Fed'n of Am. v. USDA*, 455 F.3d 283, 288-293 (D.C. Cir. 2006) (five electronic appointment calendars are agency records, *inter alia*, because they were used to communicate availability with other persons, but the calendar which was shared only with the agency official's secretary is a personal record); *Dow Jones & Co. v. General Servs. Admin.*, 714 F. Supp. 35, 38-39 (D.D.C. 1989) (list of official's business partners is personal record where official created list with intent for it to remain personal property, list was kept in locked safe, and only limited agency employees had access to it); *Sibille v. Fed. Reserve Bank*, 770 F. Supp. 134, 138 (S.D.N.Y. 1991) (notes of meetings and telephone conversations are personal records where they were created by employees for their personal convenience, were not written for circulation within the agency, and were kept in a locked drawer in a credenza behind the employee's desk so that only the employee and secretary had access, no one other than the employee had ever read or handled the notes, and the employee never read or relied on the notes in any way).

3. E-Mails as Agency Records

Under these principles, e-mails created or obtained by employees in the conduct of agency business generally would be considered "agency records" subject to disclosure, absent any applicable exemption. The purpose of such documents necessarily would be to further agency business. Likewise, by their very nature as "communications," most e-mails are not intended for personal use only, but are relied on by the recipients to conduct agency business. Conversely, to the extent that any notes are created in electronic form, but are not circulated to other employees for their use in conducting agency business and are not otherwise integrated into the agency's files, they would be considered personal notes rather than agency records. As in the cases discussed above, even if the notes assist the employee in performing work, if such electronic notes are kept for the employee's convenience only and are not circulated to other employees, they would not constitute agency records subject to disclosure.

E-mail messages sent to the Agency from outside sources could also constitute records "obtained" by the Agency. The criteria for assessing whether such documents are agency records are set forth above in subsection 1 of this section (intent of document's creator to relinquish control, ability of agency to use and dispose of record, extent of reliance by agency personnel, integration into agency records).

B. E-Mail Policy

The Agency has separate obligations apart from the FOIA under the Federal Records Act[15], to maintain electronic records. By Administrative Policies and Procedures Manual (APPM) Chapter Rec-5, "Agency E-Mail Records Retention Policy," the Agency distributed an e-mail policy in response to National Archives and Records

Administration regulations on e-mail. That memo directs Agency employees to preserve e-mail messages if they meet the definition of "records" contained in the Federal Records Act.[16]

Specifically, the memo instructs employees to print e-mail messages and attachments that meet the definition of "records" and to annotate the printed message with essential transmission and receipt data if the printed message does not reflect that information (sender, receiver, date of transmission, receipt of message). The memo further directs employees to file the printed messages with related office files. These steps are necessary until technology allowing archival capabilities for long-term electronic storage and retrieval of e-mail messages is available.[17]

While this e-mail policy has been distributed in response to the Agency's obligations under the Federal Records Act and regulations promulgated thereunder, the Federal Records Act is not determinative of our FOIA obligations. Even if an e-mail message does not meet the definition of "record" for purposes of the Federal Records Act, and therefore need not be printed and stored, the e-mail message may still be an "agency record" under the FOIA, pursuant to the criteria described above. Thus, all Agency employees should be aware that e-mail messages are potentially subject to disclosure when they meet the definition of "agency record" under the FOIA, and should

[15] 44 U.S.C. §§ 2901-2910, 3101-3107, 3301-3324.

[16] 44 U.S.C. § 3301. This section provides:

As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the U.S. Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

[17] This "print and delete" policy was upheld in *Public Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999), *rev'g* 2 F. Supp. 2d 1 (D.D.C. 1997).

be appropriately circumspect when using this tool.[18] For example, if a Board agent sends an e-mail to a party with questions regarding the party's position statement and the party responds, those e-mail documents would be protected under FOIA Exemption 7(A) while the case is open, but would be releasable, absent appropriate redactions under Exemptions 4, 6, 7(C), 7(D), and 7(F) after the case closes.

C. Retrieving and Disclosing Electronic Documents

The FOIA applies a general "reasonable efforts" standard to an agency's search obligation in connection with electronic records. It provides that "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system."[19]

Agency FOIA processors should also be aware that the FOIA addresses the format in which a requested record must be disclosed under the FOIA. "[A]n agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."[20] In addition, "[e]ach agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section."[21] These provisions require the Agency to comply with a requester's specified choice of format if the format is "readily reproducible" with a "reasonable effort." This potentially could require the Agency to

[18] In Administrative Policy Circular (APC) 99-03, "Use of Agency Telecommunications Resources," issued January 22, 1999, the Agency advised that messages sent and information acquired through e-mail, internet logs, or other files created or received while using Agency networks or computers are considered Agency property, which only may be accessed and disclosed for cause or other purposes as authorized by law, *e.g.*, FOIA, subpoenas. Thus, employees have no expectation of privacy within the Agency in their use of these telecommunications systems.

[19] 5 U.S.C. § 552(a)(3)(C).

[20] 5 U.S.C. § 552(a)(3)(B).

[21] *Id.*

scan into electronic format documents that the Agency does not otherwise maintain electronically. Whether such efforts are required would be determined on a case-by-case basis, measured by whether the Agency can supply the requested format with "reasonable efforts." In the event that a request is made to supply documents in electronic format (such as transcripts and exhibits, or parties' briefs), please contact the General Counsel's FOIA officer in Washington so that the Agency can make uniform determinations about whether such requests can be satisfied.

Provisions regarding redactions to documents apply to both electronic and non-electronic records. Thus, when disclosing electronic documents that have been redacted in part, the FOIA requires that "[t]he amount of information deleted and the exemption under which the deletion is made shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption . . . under which the deletion is made."[22] The FOIA also requires that "[i]f technically feasible, the amount of information deleted and the exemption under which the deletion is made shall be indicated at the place in the record where such deletion is made."[23]

D. Electronic Reading Room

Section (a)(2) of the FOIA, known as the "reading room" requirement, requires the Agency to make certain records available for public inspection and copying. Previously, the required reading room documents included (1) final opinions rendered in the adjudication of cases; (2) Agency policy statements; and (3) administrative staff

[22] 5 U.S.C. § 552(b).

[23] *Id.* A court is required to accord substantial weight to the agency's determinations regarding technical feasibility for indicating deletions of information at the place in the record where the deletion is made and regarding the reproducibility of records in specified formats. 5 U.S.C. § 552(a)(4)(B).

manuals and instructions to staff that affect the public.[24] Amendments to the FOIA in 1996 added a fourth category of documents to be made available in the Agency's reading room—records that have been disclosed in response to a FOIA request and that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."[25] These amendments also added a general index of these frequently requested documents.[26] Under this provision, an agency is required to determine whether documents disclosed in response to a FOIA request have been the subject of multiple FOIA requests (*i.e.*, three or more additional ones) or, in the agency's best judgment based upon the nature of the records and the types of requests regularly received, are likely to be the subject of multiple requests. Accordingly, FOIA processors should provide the General Counsel's FOIA officer in Washington any documents believed to fall in this category.

Caution should be used, however, in cases where the initial disclosure was to a first-party requester, *i.e.*, a requester seeking information that involves his own privacy interests.[27] Prior to their placement in the reading room, the disclosed documents should be examined for any additional exempt material that was not required to be withheld from the first-party requester.

The FOIA also requires the Agency to maintain its reading room in electronic form. For any reading room records created on or after November 1, 1996, the Agency

[24] 5 U.S.C. § 552(a)(2).
[25] 5 U.S.C. § 552(a)(2)(D).
[26] 5 U.S.C. § 552(a)(2)(E).
[27] Generally, agencies should treat all requesters alike in making FOIA disclosure decisions. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("*Reporters Comm.*"). The only exception to this is that an agency should not withhold from a requester any information that implicates that requester's own privacy interest only; making a disclosure to a "first-party" requester in such a circumstance "is consistent with . . . denying access to all other members of the general public." *Id.* (*See* Chapter XII. First-Party Requesters).

must make them available to the public by "electronic means."[28] In light of the strong statutory preference that this new electronic availability be provided by agencies in the form of on-line access, the Agency's electronic reading room obligations are now satisfied by the on-line access to the Agency's web site (http://www.nlrb.gov, under both the "E-Gov" and the "FOIA" tabs).

Documents that are required to be made available for public inspection and copying under Section (a)(2) of the FOIA—the "reading room" requirement—are not included within those documents that the Agency is required to disclose pursuant to a request made under Section (a)(3).[29] That is, the FOIA requires agencies to disclose documents made pursuant to a valid request, "[e]xcept with respect to the records made available under paragraphs (1) [Federal Register publications] and (2) [reading room documents] . . . ."[30] Accordingly, a response to a request for reading room documents (such as documents located in the Electronic Case Information System (ECIS), or Advice and GC/OM Memoranda posted on the website) need only direct the requester to the availability of the reading room.[31] This is not the case, however, with respect to the reading room category of frequently requested documents,[32] discussed *supra*, which must be provided to a requester despite their placement in the reading room if a requester so chooses.

On December 14, 2005, the President issued Executive Order 13,392, entitled "Improving Agency Disclosure of Information," which calls upon agencies to improve their FOIA operations. It urges agencies to review the use of their web sites in making

[28] 5 U.S.C. § 552(a)(2).
[29] 5 U.S.C. § 552(a)(3)(A).
[30] *Id.*
[31] *See* Chapter XVI. Processing FOIA Requests for additional guidance on how to respond to requests for reading room documents.

Section (a)(2) records available,[33] as well as in making proactive disclosures of other information that may not fall into any Section 2 category but that could be made readily available to the public without the necessity of a FOIA request.[34]

[32] 5 U.S.C. § 552(a)(2)(D).
[33] Exec. Order No. 13,392, Sec. 3(a)(iv).
[34] Exec. Order No. 13,392, Sec. 3(b)(ii).

V. Application of FOIA Privileges

Once records responsive to a FOIA request have been located, it is necessary to determine whether the records are privileged from disclosure by one or more of the exemptions set forth in Section 552(b) of the Freedom of Information Act. In our experience, and given the nature of most of our files, the exemptions most frequently utilized are Exemptions 2, 4, 5, 6, and 7. Each of these exemptions will now be examined in depth.[1]

[1] Exemptions 1 (national security), 3 (prohibitions contained in other statutes), 8 (related to regulation of financial institutions), and 9 (geological data) and criminal law exclusions to the FOIA for protecting especially sensitive criminal law matters (§§ 552(c)(1)(2) and (3)) either are inapplicable to our agency or arise so infrequently that they are not treated here. If you think you may have a document that is covered by one of these exemptions, either consult the current U.S. Department of Justice, *Freedom of Information Act Guide* or call the General Counsel's FOIA officer in Washington for advice.

VI. Exemption 2

Exemption 2 exempts from mandatory disclosure records "related solely to the internal personnel rules and practices of an agency."[1] Courts have interpreted Exemption 2 to have two distinct aspects: "low 2," covering trivial administrative material; and "high 2," which covers more substantial internal matters such as procedural manuals and guidelines, the release of which would risk circumvention of a legal requirement.[2] Once the threshold of a personnel rule or internal practice of an agency is met, if the material relates to trivial administrative matters of no genuine public interest,[3] the information is considered "low 2" and is automatically exempt under the statute. However, if there is a "legitimate public interest" in the material, the material should be disclosed unless there is a risk of "circumvention of lawful agency regulation"[4] and is thus privileged under "high 2." In making this analysis, agencies must always bear in mind that "a reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interests."[5]

Examples of "low 2" material are routine or ministerial internal matters such as administrative markings, file numbers, room numbers, facsimile cover sheets (which contain no substantive exempt material), transmittal slips (which contain no substantive exempt material), return receipt slips, envelopes, NLRB casehandling forms including

[1] U.S.C. § 552(b)(2).

[2] *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (describing "low 2" and "high 2" aspects of exemption).

[3] The Supreme Court's interpretation of what constitutes "public interest" was defined in *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). *See* discussion in Chapter IX. Exemption 6.

[4] *Founding Church of Scientology v. Smith*, 721 F.2d 828, 830 n.4 (D.C. Cir. 1983). It would be rare to have "low 2" information or trivial information in which there is a legitimate public interest.

[5] *Id.* at 830-831 n.4.

computer forms, and filing instructions. ("Low 2" documents are particularly appropriate for discretionary disclosure; *see* Chapter XVII. Agency's Release Policies, Section B.)

The second category of records ("high 2") covered by Exemption 2 is internal matters of a more substantial nature, the disclosure of which would risk circumvention of a statute or agency regulation. In *Crooker v. ATF*, 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."[6] The public interest in disclosure is legally irrelevant to the anti-circumvention aspect of this test.[7] The concern under "high 2" is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection."[8]

Specific guidance on what constitutes an "internal" document may be found in *Cox v. U.S. Department of Justice*,[9] which held protectable information that ". . . prescribe[s] the methods and strategy to be followed by law enforcement agents in the performance of their duties . . . [providing that it] does not purport to regulate activities among members of the public. . . . Differently stated, the unreleased information is not 'secret law,' the primary target of [the FOIA's] broad disclosure provisions." Reflecting the high degree of deference that is implicitly accorded law enforcement activities under this substantive aspect of Exemption 2, the courts have treated a wide variety of

[6] *Crooker v. ATF*, 670 F.2d 1051, 1073-1074 (D.C. Cir. 1981) (en banc).

[7] *Voinche v. FBI*, 940 F. Supp. 323, 328 (D.D.C. 1996); *see also Gordon v. FBI*, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005).

[8] *Crooker v. ATF*, 670 F.2d at 1053-1054.

[9] 601 F.2d 1, 4-5 (D.C. Cir. 1979) (per curiam), *overruled on other grounds by Benavides v. Bureau of Prisons*, 993 F.2d 257 (D.C. Cir. 1993).

information pertaining to such activities as "internal,"[10] such as general guidelines for conducting investigations[11] and guidelines for conducting litigation.[12]

Records whose release could involve a risk of circumvention of law or regulations include such materials as general guidelines for conducting investigations[13] or records that would reveal the nature and extent of a particular type of investigation.[14] For example, the Agency has withheld, in their entirety, casehandling memoranda that contain instructions to staff regarding the prosecution of ULP cases, the use of "reservation language" in settlement agreements, and the assessment of the General Counsel's 10(j) priorities. However, when a document is determined to be "high 2," it is important to remember that an obligation remains to review the document to see whether there is any reasonably segregable portion that can be disclosed without harm.[15] For example, the Agency has disclosed, with portions redacted, casehandling memoranda dealing with the effects of settlement agreements on decertification petitions, the litigation of multiple charges against the same respondent, and the use of expedited ALJ hearings in lieu of 10(j) injunction proceedings. (Such memoranda are also likely to be protected under Exemption 7(E). *See* Chapter XI. Exemption 7, Section E.)

[10] U.S. Department of Justice, *Freedom of Information Act Guide*, 279-280 (March 2007 Edition); *see also Wiesenfelder v. Riley*, 959 F. Supp. 532, 535-537 (D.D.C. 1997).

[11] *See, e.g.*, *Crooker v. ATF*, 670 F.2d at 1054, 1075, where the court rejected the requester's argument that an agency training manual on surveillance was not "predominantly internal" because it affected the public at large. The court held instead that the manual was "predominantly internal" because it sought only to instruct agency personnel and did not attempt to modify or regulate public behavior, only to observe it for illegal activity.

[12] *See, e.g.*, *Schiller v. NLRB*, 964 F.2d at 1207, where the court found that documents concerning litigation strategy pertaining to an Equal Access to Justice Act case were designed to establish rules and practices for agency personnel, and thus met Exemption 2's "predominantly internal" test.

[13] *See, e.g.*, *PHE, Inc. v. U.S. Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993).

[14] *See, e.g.*, *Watson v. U.S. Dep't of Justice*, 799 F. Supp. 193, 195 (D.D.C. 1992).

[15] *See, e.g.*, *Schiller v. NLRB*, 964 F.2d at 1209-1210; *Kimberlin v. U.S. Dep't of Justice*, 139 F.3d 944, 949-951 (D.C. Cir. 1998).

"High 2" is closely related to Exemption 7(E), discussed *infra*.[16] If the material sought is related to law enforcement, there is no practical difference, and both exemptions may be cited in support of a decision to withhold records. (*See* Chapter XI. Exemption 7). However, if the material sought does not relate to law enforcement, only "high 2" would apply. In the interest of consistent application of this exemption, if you plan to use "high 2" in response to any FOIA request, contact the General Counsel's FOIA officer in Washington.

[16] *See Kaganove v. EPA*, 856 F.2d 884, 888-889 (7th Cir. 1988).

VII. Exemption 4

Exemption 4 is designed to encourage the submission of useful and reliable commercial or financial information to the government and to protect against competitive disadvantage potentially resulting from disclosure of that information to others, thereby protecting governmental as well as private interests.[1] **To assure nationwide uniformity, contact the General Counsel's FOIA officer in Washington in every FOIA request raising Exemption 4 issues before initiating the notice process.**

Exemption 4 exempts the Agency from being required to disclose (1) "trade secrets" and "commercial or financial information" (2) obtained from a "person"[2] (3) where the information is "privileged or confidential." Whether the information is entitled to protection as "confidential" depends upon whether the submitter was required to submit the information or volunteered to do so. If the submitter was required to provide the information to the Agency, the submitter must be able to demonstrate that its disclosure "would cause substantial harm to its competitive position" or "is likely to impair the government's ability to obtain necessary information in the future."[3] If the information was voluntarily submitted, the submitter must show that the information "would customarily not be released to the public by the person from whom it was obtained."[4]

[1] *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-770 (D.C. Cir. 1974); *see also* Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) (recognizing fundamental societal value of "protecting sensitive business information").

[2] "Person" is defined broadly for FOIA purposes: a "person" includes a partnership, corporation, association, and public or private organization, other than an agency of the federal government. 5 U.S.C. §§ 551(1) & (2).

[3] *See Nat'l Parks & Conservation Ass'n*, 498 F.2d at 770.

[4] *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878-879 (D.C. Cir. 1992) (en banc).

A. Trade Secret Defined

For purposes of the FOIA, the term "trade secret" has been 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."[5] Because it is unusual for the Agency to obtain records containing trade secrets, this FOIA Manual focuses on the second type of information covered by Exemption 4—commercial or financial information.

B. Commercial or Financial Information Defined

The phrase "commercial or financial information" is broadly defined. It includes information that relates to the provider's business activities or trade that "reveal[s] basic commercial operations."[6] The term covers anything "pertaining or relating to or dealing with commerce," including certain information from labor unions[7] and non-profit organizations.[8] Examples of commercial or financial information can include commerce information; bid information; economic bargaining proposals; salary and wage information; the number of union authorization cards submitted as a showing of interest; business sales statistics; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial condition.[9] In addition, Exemption 4 has been held to apply to personal financial information, which could include certain

[5] *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).
[6] *Id.* at 1290.
[7] *Am. Airlines, Inc. v. NMB*, 588 F.2d 863, 870 (2d Cir. 1978) (authorization card information submitted by a labor union); *see also Hustead v. Norwood*, 529 F. Supp. 323, 326 (S.D. Fla. 1981) ("information relating to the employment and unemployment of workers").
[8] *See Critical Mass Energy Project* at 880.
[9] *See, e.g.*, *Landfair v. U.S. Dep't of the Army*, 645 F. Supp. 325, 327 (D.D.C. 1986).

financial information submitted by discriminatees.[10] Documents prepared by the Agency may fall within Exemption 4 if they contain summaries or a reformulation of commercial or financial information supplied by a person.[11]

C. Determining Whether Information is Confidential—the Distinction Between Voluntarily Submitted Information and Compelled Information

The next step is to determine whether the commercial or financial information is "confidential."[12] In *Critical Mass Energy Project v. NRC*, the D.C. Circuit drew an important distinction for Exemption 4 purposes between commercial information obtained under compulsion and commercial information provided voluntarily.[13] In general, information submitted voluntarily has a lower threshold for withholding under Exemption 4 than information submitted under compulsion. Later, in *Center for Auto Safety v. National Highway Traffic Safety Administration*, the D.C. Circuit analyzed this distinction and explained that:

> In determining that the submission was not mandatory, we hold that actual legal authority, rather than parties' beliefs or intentions, governs judicial assessments of the character of submissions. We reject the argument that, in assessing submissions for the purpose of Exemption 4 analysis, we should look to subjective factors, such as whether the respondents believed that the Information Request was voluntary, or whether the agency, at the time it issued the request for

[10] *See Defenders of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 15 (D.D.C. 2004) (finding that draft severance agreements that contained "financial information surrounding [the Deputy Secretary's] separation from his former company . . . are within the common understanding of the term 'financial information'"); *Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982) (but also holding that mere "list of non-federal employment" was not "financial" within the meaning of Exemption 4).

[11] *See, e.g.*, *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 529-530 (D.C. Cir. 1979) (contractor information contained in agency audit report).

[12] As stated above, the third prong of the text of Exemption 4 also protects non-confidential commercial or financial information that is "privileged." However, it is uncommon for the Agency to possess such information, and judicial decisions relating to privilege in the context of Exemption 4 are rare. *See, however*, *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235, 242-243 (E.D. Mo. 1996) (reverse FOIA), *appeal dismissed*, No. 96-2662 (8th Cir. Aug. 29, 1996) (finding Exemption 4 to apply to attorney-client information submitted by corporation).

[13] 975 F.2d at 880.

> information, considered the request to be mandatory. Focusing on parties' intentions, for purposes of analyzing submissions under Exemption 4, would cause the court to engage in spurious inquiries into the mind. On the other hand, linking enforceability and mandatory submissions creates an objective test; regardless of what the parties thought or intended, if an agency has no authority to enforce an information request, submissions are not mandatory.

244 F.3d 144, 149 (D.C. Cir. 2001).[14] Thus, the D.C. Circuit places key emphasis on the objective ability of the agency to enforce its information request. This *Center for Auto Safety* test has since been applied by district courts to a variety of situations.[15] Courts have also held that submissions that are required to receive the benefits of a program, such as contracting or grant programs, are considered mandatory, even if participation in the program is voluntary.[16]

D. The Test for Compelled Information

If the requested information has been obtained under compulsion, *e.g.*, a court-enforced subpoena, under the D.C. Circuit's *National Park's*[17] analysis, the FOIA processor must apply a two-part test: is disclosure "likely [either] (1) to impair the

[14] *See also McDonnell Douglas Corp.*, 922 F. Supp. at 242 (court found subpoenaed information to have been submitted voluntarily, in part because the court believed that a hypothetical court challenge to the subpoena would have been successful, as it had found the subpoenaed documents to be privileged).

[15] *See Parker v. Bureau of Land Mgmt.*, 141 F. Supp. 2d 71, 78 (D.D.C. 2001) (letters submitted by contractors about pipeline projects were not "required" because there were no environmental regulations "giving [the government] the authority to compel submission of such materials"); *In Def. of Animals v. HHS*, No. 99cv3024, 2001 WL 34871354, at *9 (D.D.C. Sept. 28, 2001) (letter from president of foundation was "required" because regulations gave agency the "right of timely and unrestricted access," and agency exercised its authority to compel the information by requesting it); *Defenders of Wildlife v. U.S. Dep't of Interior*, 314 F. Supp. 2d at 17 (neither statute nor regulations compelled the submission of a Department of Interior official's draft severance agreements with his former firm). *But see Shell Oil Co. v. U.S. Dep't of Labor*, No. H-96-3113, slip op. at 13 (S.D. Tex. Mar. 30, 1998) (reverse FOIA suit) (court found submission in an investigation context was voluntary, where the submitter promptly "cooperated with agency officials" and provided agency inspectors "all the information" requested, "prior to the issuance of any subpoenas or warrants," that in turn ensured that the investigation "was neither delayed nor impeded in any manner," and did not examine the agency's legal authority to compel the submitted information or whether such authority was exercised), *aff'd on other grounds*, No. 98-20538 (5th Cir. Oct. 14, 1999).

[16] *See, e.g., Pub. Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 414 n.1 (D.D.C. 1997) (finding that information submitted in order to win approval of new drug application was mandatory); *see also McDonnell Douglas Corp. v. NASA*, 895 F. Supp. 316, 318 (D.D.C. 1995) (court ruled that that bidder required to submit price elements of contract bid).

[17] *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

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 it was obtained."[18] (Though not yet widely litigated, a third *National Parks* prong—protection of government interests such as compliance and program effectiveness—also exists.[19]) This test for confidentiality of compelled information is an objective one.[20] Although disclosure may not adversely affect the government's ability to compel the disclosure of information, the D.C. Circuit noted in that case that the government still has an interest in assuring the reliability of information provided under compulsion in the future.[21] 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.[22]

E. The Test for Voluntarily Submitted Information

The exemption for agency records containing confidential commercial or financial information voluntarily submitted to the government is broader: Exemption 4 categorically protects voluntarily submitted commercial or financial information provided that the submitter does not "customarily" disclose the information to the public.[23] Thus, the standard for disclosure of voluntarily submitted information is an objective one that is controlled by the actual practice of the individual provider. Neither the general practices

[18] *Id.* at 770; *see also Anderson v. HHS*, 907 F.2d 936 (10th Cir. 1990).

[19] *See Critical Mass*, 975 F.2d at 879; *Pub. Citizen Health Research Group v. NIH*, 209 F. Supp. 2d 37, 52 (D.D.C. 2002).

[20] *See Critical Mass*, 975 F.2d at 871, 879; *Nat'l Parks*, 498 F.2d at 766.

[21] *See Critical Mass*, 975 F.2d at 878, 883 n.3; accord, *e.g.*, *Judicial Watch, Inc. v. Exp.- Imp. Bank*, 108 F. Supp. 2d 19, 29 (D.D.C. 2000) (protecting export-insurance applications that contained detailed financial information and customer lists, because "disclosure of such information might encourage exporters to be less forthcoming in their submissions").

[22] *See CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *Gilda Industries, Inc., v. U.S. Customs and Border Prot. Bureau*, 457 F. Supp. 2d 6, 9-13 (D.D.C. 2006); *Inter Ocean Free Zone v. U.S. Customs Serv.*, 982 F. Supp. 867, 872 (S.D. Fla. 1997) (even a failing business/submitter may suffer competitive harm and be entitled to Exemption 4 protection).

of the industry nor a subjective measure of what reasonably would be publicly disclosed is determinative. Further, the customary treatment standard allows for the provider previously to have disclosed the information consistent with its own business interests, as long as those disclosures were not to the public.[24] FOIA processors should be mindful that documents and records submitted voluntarily often may contain information not customarily provided to the public. For example, documents generated in preparation for eventual settlement of a case may qualify for protection under Exemption 4.[25]

F. Reverse FOIA Litigation

It is important that FOIA processors guard against the release of protected Exemption 4 material, because release of such material may expose the Agency to litigation and damages. The Agency's disclosure decision may be challenged in a "reverse FOIA" action under the Administrative Procedure Act (APA).[26] Also, other laws, such as the Trade Secrets Act may proscribe release of trade secrets or confidential information.[27] In fact, the Trade Secrets Act, covers far more information than just "trade secrets" and actually, "is at least co-extensive with that of Exemption 4."[28] Accordingly, when information falls within Exemption 4, the Agency is precluded from releasing it under the Trade Secrets Act.[29] Moreover, an objecting provider of information may initiate an APA action to attempt to enjoin release of information on this

[23] *Critical Mass*, 975 F.2d at 879.
[24] *Id.* at 880.
[25] *See, e.g., M/A-Com Info. Sys., Inc. v. HHS*, 656 F. Supp. 691 (D.D.C. 1986).
[26] 5 U.S.C. § 701, et seq. (1994); *see Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 54 (D.C. Cir. 1981); *Penziol Co. v. Fed. Power Comm'n*, 534 F.2d 627, 630 (5th Cir. 1976).
[27] 18 U.S.C. § 1905.
[28] *CNA Fin. Corp*., 830 F.2d at 1151 (footnote omitted); *see also Sealed Appellee #1 v. Sealed Appellant*, 199 F.3d 437 (5th Cir. 1999) (unpublished decision).
[29] *See Sealed Appellee #1*, 199 F.3d at 437; *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 305 (D.C. Cir. 1999).

ground as well.[30] It is critical that the Agency develop a comprehensive administrative record, as the courts in reverse FOIA cases have placed the evidentiary burden on the party seeking to release information, and on several occasions have remanded reverse FOIA cases to the Agency for development of a more complete record.[31]

G. Procedure to Follow Where Exemption 4 Arguably Applies

If the FOIA processor is inclined to grant a FOIA request but believes that the requested records at least arguably could be protected by Exemption 4, Executive Order No. 12,600[32] and the Board's Rules and Regulations § 102.117 (c)(2)(iv)(B) require the Agency to notify the submitter promptly and to provide the submitter a reasonable period of time—*e.g.* at least ten (10) working days—to object to the proposed disclosure.[33] The term "submitter" in this context refers to the "person" that Exemption 4 would arguably protect, regardless of whether such person actually submitted the information. For instance, if a union submits company information to the Agency, and Exemption 4 would arguably protect that information, the "submitter" in that case would be the company.[34]

However, the Agency should also offer the submitter the opportunity to immediately consent to disclosure. A telephone call to the submitter soliciting authorization for disclosure often will be helpful; however, all such disclosure authorizations must be in writing. **Either the FOIA processor or the submitter should confirm the submitter's oral authorization by e-mail or letter.** The FOIA processor

[30] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979); *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 971 (D.C. Cir. 1980).

[31] *See McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1191 n.5, 1192 (D.C. Cir. 2004); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 342, 346 (D.C. Cir. 1989).

[32] 3 C.F.R. § 235 (1988), reprinted in 5 U.S.C. § 552 note (1994), *see* Appendix.

[33] *See* Board's Rules and Regulations § 102.117 (c)(2)(iv)(D); *see* Sample Language for Letters in Appendix.

[34] *See* 29 C.F.R. § 102.117(c)(2)(iv)(A)(2).

also must advise the requester that the submitter is being given an opportunity to comment.[35]

If the information was submitted voluntarily, in objecting to disclosure, the submitter should be asked to provide an affidavit describing its treatment of the information, including any disclosures that are customarily made, and the conditions under which such disclosures occur. On the other hand, if the information was submitted under compulsion and the submitter objects to disclosure, the submitter should be asked to provide an affidavit including an explanation of any competitive harm that is likely to occur and the impact of disclosure on the reliability of the information provided to the government. If the FOIA processor determines that either: (1) material voluntarily given the Agency reveals commercial or financial information that the submitter would not customarily make available to the public, or (2) the provider would be substantially harmed by the disclosure of information which has not been voluntarily submitted and is likely to impact on the government's ability to obtain reliable information in the future, the information should be withheld.[36]

A decision to withhold under Exemption 4 must be promptly communicated in writing both to the FOIA requester and the submitter.[37] If the determination is to disclose commercial information over the submitter's objection, the submitter must be given a brief written statement explaining the decision in a reasonable period of time—*e.g.*, at

[35] Board's Rules and Regulations § 102.117 (c)(2)(iv)(H); *see* Sample Language for Letters in Appendix for sample language to a requester indicating the Agency's need to follow Executive Order procedures prior to disclosure.

[36] *See* Sample Language for Letters in Appendix for language to a submitter who has submitted records containing arguably confidential commercial information or who has previously designated the requested material as confidential commercial information.

[37] *See* Sample Language for Letters in Appendix.

least ten (10) working days—prior to a specified disclosure date.[38] The FOIA, Executive Order No. 12,600, and the Board's Rules and Regulations do not provide a submitter with the right to an evidentiary hearing or to an administrative appeal of the Agency's decision.[39]

H. Road Map to Processing Information Arguably Covered by Exemption 4

1. Contact the General Counsel's FOIA officer in Washington regarding the request.

2. Respond to the requester: all responses to FOIA requests for arguably confidential commercial or designated confidential Exemption 4 material should explain to the requester that:

   - the requested records may be covered by FOIA Exemption 4, 5 U.S.C. § 552(b)(4);[40]

   - pursuant to Executive Order No. 12,600[41] and the Board's Rules and Regulations § 102.117 (c)(2)(iv)(B), the Agency is required to undertake a specified evaluation process with respect to those records;

   - the requester needs to review the [list of documents attached as an Appendix to the letter by the Agency] OR [attached redacted documents], and identify the documents which he or she still wants as part of the FOIA request; and

   - once the Agency receives the requester's response noting the [redacted] OR [withheld] documents he or she continues to request, the Agency will compile [the requested documents] OR [a list of the requested documents] and send [those documents] OR [that list] to the submitter, who must be

[38] Board's Rules and Regulations § 102.117 (c)(2)(iv)(E); *see* Sample Language for Letters in Appendix.

[39] *See CNA Fin. Corp.*, 830 F.2d at 1159; *TRIFID Corp. v. Nat'l Imagery and Mapping Agency*, 10 F. Supp. 2d 1087, 1093-1094 (E.D. Mo. 1998) (noting the lack of an appeal provision in the executive order, and concluding that the "absence of an appeal mechanism and a formal mechanism to provide additional information [did] not render [the agency's] procedures defective"); *Fed. Elec. Corp. v. Carlucci*, 687 F. Supp. 1, 5 (D.D.C. 1988).

[40] If only some of the requested records, or portions of those records, are covered by Exemption 4, the Agency should include a list of the relevant records.

[41] Exec. Order No. 12,600; *see* 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (1994).

given the opportunity to assert objections to disclosure under one of the two applicable governing legal standards.[42]

3. Send a letter to the submitter: the FOIA processor's notification letter to the submitter of the ["required"] OR ["voluntarily"] submitted arguably confidential commercial information should advise the submitter that:

   - the submitter has submitted certain attached [redacted] OR [listed] records to the Agency, and that such records [may contain information arguably covered by Exemption 4] OR [were previously designated by the submitter as confidential commercial information];

   - the submitter is being provided with the opportunity to object to the disclosure of the records by submitting a written opposition within a reasonable period of time—*e.g.*, within ten (10) working days of the date of the Agency's letter;

   - the submitter may either: (1) not respond to the letter, in which case the Agency would wait for the stated relevant period—*e.g.*, 10 working days—before it could release the records to the FOIA requester, or (2) to expedite the Agency's release of the records, the submitter may immediately submit a letter consenting to the disclosure of such records notwithstanding their potential Exemption 4 protection;

   - if the submitter objects to disclosure, the submitter's written objection should specify those portions of the records which the submitter asserts should not be disclosed and should state in detail all grounds upon which disclosure is opposed, including, if the information was required to be submitted, whether and how disclosure of the records is likely to cause substantial competitive harm to your organization and is likely to impact on the government's ability to obtain reliable information in the future, *see National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974) or, if the information was voluntarily submitted, whether or not the information contained in the records is customarily disclosed to the public. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-80 (D.C. Cir. 1992).

   - any additional information provided by the submitter may itself be subject to disclosure under the FOIA;

   - factual assertions contained in such written submissions should, if appropriate, be supported with declarations or affidavits;

[42] *See* Sample Language for Letters in Appendix for sample language to a requester indicating the Agency's need to follow Executive Order procedures prior to disclosure.

- if a timely written objection is not submitted, the Agency will assume that the submitter has no objection to disclosure of the information, and may release that information;[43]

- if, after careful review of the [submitter's] written objections to disclosure of the described records, the Agency decides not to sustain the objections and instead to release the records to the requester, the submitter will be notified by letter of that determination, with a statement of reasons explaining why each of the submitter's objections was not sustained, a description of the business information to be disclosed, and a specified disclosure date at a reasonable time after the notice, *e.g.*, ten (10) working days after the date of the Agency's letter.[44]

4. Notify submitter and requester of Agency's decision: after the Agency carefully considers the submitter's objections and specific grounds for non-disclosure of the requested information and makes an ultimate disclosure determination, FOIA processors must promptly notify the requester and the submitter in writing of such decision.[45]

5. Notification of lawsuit: FOIA processors should also be aware that whenever a requester files a lawsuit seeking to compel the disclosure of commercial information, the submitter must be promptly notified in writing.[46] Similarly, whenever a submitter files a lawsuit seeking to prevent the disclosure of commercial information (a "reverse FOIA" action), the Agency must notify the requester.[47]

[43] Board's Rules and Regulations § 102.117 (c)(2)(iv)(D); *see* Sample Language for Letters in Appendix for sample language to a submitter who has submitted records containing arguably confidential commercial information or who has previously designated the requested material as confidential commercial information.

[44] Board's Rules and Regulations § 102.117 (c)(2)(iv)(E); *see* Sample Language for Letters in Appendix for language for a submitter who has submitted records containing arguably confidential commercial information or who has previously designated the requested material as confidential commercial information.

[45] *See* Sample Language for Letters in Appendix for language to a requester and a submitter announcing decision to withhold records pursuant to Exemption 4 and to a submitter announcing decision to disclose notwithstanding objection. (The requester will be informed of the disclosure decision by the Determination Letter.)

[46] Board's Rules and Regulations § 102.117(c)(2)(iv)(G).

[47] Board's Rules and Regulations § 102.117(c)(2)(iv)(H); *see* Sample Language for Letters in Appendix for language to notify a requester of the "reverse FOIA" action filed by the submitter of the requested records and notifying a submitter of the commencement of a FOIA action filed by the requester.

VIII. Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters"—the first threshold for coverage—"which would not be available by law to a party. . . in litigation with the agency."[1] This latter language has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context."[2] Exemption 5 incorporates into the FOIA all of the normal civil discovery privileges that the government enjoys under relevant statutes and case law.[3] Three frequently invoked privileges are the attorney work-product privilege, the deliberative process privilege, and the attorney-client privilege.[4]

A. Threshold Question of the Applicability of Exemption 5

The threshold issue for determining the applicability of Exemption 5 is whether the document is covered by the phrase "inter-agency or intra-agency memorandums."[5] In *U.S. Department of Interior v. Klamath Water Users Protective Ass'n* ("*Klamath*"), the Supreme Court focused on the threshold test for the first time and emphasized that it must be met before the protections of Exemption 5 apply.[6] The Court ruled unanimously that Exemption 5's "inter-agency or intra-agency" threshold requirement was not satisfied where the records were obtained from an interested party that not only had "[its] own,

[1] 5 U.S.C. § 552(b)(5).

[2] *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).

[3] *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp*., 421 U.S. 168, 184 (1975).

[4] *See NLRB v. Sears, Roebuck & Co*., 421 U.S. at 149.

[5] In recognition of the practicalities of agency operations, some courts had interpreted this phrase broadly and included documents generated outside of an agency, including by consultants. This approach had been characterized as the "functional" test for determining whether Exemption 5 protection should apply. *See Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1123 (D.C. Cir. 1989) ("'inter-agency' and 'intra-agency' are not rigidly exclusive terms, but rather embrace any agency document that is part of the deliberative process"). Under the "functional" test, the pertinent element is the role, if any, the document plays in the process of agency deliberations—*i.e.*, whether the document is regularly relied upon by agency authors and supervisors in making agency decisions. *Id.*

albeit entirely legitimate interests in mind," but also was "seeking a Government benefit at the expense of other [such parties]."[7] At issue in *Klamath* were records exchanged between several Indian Tribes and the Department of the Interior ("DOI") addressing tribal interests in state and federal proceedings determining allocation of water.[8]

The Supreme Court rejected DOI's attempt to rely on the "outside consultant" corollary to Exemption 5 to protect the tribal communications and documents. The Court recognized that some courts of appeals have held that Exemption 5 covers documents from consultants that are generated outside the government. However, it explained that the theory behind those cases was that the consultants had no "interest" of their own, separate from that of the agency; that they were "enough like the agency's own personnel to justify calling their communications 'intra-agency.'"[9] The Court distinguished the tribal communications in the case from those of consultants. The Court concluded "the dispositive point is that the apparent object of the Tribes' communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily

[6] 532 U.S. 1 at 9, 12, 13 (2001).

[7] *Id.* at 12, n.4.

[8] In *Klamath*, the district court had utilized the "functional" test, finding the threshold had been met because each document "played a role" in DOI's deliberations. The district court then found that the work-product and deliberative process privileges applied so that the documents were exempt. *See Klamath Water Users Protective Ass'n v. U.S. Dep't of Interior*, 189 F.3d 1034, 1036 (9th Cir. 1999). The Ninth Circuit reversed without reaching the issue of the functional test, finding that the Tribes' "direct interest" in the agency's decision-making disqualified them from Exemption 5 protection as a threshold matter. 189 F.3d at 1038. The dissent noted that the majority never considered, as it should have, how the documents were employed in the agency decision-making. *Id.* at 1039. But the Ninth Circuit's "direct interest" test did not survive the Supreme Court's review. While, as stated above, the Supreme Court's decision affirmed the Ninth Circuit, it limited its holding to only those communications in which the outside party has an interest in the outcome of the agency's decision making and that interest is "necessarily adverse" to the competing interests of other existing parties.

[9] *Klamath*, 532 U.S. at 12. *See, e.g., Hoover v. U.S. Dep't of the Interior*, 611 F.2d 1132, 1137-1138 (5th Cir. 1980) (involving reports prepared by outside real estate appraisers); *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979) (involving feasibility reports prepared by outside scientists); *Formaldehyde Inst. v. HHS*, 889 F.2d at 1123-1124 (involving critiques of scientific articles prepared by outside peer reviewers); *Gov't Land Bank v. GSA*, 671 F.2d 663, 665 (1st Cir. 1982) (involving property appraisal performed by an independent professional). While the Court did not decide the issue of whether consultants' reports qualify as intra-agency under Exemption 5, *see* 532 U.S. at 12, this line of cases still

adverse to the interests of competitors."[10] According to the Court, the Tribes' position is that of a government "beneficiary," which is a "far cry" from that of a paid consultant.[11] Thus, under this narrow view of the threshold requirement, and without reaching step two of the Exemption 5 analysis involving the application of a covered privilege,[12] the records before the Court failed to qualify for Exemption 5 protection, and had to be disclosed.

The lesson from *Klamath* is that the "inter-agency or intra-agency" threshold is the first condition that must be met before a document may be protected by Exemption 5.[13] Moreover, "intra-agency or inter-agency" is not a "purely conclusory term, . . . [or] label to be placed on any document the Government would find valuable."[14] For example, documents produced by experts hired by a party to a Board proceeding and sent to the Agency would not meet the inter- or intra-agency threshold. But if the same expert was hired by the Agency, documents produced by that expert would likely continue to meet the threshold. Because the case law in this area is still developing in light of *Klamath*,[15] FOIA processors should contact the General Counsel's FOIA officer in Washington if a threshold issue arises.

stands as sound precedent for the satisfaction of Exemption 5's threshold requirement applying the functional test where the consultant is a truly disinterested party.

[10] *Id.* at 12.

[11] *Id.* at 15.

[12] *Id.* at 12, n.3.

[13] *Klamath* also noted two cases that had approved withholding documents that were generated by outsiders but not paid consultants: *Pub. Citizen, Inc. v. U.S. Dep't of Justice*, 111 F.3d 168 (D.C Cir. 1997) (communications from former presidents on archival matters held protectable as "consultative relationship") and *Ryan v. U.S. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) (congressional responses to questionnaires held protectable). The Court noted that those two decisions "arguably extend" beyond the "typical examples" of outside consultants, but indicated that in those particular cases, the outsiders were not "interested parties seeking a Government benefit at the expense of other applicants." *Klamath*, 532 U.S. at 12 n.4. Thus, the Court appears to have left open the continued viability of these two cases.

[14] *Klamath*, 532 U.S. at 12.

[15] *See, e.g.*, *Judicial Watch, Inc. v. U.S. Dep't of Energy*, 412 F.3d 125, 129-133 (D.C. Cir. 2005) (finding that documents created from the presidentially created National Energy Policy Development

B. Document is "Normally Privileged in the Civil Discovery Context"[16]

Once a document has satisfied the threshold requirement of being an inter-agency or intra-agency memorandum, it must be established that the document is covered by a privilege. Agency documents are most often withheld on the basis of the attorney work-product, deliberative process, and attorney-client privileges.

1. Attorney Work-Product Privilege

The attorney work-product privilege protects documents and other memoranda that reveal an attorney's mental impressions and legal theories and were prepared by an attorney in contemplation of litigation.[17] The privilege also protects materials prepared by non-attorneys who are supervised by attorneys.[18] Litigation need not have commenced for the privilege to attach, so long as there is "some articulable claim likely to lead to litigation."[19] The work-product privilege extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim has been identified.[20] The work-product privilege has also been held to protect internal agency drafts of settlement documents[21] and internal recommendations to close litigation.[22] However, if an internal

Group (NEPDG) were lawfully withheld, even though NEPDG was not itself an "agency" for purposes of the FOIA); *Nat'l Inst. of Military Justice v. U.S. Dep't of Def.*, 404 F. Supp. 2d 325, 343-345 (D.D.C. 2005) (documents from outside lawyers properly withheld).

[16] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 149.

[17] *See Hickman v. Taylor*, 329 U.S. 495, 509-510 (1947); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 432 F.3d at 369-370; Fed. R. Civ. P. 26(b)(3); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 155 (protecting from disclosure agency memoranda reflecting decision to prosecute unfair labor practice charges).

[18] *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Shacket v. United States*, 339 F. Supp. 2d 1092, 1096 (S.D. Cal. 2004); *Durham v. U.S. Dep't of Justice*, 829 F. Supp. 428, 432-433 (D.D.C. 1993); Fed. R. Civ. P. 26(b)(3).

[19] *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980); *Kent Corp. v. NLRB*, 530 F.2d 612, 613 (5th Cir. 1976).

[20] *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (documents that provide advice and instructions on how to handle future EAJA litigation held protectable); *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 78-79 (D.D.C. 2003).

[21] *United States. v. Metro. St. Louis Sewer Dist.*, 952 F.2d 1040, 1045 (8th Cir. 1992) (holding that it is "beyond doubt that draft consent decrees prepared by a federal government agency involved in

agency draft of a settlement is shared outside the agency (including to the charging or charged party/respondent), the FOIA processor should contact the General Counsel's FOIA officer in Washington for guidance. Moreover, even after litigation terminates, the work-product privilege continues to protect documents created under its protection while the case was open.[23]

The policy underlying the attorney work-product privilege was originally explained in *Hickman v. Taylor*,[24] where the Supreme Court held that an attorney in a civil suit should not have been ordered to turn over to opposing counsel memoranda, notes, and statements of fact that he had gathered from witnesses in anticipation of litigation. None of the documents or information sought in *Hickman* concerned legal strategies or deliberative material;[25] nevertheless, discovery of the factual information was not permitted on the basis of the work-product privilege. The Court's reasons for recognizing this privilege emphasized the intrusion upon the attorney's deliberative processes that would be occasioned by allowing disclosure of the material.[26]

The Supreme Court's subsequent decisions in *U.S. v. Weber Aircraft Corp.*[27] and *FTC v. Grolier, Inc.*,[28] viewed in the light of the traditional contours of the attorney

litigation" are covered by Exemption 5, but remanding to determine if the privilege was waived by disclosing to opposing and third parties); *see also* discussion of settlement privilege in Chapter VII. Exemption 4, potentially applying to settlement documents created by outside parties.

[22] *See, e.g., A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 146-147 (2d Cir. 1994) (work-product privilege still applies even though documents were prepared after staff attorney decided to recommend no enforcement litigation, where investigation was still open and no final decision had been made regarding closing the investigation); *Heggestad v. U.S. Dep't of Justice*, 182 F. Supp.2d 1, 10-11 (D.D.C. 2000).

[23] *See FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983) (establishing that the scope of the work-product immunity is not temporal; "[U]nder Exemption 5, attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation."); *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) ("perpetual protection for work product" is needed "if we are to remain faithful to the articulated policies of *Hickman*").

[24] 329 U.S. 495 (1947).

[25] 329 U.S. at 508.

[26] 329 U.S. at 511; *see Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

[27] 465 U.S. 792 (1984) (statements made during safety investigation held privileged from disclosure).

work-product privilege, afford sweeping work-product protection to factual materials under Exemption 5. Additionally, the protection provided by Exemption 5 for attorney work-product material is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. Although such a showing might be adequate to obtain production of attorney work-product in a civil discovery case,[29] the Supreme Court has expressly rejected the contention that FOIA Exemption 5's protection should be similarly qualified.[30] In this broad view of the privilege, factual material is fully entitled to work-product protection, and the segregation of factual material from an otherwise protected document is not required.[31]

Board documents that may be protected from disclosure by the attorney work-product privilege include but are not limited to:

- Final Investigation Reports (FIRs),[32]
- Agenda Minutes,

[28] 462 U.S. 19 (1983) .

[29] Within the civil discovery context, there is a qualified privilege from civil discovery for such documents, *i.e.*, such material is discoverable only upon a showing of necessity and justification. *Hickman*, 329 U.S. at 511; *see also U.S. v. Weber Aircraft Corp*., 465 U.S. at 799, citing *FTC v. Grolier, Inc*., 462 U.S. at 26; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 149 and n.16; Fed. R. Civ. P. 26(b)(3).

[30] *FTC v. Grolier, Inc*., 462 U.S. at 27-28 (such documents are not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5).

[31] *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. U.S. Dep't of Justice*, 955 F.2d 1479, 1492 (11th Cir. 1992); *Spannaus v. U.S. Dep't of Justice*, 942 F. Supp. 656, 658 (D.D.C. 1996) (citing *Martin*, 819 F.2d at 1187 (work-product privilege does not distinguish between factual and deliberative material)); *see also 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); *United Techs. Corp. v. NLRB*, 632 F. Supp. 776, 781 (D. Conn.), *aff'd on other grounds*, 777 F.2d 90 (2d Cir. 1985).

[32] The factual matters in a FIR would be exempt from disclosure under the attorney work-product privilege to the extent that those matters reveal the thought processes of the Board agent and contain the agent's analysis of the legal issues of the case. *See Kent Corp. v. NLRB*, 530 F.2d at 623-624 (where contents of the reports were not "primary information" such as verbatim witness statements or objective data, but were mainly reports reflecting counsel's appraisal of evidence, court concluded that such material was protected in its entirety by Exemption 5 by a properly raised claim of work-product privilege, regardless of opposing counsel's need; court noted, however, that it did not hold that the FIRs of the NLRB

- General Counsel Minutes,
- Legal research memoranda prepared by Board agents during investigation,
- Internal Advice or Appeals Memoranda to the General Counsel,
- Advice submission memoranda,
- Regional Office comments on appeal,
- Internal Section 10(j) recommendation memoranda,
- Memoranda and handwritten notes to case files,[33]
- Recommendations for approval of election agreements,
- Recommendations to issue Notice of Hearing, and
- "GC" Memoranda prepared in contemplation of litigation.

2. Deliberative Process Privilege

The deliberative process privilege (also referred to as the executive or governmental privilege) protects the internal decision-making processes of government agencies in order to safeguard the quality of agency decisions.[34] There are essentially three policy bases for this privilege: (1) to protect and encourage the creative debate and candid discussion of alternatives, recommendations, and advisory personal opinions between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they have been finally adopted; and (3) to protect against

are always wholly within the work-product privilege); *Associated Dry Goods v. NLRB*, 455 F. Supp. 802, 810-811 (S.D.N.Y. 1978).

[33] *See, e.g.*, *Nadler v. U.S. Dep't of Justic*e, 955 F.2d at 1491; *Associated Dry Goods v. NLRB*, 455 F. Supp. at 811.

[34] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150-151, 152.

confusing the issues and misleading the public by the disclosure of reasons and rationales that ultimately do not form the basis for an agency's actions.[35]

Two fundamental requirements must be satisfied before an agency may properly withhold a document or communication pursuant to the deliberative process privilege. The document or communication must be: (1) predecisional, *i.e.*, prepared in order to assist an agency decision maker in arriving at the decision,[36] and (2) deliberative, *i.e.*, "it must form a part of the agency's deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[37] The burden is upon the agency to show the requested information satisfies both requirements.[38] In this regard, an agency need not "identify a specific decision in connection with which a memorandum is prepared," but need only show that the document constituted a recommendation in connection with the examination of some agency policy.[39]

a. Document Must Be Predecisional

In determining whether a document is predecisional, FOIA processors should consider several factors:

[35] *See, e.g., Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1095 (9th Cir. 1997) (the withheld materials consisted of recommendations and suggestions from a subordinate to a superior that reflected the personal opinion of the writer rather than the policy of the agency); *Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *EPA v. Mink*, 410 U.S. 73, 87 (1972).

[36] *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp*., 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006); *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978).

[37] *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151, quoting *Coastal States Gas v. U.S. Dep't of Energy*, 617 F.2d at 866; *see also Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975) (document must be a direct part of the agency's deliberative process in that it makes recommendations or expresses opinions on legal or policy matters).

[38] 5 U.S.C. § 552(a)(4)(B); *see also Schiller v. NLRB*, 964 F.2d at 1207.

[39] *NLRB v. Sears, Roebuck & Co*., 421 U.S. at 151, n.18 ("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.").

- whether the person preparing the document lacked decision-making authority;[40]

- whether the document flowed upwards or downwards along the decision-making chain;[41] and

- whether the document provided the basis for a final decision; even if it is unclear if the document provided a basis for a final decision, if the document is a recommendation, it should be protectable.[42]

Thus, the privilege protects the integrity of the deliberative process itself where the exposure of the agency's process would result in harm.[43] Moreover, the protected status of a predecisional document is not altered by the subsequent issuance of a decision,[44] by the agency opting not to make a decision,[45] or by the passage of time.[46] However, a predecisional document that otherwise would be entitled to protection under the deliberative process privilege may lose its protected status, if it is adopted, formally or informally, or expressly incorporated by reference as the agency's position on an issue, or if it is used by the agency in its dealings with the public.[47]

[40] *Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 559 (1st Cir. 1992) (an agency may meet its burden of proof under the "predecisional document" test by demonstrating that the preparer was not the final decisionmaker and that the contents confirm that the document was originated to facilitate an identifiable final agency decision); *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 703 (9th Cir. 1989).

[41] *See Coastal States*, 617 F.2d at 868 (noting that "a document from a subordinate to a superior official is more likely to be predecisional"). Ordinarily, documents that flow from the top down are held not to be predecisional. There are exceptions, however, for comments from a headquarters office to regional offices that were more advisory than binding. *See, e.g.*, *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1123 (9th Cir. 1988).

[42] *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. at 184-185; *Afshar v. U.S. Dep't of State*, 702 F.2d 1125, 1143 n.22 (D.C. Cir. 1983); *Greyson v. McKenna & Cuneo*, 879 F. Supp. 1065, 1069 (D.Colo. 1995).

[43] *Nat'l Wildlife Fed'n*, 861 F.2d at 1120 (noting that subjecting a policymaker to public criticism on the basis of tentative assessments is precisely what the deliberative process privilege is intended to prevent).

[44] *Fed. Open Market Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100, 112-113 (D.D.C. 2005).

[45] *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996), citing *Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982).

[46] *See Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 16 (D.D.C. 2000) (finding that the deliberative process privilege is not temporary).

[47] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 161 (noting that if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 into a final opinion, that memorandum may be withheld only if it falls within the coverage of some exemption

In contrast, however, are documents that embody statements of policy and final opinions that have the force of law, implement an established policy,[48] or explain actions that an agency has already taken.[49] Thus, dismissal letters from the Regions, denial letters from the Office of Appeals, Advice "no go" memoranda, Decisions and Directions of Election, and Decisions and Orders would all be considered outside the protection of the deliberative process privilege. Exemption 5 does not generally protect such documents from disclosure. They constitute "final opinions," and the public is entitled to know what the government is doing and why.[50] Note, however, that portions of a postdecisional document that discuss predecisional recommendations that have not been expressly adopted may be protected.[51] Further, some of the documents mentioned above may contain exempt information.[52] Contact General Counsel's FOIA officer in Washington with any questions.

other than Exemption 5); *Nat'l Council of La Raza v. U.S. Dep't of Justice*, 411 F.3d 350, 358-360 (2d Cir. 2005) (finding that Office of Legal Counsel memorandum was privileged under deliberative process, but ruling that most of the memorandum was not exempt because it had been expressly adopted in public statements by agency officials); *see also Horowitz v. Peace Corps*, 428 F.3d 271, 276 (D.C. Cir. 2005), citing *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

[48] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 152; *Brinton v. U.S. Dep't of State*, 636 F.2d 600, 605 (D.C. Cir. 1980).

[49] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 153-154.

[50] *See Coastal States*, 617 F.2d at 868.

[51] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 151 (noting that quality of the decision will not likely be affected by forced disclosure of communications after the decision is made, as long as prior communications and the ingredients of the decisionmaking process are not disclosed).

[52] *Fed. Open Market Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 n.23 (1979) (noting that "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"); *Iglesias v. CIA*, 525 F. Supp. 547, 559 (D.D.C. 1981) ("[i]t is settled that even if a document is a final opinion or is a recommendation which is eventually adopted as the basis for agency action, it retains its exempt status if it falls properly within the work-product privilege."); *Exxon Corp. v. FTC*, 476 F. Supp. 713, 726 (D.D.C. 1979) ("a document may be exempt as attorney 'work product' under exemption (b)(5) notwithstanding that it is also a "final opinion,' or has been incorporated by reference into a 'final opinion,' within the meaning of § 552(a)(2)(A).").

Be aware that a memorandum memorializing a decision already made or communicated to a party generally would not be predecisional and therefore would not be exempt under the deliberative process privilege.[53]

Accordingly, all memoranda that memorialize tentative merits decisions, including Final Investigative Reports (FIRs) and Agenda Minutes, must be prepared prior to the issuance of the dismissal letter or any oral communication of the dismissal decision to a party in order to be covered by the deliberative process privilege.

b. Document Must be Deliberative

A predecisional document will qualify as "deliberative" if it is "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[54] Deliberative material "reflects the give-and-take of the consultative process," by revealing the manner in which the agency evaluates possible alternative policies or outcomes.[55]

[53] In the rare case, a document prepared after the decision was issued may still be considered predeliberative. *See, e.g.*, *North Dartmouth Props., Inc. v. HUD*, 984 F. Supp. 65, 68 (D. Mass. 1997) (postdecisional e-mail protected where message reiterated agency's predecisional deliberations and reflected sender's personal views, opinions and recommendations concerning matter decided); *Hornbeck Offshore Transp. LLC v. U.S. Coast Guard*, 2006 WL 696053 at *21 (D.D.C. 2006) (there may be cases "where a document that is postdecisional in form but predecisional in content may be properly covered by the deliberative process exemption").

[54] *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978), citing *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975); *Cowdery, Ecker & Murphy, LLC v. U.S. Dep't of the Interior*, 511 F. Supp. 2d 215, 220-221 (D. Conn. 2007); *see also SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1204 (D.C. Cir. 1991); *Nat'l Wildlife Fed'n v. Forest Serv.*, 861 F.2d 1114, 1118-1120 (9th Cir. 1988); *cf. Senate of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 585-586 (D.C. Cir. 1987) (agency bears burden of establishing "what deliberative process is involved, and the role played by the documents in the course of that process" quoting *Coastal States*, 617 F.2d at 868).

[55] *Coastal States*, 617 F.2d at 866; *see also City of Virginia Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993); *Keepers of the Mountain Found. v. U.S. Dep't of Justice*, 514 F. Supp. 2d 837 (S.D. W. Va. 2007).

c. Segregation of Factual Material

Determining that a document is both predecisional and deliberative does not end the analysis. A primary limitation on the scope of the deliberative process privilege is that ordinarily, it does not protect purely factual material that does not reflect the agency's deliberative process, or factual portions of an otherwise deliberative and privileged document.[56] Under the FOIA, an agency has the statutory duty to release all "reasonably segregable" factual portions of an exempt or withheld document.[57] Generally, factual material may be withheld where: (1) that factual material is so "inextricably intertwined" with the privileged deliberative material that its disclosure would expose or cause harm to the agency's deliberations or decision-making process;[58] (2) the very act of separating the significant facts from the insignificant facts in a file constitutes an exercise of deliberative judgment by agency personnel;[59] or (3) it is impossible to reasonably segregate meaningful portions of the factual information from the deliberative information without imposing an inordinate burden[60] or creating a

[56] *Local 3, IBEW v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988); *Coastal States*, 617 F.2d at 867; *S.W. Ctr. for Biological Diversity v. USDA*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (concluding that release of "raw research data" would not expose agency's deliberative process, because such data were not recommendations, not subject to alterations upon further agency review, and "not selective" in character).

[57] 5 U.S.C. § 552(b); *see EPA v. Mink*, 410 U.S. 73, 92 (1973) (purely factual material that is severable from remainder of a document must be produced); *Schiller v. NLRB*, 964 F.2d at 1209 (remanded to the district court to hold the Board to its obligation to disclose reasonably segregable portions of withheld documents); *Edmonds v. FBI*, 272 F. Supp. 2d 35, 57 (D.D.C. 2003); *see also United States v. Weber Aircraft Corp*., 465 U.S. 792, 800 n.17 (1984). However, even if an agency document contains facts that would be disclosable under the deliberative process privilege, the document may still be entitled to protection under Exemption 5's attorney work-product privilege and thus withheld in its entirety. For a more detailed discussion on the applicability of the attorney work-product privilege, *see* Section 1, *supra*.

[58] *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 432 F.3d 366, 372 (D.C. Cir. 2005); *Wolfe v. HHS*, 839 F.2d 768, 774-776 (D.C. Cir. 1988); *Ryan v. U.S. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980).

[59] *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979) (disclosing factual segments of summaries would reveal deliberative process by demonstrating which facts in the massive rule-making record were considered significant by the decisionmaker and those assisting her); *Envtl. Prot. Servs. v. EPA*, 364 F. Supp. 2d 575, 585 (N.D. W. Va. 2005) (protecting agency investigator's notes where he had previously been briefed on investigation and geared queries accordingly, thereby making his notes selectively recorded information).

[60] *Lead Indus. Ass'n v. OSHA*, 610 F.2d at 86.

useless disclosure.[61] For example, a Final Investigation Report (FIR), or its equivalent, prepared by a Board agent will contain a recounting of "facts." Because these facts are typically a "selective" summarization of a body of investigative materials, combined with recommendations and evaluations, and are thus "intertwined" with the Board's decision-making processes, they are entitled to the same protection afforded to deliberative material. Similarly, factual or statistical information that is actually an expression of deliberative communication may also be withheld on the basis that to reveal that information would reveal the agency's deliberations.[62]

d. Examples of Documents Protected by Deliberative Process Privilege

Documents that are commonly protected by the deliberative process privilege include internal recommendations, draft documents, proposals, suggestions, meeting notes, and deliberations comprising part of a process by which governmental decisions and policies are formulated.[63]

Board documents covered by the deliberative process may include but are not limited to:

- Final Investigation Reports (FIRs),
- Agenda Minutes,

[61] *Local 3, IBEW v. NLRB*, 845 F.2d at 1180 (declining to compel disclosure where stripping short documents down to their "bare-bone facts" would render them "nonsensical" or too illuminating of the agency's deliberative process).

[62] *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d at 1120-1121.

[63] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150; *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006) (observing that notes generally are selective and deliberative and that routine public disclosure of meeting notes and other notes would hinder government officials from debating issues internally, deter them from giving candid advice, and lower the overall quality of the government decisionmaking process); *Moye, O'Brien, O'Rourke, Hogan, & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270, 1277 (11th Cir. 2004); *Coastal States*, 617 F.2d at 866; *Strang v. Collyer*, 710 F. Supp. 9, 11-12 (D.D.C. 1989), *aff'd sub nom, Strang v. DeSio*, 899 F.2d 1268 (D.C. Cir. 1990) (table) (meeting notes that reflected give-and-take between agency personnel or divisions of NLRB held protected).

- Internal Advice or Appeals memoranda to the General Counsel,
- General Counsel Minutes,
- Advice submission memoranda,
- Regional Office comments on appeal,
- Internal Section 10(j) recommendation memoranda,
- Recommendations for approval of election agreements, and
- Recommendations to issue Notice of Hearing.

To the extent that any of the listed Board documents reflect the consideration or mental processes of various Board employees, *i.e.*, identifying initials or hand-written or typed comments in the margins, those markings also should be protected by the deliberative process privilege.[64]

Exemption 5 also protects "drafts" of these documents.[65] Indeed, the very process by which a draft evolves into a final document can itself constitute a deliberative process warranting protection.[66] However, such "draft" designation "does not end the inquiry,"[67] as drafts must still otherwise meet the requirements of the deliberative process privilege.[68] Thus, to retain its status as deliberative material the draft should not have

[64] *See Rothschild v. CIA*, 1992 WL 71393 (D.D.C. 1992).

[65] *See, e.g.*, *Arthur Anderson & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982), citing *Coastal States*, 617 F.2d at 866.

[66] *Moye, O'Brien, O'Roarke, Hogan & Pickart*, 376 F.3d at 1279-1281 (noting that audit work papers document "the entire body of collaborative work" performed by auditors, and were properly protected); *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d at 1121-1122 ("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."); *Marzen v. HHS*, 825 F.2d 1148, 1154-1155 (7th Cir. 1987) (draft investigatory report containing excerpts from medical records and a section of conclusions held exempt).

[67] *Arthur Anderson & Co*, 679 F.2d at 257; *Lee v. FDIC*, 923 F. Supp. 451, 458 (S.D.N.Y. 1996).

[68] *See Arthur Anderson & Co.*, 679 F.2d at 257; *see also Lee*, 923 F. Supp. at 458 (requiring disclosure of draft document because there was no claim by agency of harm to the agency's deliberative process).

been adopted formally or informally as the agency position on an issue, nor should it have been used by the agency in its dealings with the public.[69]

e. Advice Memoranda, GC Minutes, and the General Counsel's "GC" and "OM" Memoranda

Advice Memoranda, GC Minutes, and the General Counsel's "GC" and "OM" Memoranda are Agency documents warranting special attention. The deliberative process privilege protects from disclosure Advice Memoranda and GC Minutes that concern the issuance of a complaint and the commencement of litigation.

All requests for Advice Memoranda should be directed to the General Counsel's FOIA officer in Washington, unless the requested Advice Memorandum is posted on the Agency's website. The Legal Research Branch regularly posts all "no go" memoranda as these memoranda must be disclosed in their entirety[70] without regard to the open or closed status of the case as a final agency opinion under 5 U.S.C. § 552(a)(2).[71] "No go" Advice Memoranda are generally disclosable upon issuance even though there remains the possibility that the General Counsel, acting through the Office of Appeals, may reverse Advice and direct issuance of a complaint.[72] However, as noted above, some "no

[69] *See Nat'l Council of La Raza v. U.S. Dep't of Justice*, 411 F.3d 350, 359 (2d Cir. 2005) (noting that while only casual references to document may not be found to be considered agency adoption of document, where agency repeatedly referred to document orally and "embraced the OLC's reasoning as its own," it should be released); *Coastal States*, 617 F. 2d at 276, 284-286 (where memoranda prepared by regional counsel and transmitted to auditors, then used in auditing particular firms, memoranda not protected by deliberative process privilege); *Natural Resources Def. Council v. U.S. Dep't of Def.*, 442 F. Supp. 2d 857, 865-866 (C.D. Cal. 2006) (where government and outside party discussed agency letter's content, letter held to have been "used by the agency in its dealings with the public" and Exemption 5 did not apply); *Wilderness Soc'y v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004); *Hansen v. U.S. Air Force*, 817 F. Supp. 123, 125 (D.D.C. 1992) (unpublished internal monograph lost draft status when consistently treated by agency as finished product over many years, and thus was considered adopted as agency position).

[70] The Division of Advice has been advised to draft its memoranda to avoid references that would constitute clearly unwarranted invasions of personal privacy, pursuant to 5 U.S.C. §§ 552 (b)(7)(C) and (b)(6).

[71] *NLRB v. Sears, Roebuck & Co.*, 421 U.S at 155.

[72] *Id.* at 158, n.25.

go" memoranda may contain exempt information that is protected.[73] Moreover, if Advice sua sponte decides to recall a "no go" memorandum before the Region has acted upon it, the Agency has taken the position that the initial memorandum is not final and will release only the later version provided that it is a "no go" memorandum. Contact the General Counsel's FOIA officer in Washington if a question arises about withholding a "no go" memorandum.

Requests for all other types of Advice memoranda, including "go" memoranda, "casehandling" memoranda,[74] and "mixed no-go" memoranda, *e.g.*, those that also contain "go" or "casehandling" instructions should be referred to the General Counsel's FOIA officer in Washington. After cases close, all "go" memoranda are reviewed for release and if a determination is made to release these memoranda, in full or in part, these memoranda are posted on the Agency's website. Thus, a FOIA processor should first check the Agency's website before referring the request to the General Counsel's FOIA officer in Washington.

Although covered by Exemption 5, General Counsel Minutes (prepared by the Office of Appeals) are subject to discretionary release by the General Counsel and not the regions upon request once a case has been closed. Requests for the release of General Counsel Minutes should be referred to the General Counsel's FOIA officer in Washington. *See also* Chapter XVII. Agency Release Policies.

Exemption 5 does not protect either "GC" Memoranda—memoranda in the format "GC-xx"—or "OM" Memoranda—memoranda in the format "OM-xx"—which

[73] *See* cases in n. 52, *supra*.

[74] Casehandling memoranda are those that direct neither issuance of a complaint nor dismissal of a charge, but rather deal with some other intermediate aspect of the processing of a case. They include, for example, deferral memoranda, memoranda concerning settlement, instructions to further investigate a case, and all internal Section 10(j) memoranda.

contain the notation "Release to the Public." These memoranda are available on the Agency's website and should be released to a requester in their entirety, if the requester is unable to access the website. *See* Chapter XVI Processing FOIA Requests. Requests for other "GC" or "OM" Memoranda should be referred to the General Counsel's FOIA officer in Washington.

3. Attorney-Client Privilege

The third traditional privilege incorporated into Exemption 5 protects from disclosure "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."[75] With respect to documents containing legal opinions and advice, there is a "great deal of overlap" between the attorney-client privilege and the deliberative process privilege. The distinction between the two exemptions is that the attorney-client privilege permits non-disclosure of facts contained within communications between the attorney and client in order to preserve the secrecy of the attorney's communication of opinions or advice to the client, while the deliberative process privilege directly protects opinions and advice and does not protect the underlying facts, unless they would indirectly reveal part of the agency's decision-making process.[76] Because the privilege is designed to protect communications between the attorney and client, it allows the non-disclosure of facts divulged by a client to the client's attorney, confidential opinions given by an attorney to the client based on those facts,[77] and communications between attorneys that reflect

[75] *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).
[76] *Id.* at 254, n.28.
[77] *See*, *e.g.*, *Schlefer v. United States*, 702 F.2d 233, 245 (D.C. Cir. 1983); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005).

client-supplied information.[78] Further, unlike the attorney work-product privilege, the attorney-client privilege extends beyond efforts taken in anticipation of litigation.

The concept of confidential communications within the attorney-client relationship, and thus, Exemption 5 protection under the privilege, 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."[79] The privilege extends to those communications between an attorney and all agents or employees of the agency who are authorized to act or speak for the organization in relation to the subject matter of the communication.[80] For example, communications between the General Counsel and the Board would be covered by the attorney-client privilege when the General Counsel is acting as the Board's attorney in litigation, such as when Appellate Court Branch attorneys are acting to enforce or defend Board orders.

A fundamental prerequisite to assertion of the privilege is that confidentiality is maintained consistently at the time of communication and thereafter.[81] Courts have found an attorney-client privilege claim to fail where an agency is unable to affirmatively establish the document's confidentiality and that it was reasonably careful to protect this confidential information from general disclosure.[82] Contact the General Counsel's FOIA officer in Washington in every case in which attorney-client privilege is claimed.

[78] *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984); *Elec. Privacy Info. Ctr.*, 384 F. Supp. 2d at 114; *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 174 (D.D.C. 2004) (applying privilege to documents written by agency attorneys to their superiors describing advice given to clients within agency).

[79] *Coastal States*, 617 F.2d at 863.

[80] *Mead Data Central*, 566 F.2d at 253, n.24.

[81] *Coastal States*, 617 F.2d at 863; *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 267 (D.D.C. 2004).

[82] *Coastal States*, 617 F.2d at 863 (burden is on the agency to demonstrate that confidentiality was expected in the handling of these communications and that the agency was reasonably careful to keep this confidential information protected from general disclosure); *Judicial Watch, Inc.*, 297 F. Supp. 2d at 267; *Scott Paper Co. v. United States*, 943 F. Supp. 489, 499-500 (E.D. Pa. 1996).

IX. Exemption 6

Personal privacy interests are protected by two provisions of the FOIA, Exemptions 6 and 7(C).[1] While Exemption 7(C) is limited to information compiled for law enforcement purposes, Exemption 6 permits agencies to withhold information about individuals in "personnel and medical files and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy."[2]

Although the types of files protected by Exemption 6 might appear limited, it is now settled that privacy protection is to be interpreted broadly and does not "turn upon the label of the file."[3] Instead the threshold "files" requirement covers all information that "applies to a particular individual."[4]

A. Summary of Exemption 6 Analysis

Once information meets the low threshold "similar files" requirement to qualify for protection under Exemption 6, the inquiry turns to whether disclosure "would constitute a clearly unwarranted invasion of personal privacy."[5] This requires a balancing of the public's right to disclosure against the individual's right to privacy.[6]

[1] Because much of the analysis under Exemptions 6 and 7(C) is largely the same, cases cited for legal propositions in these chapters, where appropriate, may involve either of those exemptions. *See U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 496 & n.6 (1994); *McDonnell v. United States*, 4 F.3d 1227, 1252-1253 (3d Cir. 1993).

[2] 5 U.S.C. § 552(b)(6).

[3] *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601-602 (1982); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006). Further, the term "similar files" is generally not construed in a narrow technical way if to do so would defeat the purpose of Exemption 6. *Arieff v. U.S. Dep't of the Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983) (discussing broad construction of term "similar files"); *Comm. on Masonic Homes v. NLRB*, 556 F.2d 214, 219 (3d Cir. 1977).

[4] *Wash. Post*, *supra*, 456 U.S. at 601-602; *see also, e.g.*, *Wood v. FBI*, 432 F.3d 78, 86-87 (2d Cir. 2005).

[5] The burden is on the government to establish that the invasion of privacy is clearly unwarranted. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 172 (1991); *Avondale Indus., Inc. v. NLRB*, 90 F.3d 955, 960 (5th Cir. 1996).

[6] The burden of proof as to the public interest in disclosure is on the requester. *See Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 390-391 fns. 8 & 13 (D.C. Cir. 1987); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 22 (D.D.C. 2006); *see also NARA v. Favish*, 541 U.S. 157, 175 (instructing that the

First, a recognizable privacy interest must be identified or the exemption simply does not apply.[7] Then, a "significant" public interest must be identified, in the absence of which the privacy-related information is plainly exempt from disclosure.[8] If both a public interest and a privacy interest exist, then it is necessary to strike a balance between the two, requiring some assessment and comparison of the relative magnitudes of the two interests.[9] 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.[10]

B. Privacy Interests

The deceased are considered to have either diminished privacy rights or no privacy rights whatsoever.[11] Thus, before withholding information based on an individual's privacy interests, the FOIA processor should determine whether it appears

balance does not even come "into play" when a requester has produced no evidence to "warrant a belief by a reasonable person that the alleged Government impropriety might have occurred"), *reh'g denied*, 541 U.S. 1057 (2004).

[7] *See Ripskis v .HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (holding that if no privacy interest found, further analysis unnecessary and information at issue must be disclosed). The privacy interest need not involve something intimate or embarrassing to qualify for protection. *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982). In considering privacy interests, the agency should also consider the universe of possible consequences that release of the information might trigger, since the issue is not simply what the requester might do with the information but "what anyone else might do with it." *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996); *see also Favish*, 541 U.S. at 174.

[8] *See Favish*, 541 U.S. at 172; *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1990) ("something, even a modest privacy interest, outweighs nothing every time"); *Brown v. EPA*, 384 F. Supp. 2d 271, 278 (D.D.C. 2005).

[9] *See Favish*, 541 U.S. at 171 ("The term 'unwarranted' requires us to balance the family's privacy interest against the public interest in disclosure."); *Ripskis*, 746 F.2d at 3.

[10] *See, e.g.*, *Lahr v. NTSB*, 453 F. Supp. 2d 1153, 1184 (C.D. Cal. 2006) (ordering disclosure of names of eyewitnesses of TWA Flight 800 crash withheld under Exemptions 6 and 7(C) because privacy interests of the eyewitnesses were outweighed by "great" public interest, because disclosure could "contribute significantly" to the public understanding of what plaintiff called "massive cover-up by the government").

[11] *See, e.g.*, *Davis v. U.S. Dep't of Justice*, 460 F.3d 92, 98 (D.C. Cir. 2006) (finding diminished privacy interest if individual is deceased); *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1413 (D. Haw. 1995) (generally suggesting that privacy protections only pertain to living individuals, but noting that no danger of identifying particular individuals from release of information at issue).

reasonable to conclude that the person is still living.[12] If such a belief is not warranted, the Agency is then obligated to make a reasonable effort to determine whether the person is still alive, based on the accessibility of relevant information.[13] Should a request raise the issue of whether an individual is living or deceased, FOIA processors should contact the General Counsel's FOIA officer in Washington who will consult with the Region regarding appropriate searches and responses.

Neither corporations nor business associations possess protectable privacy interests,[14] except that individuals in closely held corporations, sole proprietorships, and partnerships retain some expectation of privacy.[15] However, this expectation is somewhat diminished when the individual is acting in a business capacity.[16] Furthermore, the Agency does not consider unions to possess protectable privacy interests as entities.

[12] *See Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 775-776 (D.C. Cir. 2002) (where FOIA requester told agency that two individuals whose information was at issue had AIDS, agency properly conducted search to determine if individuals were alive).

[13] *Compare Davis*, 460 F.3d at 104 (where request was for audiotapes and only four responsive documents and two names at issue, agency required to take additional steps beyond agency's usual methods, to determine whether individuals at issue were still living), *with Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 662-665 (D.C. Cir. 2003) (where request involved thousands of responsive documents and over 100 names, agency permitted to use presumption that individuals younger than 100-years-old are still alive, the "Who Was Who" publication, institutional knowledge of employees, and prior FOIA requests, in its determination); *see also McDonnell*, 4 F.3d at 1252 (courts retain discretion to require an agency to demonstrate that individuals whose privacy is at issue are alive, and are particularly likely to do so when older documents involved); *Summers v. U.S. Dep't of Justice*, No. 97-1715, 2007 WL 1541402 at *7 (D.D.C. May 24, 2007); *Piper v. U.S. Dep't of Justice*, 428 F. Supp. 2d 1, 4 (D.D.C. 2006) (where documents are fairly recent, no reason to surmise that individuals are deceased).

[14] *See, e.g.*, *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685 n.44, 686 (D.C. Cir. 1976).

[15] *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) ("While corporations have no privacy, personal financial information is protected, including information about small businesses when the individual and corporation are identical.")

[16] *See, e.g.*, *Or. Natural Desert Ass'n v. U.S. Dep't of the Interior*, 24 F. Supp. 2d 1088, 1089 (D. Ore. 1998) (concluding that cattle owners who violated federal grazing laws have "diminished expectation of privacy" in their names when such information relates to commercial interests); *Wash. Post Co. v. USDA*, 943 F. Supp. 31, 34-36 (D.D.C. 1996) (finding that farmers who received subsidies under cotton price support program have only minimal privacy interests in home addresses from which they also operate businesses), *appeal dismissed voluntarily*, No. 965373 (D.C. Cir. May 19, 1997).

1. Summary of Types of Parties' Privacy Interests

Parties with protectable privacy interests

- individuals

Parties with cognizable but diminished privacy interests

- individuals with ownership interests in closely held corporations
- members of partnerships
- sole proprietors

Parties with no protectable privacy interests

- corporations
- business associations
- labor unions

2. Examples of Privacy Interests

Examples of privacy interests recognized by the courts include threats of violence and retaliation,[17] allegations of assault,[18] charges of sexual deviancy,[19] information concerning marital status,[20] legitimacy of children,[21] identity of fathers of children,[22] medical conditions,[23] alcohol consumption,[24] family fights,[25] wage rates,[26] tax

[17] *Alirez v. NLRB*, 676 F.2d 423, 425 (10th Cir. 1982) (applying Exemption 7(C)). *See also Judicial Watch v. FDA*, 449 F.3d 141, 152-153 (D.C. Cir. 2006) (protected the names of agency personnel on the grounds that their privacy interest associated with being free from death threats outweighed the requester's stated public interest).

[18] *Alirez v. NLRB*, 676 F.2d at 425.

[19] *Id.*

[20] *Marathon LeTourneau Co. Marine Div. v. NLRB*, 414 F. Supp. 1074, 1084 (S.D. Miss. 1976), citing *Wine Hobby USA v. IRS*, 502 F.2d 133 (3d Cir. 1974).

[21] *Marathon LeTourneau Co. Marine Div. v. NLRB*, 414 F. Supp. at 1084.

[22] *Id.*

[23] *McDonnell*, 4 F.3d at 1254.

[24] *Rural Housing Alliance v. USDA*, 498 F.2d at 77; *Marathon LeTourneau Co. Marine Div. v. NLRB*, 414 F. Supp. at 1084.

[25] *Marathon LeTourneau Co. Marine Div. v. NLRB*, 414 F. Supp. at 1084.

[26] *Wayland v. NLRB*, 627 F. Supp. 1473, 1479 (M.D. Tenn. 1986) (applying Exemption 7(C)).

withholding,[27] credit card information,[28] bank account information,[29] status as employed or unemployed,[30] employment applications,[31] citizenship data,[32] names of government agents and third persons mentioned in law enforcement files,[33] social security numbers,[34] home addresses,[35] home phone numbers,[36] age,[37] handwriting,[38] family members' privacy interests in death scene photographs of the deceased,[39] or other "intimate and personal details."[40]

3. Excelsior Lists, Authorization Cards and Documents Indicating Union Support

In addition, *Excelsior* lists, containing the names and addresses of eligible voters, have been held to be categorically exempt under Exemption 6 (*see* Chapter XI.

[27] *Hopkins v. HUD*, 929 F.2d 81, 88-89 (2d Cir. 1991) (withholding payroll records including tax deduction information).

[28] *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 38 (D.C. Cir. 2000).

[29] *Id.* at 37.

[30] *See generally Associated Dry Goods Corp. v. NLRB*, 455 F. Supp. 802, 814 (S.D.N.Y. 1978) (protecting requests for unemployment compensation under Exemption 6).

[31] *Id.*

[32] *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982) (passport information); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 83 F. Supp. 2d 105, 112 (D.D.C. 1999) (visa and passport data).

[33] *Lamont v. U.S. Dep't of Justice*, 475 F. Supp. 761, 781-782 (S.D.N.Y. 1979) (applying Exemption 6 to protect names of governmental employees and third parties mentioned in government files).

[34] *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 365-366 (5th Cir. 2001); *Aronson v. IRS*, 973 F.2d 962, 968 (1st Cir. 1992); *Lewis v. EPA*, No. 06-2660, 2006 WL 3227787, at *6 (E.D. Pa. Nov. 3, 2006).

[35] *FLRA v. U.S. Dep't of Treasury*, 884 F.2d 1446, 1452 (D.C. Cir. 1989); *Lewis*, 2006 WL 3227787, at *6.

[36] *Lewis*, 2006 WL 3227787, at *6.

[37] *Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1195-1197 (N.D. Cal. 2006).

[38] *Wilchaz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 333-334 (E.D. Va. 1996) (upholding the withholding of handwriting of law enforcement officers involved in investigating death of White House Counsel Vince Foster in order to protect their identity), *aff'd*, 114 F.3d 1178 (4th Cir. 1997) (table); *Frets v. U.S. Dep't of Transp.*, No. 88-0404-CV-W-9, 1989 WL 222608, at *5 (W.D. Mo. Dec. 14, 1989) (determining that disclosure of handwritten statements would identify those who came forward with information concerning drug use by air traffic controllers even if names were redacted); *see also Church of Scientology v. IRS*, 816 F. Supp. 1138, 1160 (W.D. Tex. 1993) (where public interest in document held to outweigh employees' privacy interests in their handwriting, agency ordered agency to protect those privacy interests by typing handwritten records at requester's expense).

[39] *Favish*, 541 U.S. at 174 (noting that any consideration of potential privacy invasions must include both what the requester might do with the information at hand and also what any other requester, or ultimate recipient, might do with it as well, because, "It must be remembered that once there is disclosure, the information belongs to the general public.").

Exemption 7, Section C. for a description of categorical balancing).[41] Also, an individual's status as a union supporter (or non-supporter) or informant in an Agency proceeding is protectable.[42] Further, union authorization cards have been held to be exempt from disclosure under Exemption 6, as the disclosure of the cards would constitute a serious invasion of employee privacy and would substantially intrude upon the secrecy of representation elections. The privacy interest being protected is the support or non-support for the union.[43] However, the related showing of interest form (Form 4069) is released because it does not include the exact number of cards submitted, thereby minimizing the possibility that a requester could infer from it which individuals may have signed cards.[44]

[40] *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985-986 (9th Cir. 1985); *Alirez v. NLRB*, 676 F.2d 423, 425 (10th Cir. 1982).

[41] *See Reed v. NLRB*, 927 F.2d 1249, 1251-1252 (D.C. Cir. 1992). *But see Van Bourg, Allen, Weinberg & Roger v. NLRB*, 728 F.2d 1270 (9th Cir. 1984). In that case, the Ninth Circuit ordered the *Excelsior* list to be disclosed to a union that had not been party to the election, but wished to file a decertification petition, and raised the "possibility" that the representation election had been conducted unlawfully. Such a public interest showing would likely not suffice after *Favish*.

[42] *See Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985) (disclosure of authors and subjects of affidavits that described "in painful detail the personalities, activities, biases and proclivities of employers, union members and officials" could cause substantial risk of embarrassment and reprisal); *see also Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995) (explaining that the "privacy interest also extends to third parties who may be mentioned in investigatory files, as well as witnesses and informants who provided information during the course of an investigation"); *White v. IRS*, 707 F.2d 897, 901-902 (6th Cir. 1983) (withholding names of persons who indicated willingness to further government's investigation by providing information about appellant); *Lamont v. U.S. Dep't of Justice*, 475 F. Supp. 761, 782-783 (S.D.N.Y. 1979) (protecting the names of government informant, confidential sources, and interviewees).

[43] *See, e.g., Madeira Nursing Ctr. v. NLRB*, 615 F.2d 728, 731 (6th Cir. 1980); *Masonic Homes v. NLRB*, 556 F.2d 214, 219-221 (3d Cir. 1977).

[44] *See Pacific Molasses Co. v. NLRB*, 577 F.2d 1172, 1184 n.9 (5th Cir. 1978) (ordering release of Form 4069).

4. Privacy Interests Relating to Job Performance and Other Personnel Matters

The courts have also recognized a general privacy interest related to job performance and personnel actions,[45] as well as other information concerning current and past employment.[46] An exception to this general rule is that civilian federal employees have no reasonable expectation of privacy with respect to their names, position descriptions, present and past titles, grades, salaries, and duty stations. Bonus awards, special act awards, and time-off awards that cannot be linked to performance ratings are also disclosable. However, if disclosure of this information in connection with a particular case would cause harm, it should be protected; this includes the identity of Board-side personnel assigned to a particular case. (*See also* Chapter XVII. The Agency's Release Policies.) Information about Board personnel should also not be disclosed if there are allegations of Board agent misconduct,[47] or if there is evidence that the requester may harass the Board Agent, had done so in the past to other Board Agents, or has a violent or threatening disposition. Other private information of civilian federal employees is protectable, including their performance evaluations.[48]

[45] *See FLRA v. U.S. Dep't of Commerce*, 962 F.2d 1055, 1059 (D.C. Cir. 1992) (favorable job evaluation "reveals by omission the identities of employees who did not receive high ratings, creating an invasion of their privacy"); *Ripskis*, 746 F.2d at 3 (favorable evaluations could embarrass individual or incite jealousy among co-workers); *Wayland v. NLRB*, 627 F. Supp. 1473, 1479 (M.D. Tenn. 1986) (favorable evaluation protectable).

[46] *Dunkelberger v. U.S. Dep't of Justice*, 906 F.2d 779, 781-782 (D.C. Cir. 1990) (employment record, evaluation history and material in personnel file protected).

[47] *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)); *Cawthon v. U.S. Dep't of Justice*, No. Civ.A.05-0567(RMU), 2006 WL 581250, at *2-4 (D.D.C. March 9, 2006) (protecting information about two Federal Bureau of Prisons doctors, including records pertaining to malpractice and disciplinary matters).

[48] *See, e.g.*, *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 500 (1994) (employees' home addresses); *Core v. U.S. Postal Serv.*, 730 F.2d 946, 948-949 (4th Cir. 1984) (prior employment information of applicants not selected for positions ordered withheld from disclosure, but same personal information relating to five selected applicants was ordered to be disclosed); *Kidd v. U.S. Dep't of Justice*, 362 F. Supp. 2d 291, 296-297 (D.D.C. 2005) (home telephone number); *Barvick v. Cisneros*, 941 F. Supp. 1015, 1018, 1020-1021 (D. Kan. 1996) (finding substantial privacy interest in federal employees' names and addresses,

5. Other Privacy Interests

This list, of course, is not comprehensive. Individuals also have an obvious privacy interest in keeping secret the fact that they were subjects of a law enforcement investigation. The privacy interest also extends to third parties who may be mentioned in investigatory files, as well as to witnesses and informants who provided information during the course of an investigation.[49] Further, while the names of FOIA requesters (except for first-party requesters,—*see* Chapter XII. First-Party Requesters for definition)[50] are generally disclosable because they are considered to have no expectation of privacy in that information,[51] personal information about FOIA requesters disclosed or revealed in the letter, such as home addresses and home telephone numbers should not be disclosed. Finally, information about a single individual whose identity cannot be determined after redaction of personal identifiers from the records (*e.g.*, name, home address, or social security number) does not qualify for protection.[52]

particularly when linked with personal financial information, as well as employee evaluation forms contained in personnel files, and withholding because each reveals little or nothing about the government's conduct); *Nat'l W. Life Ins. Co. v. United States*, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (request seeking federal employees' home addresses and intimate facts relating to family status was exempt because could reasonably lead to embarrassment of employees); *see also* 5 C.F.R. § 293.311.

[49] *See Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1205-1206 (D.C. Cir. 1991); *Johnson v. Comm'r*, 239 F. Supp. 2d 1125, 1137 (W.D. Wash. 2002) (allowing categorical withholding of any identifying information about third parties and witnesses, as well as any information that they provided to IRS) (Exemption 7(C)), *aff'd on other grounds*, 68 F. App'x 839 (9th Cir. 2003).

[50] If a FOIA requester seeks records that would identify other persons' first-party FOIA requests, please contact the General Counsel's FOIA officer in Washington.

[51] *See Holland v. CIA*, No. 91-1233, 1992 WL 233820, at *15-16 (D.D.C. Aug. 31, 1992) (citing to U.S. Department of Justice, *Freedom of Information Act Guide* for proposition that FOIA requesters' identities are not protected by Exemption 6).

[52] *Citizens for Envtl. Quality, Inc. v. USDA*, 602 F. Supp. 534, 538-539 (D.C. Cir. 1984); *Dayton Newspapers, Inc. v. U.S. Dep't of the Air Force*, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1998) (ordering release of military wide medical tort-claims database with "claimants' names, social security numbers, home addresses, home/work telephone numbers and places of employment" redacted). On the other hand, where the number of individuals involved is small, mere deletion of personal identifiers may be insufficient to protect their privacy, in which case the records should be withheld in their entirety. *Alirez v. NLRB*, 676 F.2d 423, 428 (10th Cir. 1982) (applying Exemption 7(C), court held that mere deletion of names and other identifying data concerning small group of coworkers was inadequate to protect them from embarrassment or reprisals because requester could still possibly identify individuals).

C. Analytical Approach of Supreme Court in Reporters Committee

The landmark decision pertaining to the personal privacy exemptions is *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*.[53] In that case, the Supreme Court enunciated an analytical approach for evaluating privacy-related FOIA requests and has subsequently applied these "core principles" strictly.[54] Since that decision, the Supreme Court has also applied the *Reporters Committee* analysis to Exemption 6.[55]

1. Identity of Requester and Specific Purpose of Requester are Generally Irrelevant

The Court made plain that neither the identity of the requester nor the particular purpose for which the request is made is usually relevant in the analysis.[56] The proper approach is to consider the relationship of the document to the public interest generally rather than the identity or specific purpose of the requester.

2. "Public Interest" is Narrowly Defined

The Court narrowly defined the scope of the public interest to be considered under the privacy exemptions, declaring that it is limited to "the kind of public interest

[53] 489 U.S. 749, 776-780 (1989) (holding that Exemption 7(C) permits non-disclosure of the contents of an FBI rap sheet to a third party).

[54] *See Favish*, 541 U.S. at 174 (noting heightened evidentiary requirement on requester's part for public interest showing); *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam) (Supreme Court reaffirmed position that the only relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties); *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 500 (1994) (public interest "virtually non-existent" where disclosure would not contribute significantly to public understanding of the operations or activities of the government).

[55] *U.S. Dep't of Def.*, 510 U.S. at 496 & n.6 (1994); *Ray*, 502 U.S. at 177-178 (applying *Reporters Committee* principles to determination of public interest in Exemption 6 case).

[56] 489 U.S. at 771; *see also Bibles*, 519 U.S. at 356. However, when an individual requests information about themselves, the request may need to be analyzed under first-party requester principles. *See* Chapter XII. First-Party Requesters.

for which Congress enacted the FOIA."[57] This "core purpose" of the FOIA,[58] as the Court termed it, is to "shed [ ] light on an agency's performance of its statutory duties."[59] Board agents should narrowly interpret the "public interest" requirement and closely scrutinize requesters' assertions of public interest underlying FOIA requests.[60] Further, in those requests where the alleged public interest is in discovering government wrongdoing, it is not enough that a requester merely allege government wrongdoing without any evidentiary support.[61]

3. Establishment of "Practical Obscurity" Standard

The Court explained that substantial privacy interests can exist in personal information that has been made available to the public at some previous point in time. Establishing a "practical obscurity" standard, the Court held that where the public disclosure was limited and the material not readily obtainable, a privacy interest in it may still exist.[62]

[57] 489 U.S. at 774.

[58] 489 U.S. at 775.

[59] *Id.* at 773; *see also Favish*, 541 U.S. at 175 (discussing required nexus between requested documents and purported public interest served by disclosure).

[60] If the requester fails to allege a public interest at stake in the initial request, the FOIA processor should seek further guidance from the requester.

[61] *See Favish*, 541 U.S. at 174-175 (instructing that the balance does not even come "into play" when a requester has produced no evidence to "warrant a belief by a reasonable person that the alleged Government impropriety might have occurred") (Exemption 7(c)); *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904-905 (D.C. Cir. 1996) (public interest "insubstantial" unless requester submits compelling evidence that agency is engaged in illegal activity and information sought is necessary to confirm or refute that evidence.); *see also Sheet Metal Workers' Int'l Ass'n, Local Union No. 19 v. VA*, 135 F.3d 891, 900 (3d Cir. 1998) ("*Reporters Committee* and *Dep't of Defense* demonstrate both an increased appreciation for employees' privacy and a concomitant decrease in the belief that disclosure of personal information for the purpose of monitoring Davis-Bacon Act compliance serves a public interest."); *Stern v. FBI*, 737 F.2d 84, 93-94 (D.C. Cir. 1984).

[62] 489 U.S. at 762, 767.

4. "Categorical Balancing" is Permissible Under Certain Circumstances

Importantly, the Court in *Reporters Committee* made clear that agencies may engage in "categorical balancing" in favor of nondisclosure.[63] Under this approach, it may be determined, "as a categorical matter," that a certain type of information always is protectable under a privacy-related exemption, "without regard to individual circumstances."[64] These include *Excelsior* lists, voter affidavits, home addresses, home telephone numbers and social security numbers. In order to have uniformity throughout the Agency, all FOIA processors should contact the General Counsel's FOIA officer in Washington for approval when recommending the use of categorical withholding for any other "types of information."

D. "Derivative Uses" of the Disclosed Documents Should Not Be Considered In Determining Public Interest

Reporters Committee and other cases have emphasized a very circumscribed definition of the public interest within the meaning of the two privacy exemptions; they suggest that to be within the public interest, the requested information itself must reveal something directly about performance of an agency's official duties. Public interest that stems not from the document itself but from a "derivative use" to which the document could be put does not qualify. That is, if the requester must contact listed individuals or compare the requested information to other material to bring that information within the

[63] *Id.* at 776-780 & n.22; *see also Reed v. NLRB*, 927 F.2d 1249 (D.C. Cir. 1992) (*Excelsior* lists are categorically exempt).

[64] 489 U.S. at 780.

core purpose of the FOIA, that information does not qualify as having a public interest that reveals agency operations.[65]

In *U.S. Department of State v. Ray*, the Supreme Court expressly declined to decide whether a public interest that stems not from the documents themselves but from a "derivative use" to which the documents could be put could ever be weighed in the balancing process against a private interest.[66] However, the Supreme Court's emphasis in *Favish* on "the necessary nexus between" the information requested and the "public interest" to be served, at a minimum, calls this "derivative use" notion into serious question.[67] Recent cases such as *Hertzberg v. Veneman*,[68] have cogently expressed the position that no "derivative use" concept should be recognized. In that case, the District Court found: "[D]isclosure is not compelled under the FOIA because the link between the request and the potential illumination of agency action is too attenuated. Plaintiff cites no case recognizing a derivative theory of public interest, and this Court does not understand the FOIA to encompass such a concept."[69]

In sum, FOIA processors, relying upon Exemptions 6 and 7(C), should refuse to honor requests that seek personal information about individuals, unrelated to the Board's performance of its statutory duties. Where a requester seeks information that implicates privacy interests and that also does "shed light on the agency's performance of its statutory duties," the information should be supplied, but only where the redaction of all

[65] *Reporters Comm.*, 489 U.S. at 773; *Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir.1990).

[66] 502 U.S. 164, 178-179 (1991).

[67] 541 U.S. at 172-173.

[68] 273 F. Supp. 2d 67 (D.D.C. 2003).

[69] *Id.* at 86-87; *see also Seized Property Recovery Corp. v. U.S. Customs and Border Prot.*, 502 F. Supp. 2d 50, 58-59 (D.D.C. 2007). *But see, e.g., Sun-Sentinel Co. v. U.S. Dep't of Homeland Sec.*, 431 F. Supp. 2d 1258, 1269-1273 (S.D. Fla. 2006) (applying "derivative use" to order release).

identifying information would be sufficient to protect the privacy interests or where the public interest in disclosure plainly outweighs all privacy interests.

E. Glomar Responses to Protect Privacy

Finally, when a request is focused on records concerning identifiable individuals whose privacy is at issue, it may be necessary to go beyond a mere denial of access to the records or redaction of parts of the records, and to refuse to confirm or deny that responsive records exist (a "Glomar" response).[70] This approach is appropriate whenever the mere acknowledgment of the existence of records would cause an invasion of privacy. In order to have uniformity throughout the Agency, all FOIA processors should contact the General Counsel's FOIA officer in Washington, who will consult with the Region regarding the issuance of "Glomar" responses. *See* Chapter X. The "Glomar" Principle.

[70] *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (dealing with request for records regarding CIA's secret operations using Glomar Explorer submarine-retrieval ship).

X. The "Glomar" Principle: When to Neither Confirm nor Deny the Existence of Documents

A "Glomar" response should be used when the mere confirmation or denial of the existence of records responsive to a FOIA request may harm an interest protected by FOIA exemptions.[1] In the context of FOIA requests to the Agency, such a response is appropriate, for instance, when there is a specifically targeted request for records about a particular individual that would either reveal protected privacy interests, confidential source identities, or safety interests—information that is protected by Exemption 6, 7 (C), 7(D), and/or 7(F). Courts have found "Glomar" responses appropriate in answer to requests regarding such matters as: alleged government informants, individuals who are subjects of investigations or who may merely be mentioned in a law enforcement record, and government employees alleged to have engaged in misconduct.[2]

It must be remembered that a "Glomar" response is only effective if it is given consistently for a certain category of responses. For example, it is important to follow this "Glomarization" procedure whenever denying a request that seeks **affidavits of any named individuals**, even if those individuals did not supply affidavits. Otherwise, savvy requesters would soon learn that a response neither admitting nor denying the existence of an affidavit means that an affidavit was supplied. Moreover, a prior acknowledgment

[1] *See Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (initial case exploring this type of response, concerning request for records regarding CIA's secret operations using Glomar Explorer submarine-retrieval ship).

[2] *See, e.g., U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 757, 780 (1989) (request for any criminal "rap sheet" of individual defense contractor); *Beck v. U.S. Dep't of Justice*, 997 F.2d 1489, 1492-1493 (D.C. Cir. 1993) (request for disciplinary records of named DEA agents); *Dunkelberger v. U.S. Dep't of Justice*, 906 F.2d 779, 780-781 (D.C. Cir. 1990) (request for information that could verify alleged misconduct by undercover FBI Special Agent); *Antonelli v. FBI*, 721 F.2d 615, 616-619 (7th Cir. 1983) (request seeking FBI files on eight other individuals); *Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d 3, 24-25 (D.D.C. 1998) (holding "Glomar" response appropriate when

of the existence of particular records in this category may actually serve to legally waive the Agency's ability to later make a "Glomar" response to a FOIA request for those records.[3] Finally, in order to have uniformity throughout the Agency, all FOIA processors faced with such issues should the General Counsel's FOIA officer in Washington, who will consult with the Region regarding the issuance of "Glomar" responses.

existence of records would link named individuals with taking of American hostages in Iran and disclosure would not shed light on agency's performance).

[3] *See Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007) (concluding that CIA director's official acknowledgement of existence of records relating to assassinated foreign official waived agency's ability to issue "Glomar" response to FOIA request for records about that official).

XI. Exemption 7

Exemption 7 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" would cause one of the enumerated harms set forth in subsections 7(A) through 7(F).[1] Exemption 7 protects the government's case by not allowing an opposing litigant earlier or greater access to law enforcement files than he would otherwise have.[2]

A. General Principles

1. Definition of Law Enforcement Purpose

As a threshold matter, in order to successfully invoke Exemption 7, the government has the burden of proving the existence of a compilation for a law enforcement purpose.[3] The requirement that the records be "compiled for law enforcement purposes" does not require that the documents were initially created or collected for a law enforcement purpose.[4] Rather, the compilation also can include documents and materials "already collected by the Government originally for non-law enforcement purposes," and later assembled for law enforcement purposes so long as the compilation occurred prior to "when the Government invokes the Exemption."[5]

[1] 5 U.S.C. § 552(b)(7). Subsection 7(B) deals with records the release of which would deprive a person of a right to a fair trial or an impartial adjudication. Because this exemption rarely arises in our cases, it is not discussed further here. If you receive a request raising issues under this subsection, contact the General Counsel's FOIA officer in Washington for advice.

[2] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224-225 (1978).

[3] *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989); *KTVY-TV, a Div. of Knight-Ridder Broadcasting, Inc. v. United States*, 919 F.2d 1465, 1468-1469 (10th Cir. 1990).

[4] *See generally Jefferson v. U.S. Dep't of Justice, Office of Professional Responsibility*, 284 F.3d 172, 176-177 (D.C. Cir. 2002) (emphasizing that "[i]n assessing whether records are compiled for law enforcement purposes, . . . the focus is on how and under what circumstances the requested files were compiled"); *Melville v. U.S. Dep't of Justice*, 2006 WL 2927575, at *7 (D.D.C. Oct. 12, 2006) (same).

[5] *John Doe Agency*, 493 U.S. at 153-155. *See also Kansi v. U.S. Dep't of Justice,* 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (explaining that once documents become assembled for law enforcement purposes,

Conversely, the Supreme Court has held that information originally compiled for law enforcement purposes continued to meet the threshold requirements of Exemption 7 when it was summarized in a new document created for non-law enforcement purposes.[6]

The Supreme Court has determined that the statutory provision "compiled for law enforcement purposes" must be construed in a "functional way" and that courts must carefully examine "the effect that disclosure would have on the interest the exemption seeks to protect."[7] Law enforcement purposes encompass statutes authorizing administrative regulatory proceedings.[8] Records meet this threshold requirement when they involve the enforcement of an agency's statute or regulation within its authority.[9]

"all [such] documents qualify for protection under Exemption 7 regardless of their original source"); *Hayes v. U.S. Dep't of Labor*, 1998 U.S. Dist. LEXIS 14120, *12 (S.D. Ala. June 18, 1998) (finding that "[r]ecords that are incorporated into investigatory files also qualify for the application of Exemption 7 even though those records may not have been created originally for law enforcement purposes"); *Gould, Inc. v. General Serv. Admin.*, 688 F. Supp. 689, 698 (D.D.C. 1988).

[6] *FBI v. Abramson*, 456 U.S. 615, 631-632 (1982); *see also Exner v. U.S. Dep't of Justice*, 902 F. Supp. 240, 242 n.3 (D.D.C. 1995) (records of FBI organized crime investigation remain entitled to Exemption 7 protection even though "a copy of the documents might also be found in a non-law enforcement file").

[7] *John Doe Agency*, 493 U.S. at 157. *See also Sinsheimer v. U.S. Dep't of Homeland Sec.*, 437 F. Supp. 2d 50 (D.D.C. 2006) (finding threshold requirement satisfied where the investigations at issue were internal agency investigations into instances of alleged sexual misconduct in the workplace); *Lurie v. U.S. Dep't of the Army*, 970 F. Supp. 19, 36 (D.D.C. 1997) (threshold requirement met where investigation focused directly on conduct of identified officials, which could lead to disciplinary proceedings against active military personnel and administrative action against military and civilian employees).

[8] *See Envtl. Prot. Servs. v. EPA*, 364 F. Supp. 2d 575, 587 (N.D. W. Va. 2005) (stating that records compiled in EPA's administrative proceeding satisfy law enforcement threshold because Exemption 7 applies to "enforcement of civil laws such as regulations promulgated pursuant to statutes"); *Schiller v. INS*, 205 F. Supp. 2d 648, 659 (W.D. Tex. 2002) (explaining that "law enforcement" for purposes of FOIA includes regulatory proceedings). *See also Kay v. FCC*, 867 F. Supp. 11, 16-18 (D.D.C. 1994) (finding that FCC's statutory authority to revoke licenses or deny license applications qualifies as a "law enforcement" purpose); *Ehringhaus v. FTC*, 525 F. Supp. 21, 22-23 (D.D.C. 1980) (holding that documents prepared as part of FTC investigation into advertising practices of cigarette manufacturers meet threshold).

[9] *See Lewis v. IRS*, 823 F.2d 375, 379 (9th Cir. 1987); *Birch v. U.S. Postal Serv.*, 803 F.2d 1206, 1210-1211 (D.C. Cir. 1986); *Judicial Watch, Inc. v. FBI*, 2001 WL 35612541, *4 (D.D.C. Apr. 20, 2001).

2. Applicability of Exemption 7 to Both Unfair Labor Practice Cases and Representation Cases

Applying the above principles, Exemption 7 is applicable to documents prepared for the investigation and prosecution of unfair labor practice cases.[10] It is also the Board's position with respect to documents created during the investigation of a representation case that such documents meet the threshold of Exemption 7 because, as is the case with unfair labor practice proceedings, the conduct of representation proceedings indisputably lies at the heart of the Board's regulatory responsibilities under the NLRA.[11] Thus, Section 7 of the NLRA grants employees, *inter alia*, the right to bargain collectively through representatives of their own choosing or to refrain from engaging in any concerted or union activity except to the extent that a contract provides for a union security clause.[12] Section 9(c)(1) implements some of these rights by vesting in the Board the power to determine if a "question of representation" exists among employees in a bargaining unit and, if one does exist, to "direct an election by secret ballot" and to "certify the results thereof."[13] Since any representation proceeding may, and many do, form the basis for subsequent unfair labor practice proceedings, the investigations conducted during the representation cases are arguably for "law enforcement purposes."

[10] *See Robbins Tire*, 437 U.S. at 234 (concluding that "Congress intended to preserve existing law relating to NLRB proceedings—case law that had looked to the 'reasons' for the exemption and found them to be present where an unfair labor practice proceeding was pending and the documents sought were potential witnesses' statements").

[11] *Rider v. MacAninch***,** 424 F. Supp. 2d 353, 359 (D. R.I. 2006) (finding in the context of a *Garmon* preemption case, rather than a FOIA context, that the NLRB has primary jurisdiction over disputes involving unfair labor practices or representational issues). *See also Aircraft Gear Corp. v. NLRB*, No. 92-C-6023, slip op. at 10 (N.D. Ill. Mar. 14, 1994) (explaining that documents created in connection with NLRB unfair labor practice cases and union representation cases relate to law enforcement purposes, thereby meeting threshold requirement of Exemption 7).

[12] 29 U.S.C. § 157.

[13] 29 U.S.C. § 159(c)(1).

It has been long held that in such cases, the representation proceeding and the unfair labor practice proceeding "are really one."[14]

3. Treatment of Representation Proceedings by Various Circuit Courts

Though procedures vary, if aimed at enforcement of the NLRA, we think that representation proceedings are "for law enforcement purposes."[15] Consistent with this reasoning, the Fourth Circuit has broadly defined "law enforcement purposes" to find Exemption 7 applicable to affidavits obtained by a Board investigator during his inquiry into union election objections, which the employer later sought after the issuance of an unfair labor practice complaint.[16] The court concluded, "[w]hether or not resulting in an unfair labor practice charge, the Board's purpose [in conducting an investigation during a representation proceeding] was to protect and vindicate rights set out in Section 7.

However, some reviewing courts have been unwilling to find that Exemption 7 covers all representation case material.[17] For example, the Third Circuit held that authorization cards were not "compiled for law enforcement purposes" because law

[14] *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 158 (1941).

[15] *Id*., cited with approval in *Robbins Tire*, 437 U.S. at 226. *See also Clements Wire & Mfg. Co. v. NLRB*, 589 F.2d 894, 897 (5th Cir. 1979) (representation case witness statement protected from disclosure under Exemption 7); *Red Food Stores v. NLRB*, 604 F.2d 324, 325 (5th Cir. 1979) (same); *Anderson Greenwood & Co. v. NLRB*, 604 F.2d 322, 323 (5th Cir. 1979) (same); *Injex Indus. v. NLRB*, 699 F. Supp. 1417, 1419-1420 (N.D. Cal. 1986) (parties did not dispute, and court agreed, that impounded ballots were records compiled for law enforcement purposes even though the election was over and the unfair labor practice case was settled); *Howard Johnson Co. v. NLRB*, 96 LRRM 2214 (W.D.N.Y. 1977) (authorization cards are investigatory records compiled for law enforcement purposes).

[16] *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 429-430 (4th Cir. 1974). *See also Deering Miliken, Inc. v. Irving*, 548 F.2d 1131, 1136 (4th Cir. 1977) ("We do not depart from the sound precedent, including our own, which exempts from disclosure investigatory records compiled for representation and unfair labor practice proceedings.").

[17] However, these documents may well be exempt under other FOIA exemptions. *See, e.g.*, *Madeira Nursing Ctr. v. NLRB*, 615 F.2d 728, 731 (6th Cir. 1980) (holding that "signed union authorization cards or other Board documents which reveal the voting preferences of individual employees" are protected from disclosure under FOIA Exemption 6); *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172, 1183 (5th Cir. 1978) (finding union authorization cards exempt from disclosure under Exemption 6); *Am. Airlines v. NMB*, 588 F.2d 863, 870 (2d Cir. 1978) (authorization card information exempt from disclosure under Exemption 4).

enforcement purposes "must relate to some type of formal proceeding, and one that is pending."[18] The District of Columbia Circuit in dicta has expressed skepticism that *Excelsior* lists were compiled for law enforcement purposes, noting that the lists were "obtained by the Board pursuant to routine pre-election procedures—not as part of a specific investigation into potential unfair labor practices."[19] Additionally, the Fifth Circuit has held that Exemption 7 was inapplicable to marked voting lists indicating whether or not specific voters had voted, despite pending unfair labor practice cases against the employer/requester.[20]

In sum, although the law remains unsettled as to whether all representation case materials meet Exemption 7's threshold requirement, it is clear that the existence of related pending unfair labor practice proceedings at the time of the FOIA request strengthens the Board's position that requested documents were prepared for law enforcement purposes. For example, many courts have protected authorization cards from disclosure if there are pending unfair labor practice charges.[21] If there is no related unfair labor practice case, and the Circuit in which your office falls has been adverse to treating

[18] *Comm. on Masonic Homes of the R.W. Grand Lodge v. NLRB*, 556 F.2d 214, 219 (3d Cir. 1977) (rejecting the Board's argument that the authorization cards should be protected under Exemption 7 because they may be used in a future unfair labor practice proceeding).

[19] *Reed v. NLRB*, 927 F. 2d 1249, 1252 (D.C. Cir. 1991); *see also Birch v. U.S. Postal Serv.*, 803 F.2d 1206, 1209-1210 (D.C. Cir. 1986) (citing *Rural Housing Alliance v. U.S. Dep't of Agric.*, 498 F.2d 73, 81 (D.C. Cir. 1974) for the proposition that with regard to agencies performing both law enforcement and administrative functions, Exemption 7 covers only documents related to specific investigations).

[20] *Avondale Indus. v. NLRB*, 90 F.3d 955, 962 (5th Cir. 1996).

[21] *See Comm. on Masonic Homes*, 556 F.2d at 218-219 (commenting that "the only cases where authorization cards have been the subject of a disclosure request, the employer was also in the midst of an unfair labor practice proceeding," and that in such cases the records "were clearly compiled for law enforcement purposes; *L'Eggs Products, Inc. v. NLRB*, 93 LRRM 2488 (C.D. Cal. 1976) (citing Exemption 7 as grounds for refusing disclosure of all authorization cards, assuming the threshold would be met where the request occurred during a pending unfair labor practice proceeding against the requester); *NLRB v. Biophysics Sys., Inc.*, 91 LRRM 3079, 3081 (S.D.N.Y. 1976) (during pending unfair labor practice proceedings, court denied based on Exemption 7 employer's request for all authorization cards signed by employees).

representation case materials as prepared for law enforcement purposes, contact the General Counsel's FOIA officer in Washington.

B. Exemption 7(A) (Open Cases)

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."[22] Determining its applicability requires consideration of (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.[23]

1. Temporal Nature of Exemption 7(A)

Exemption 7(A) is temporal in nature.[24] This exemption ordinarily applies only so long as the proceeding remains pending or is fairly regarded as prospective.[25] To satisfy its burden, the Agency must generally identify a concrete proceeding for which disclosure of the requested documents could reasonably be expected to cause harm.[26]

[22] 5 U.S.C. § 552(b)(7)(A).

[23] *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995); *Long v. U.S. Dep't. of Justice*, 450 F. Supp. 2d 42, 73 (D.D.C. 2006); *Judicial Watch v. FBI*, 2001 WL 35612541,*4 (D.D.C. Apr. 20, 2001); *Wichlacz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 331 (E.D. Va. 1996).

[24] The other subsections of Exemption 7 are not temporal.

[25] *Manna*, 51 F.3d at 1165 (ruling that when "prospective criminal or civil (or both) proceedings are contemplated," information is protected from disclosure); *Local 32B-32J, Serv. Employees Int'l Union, AFL-CIO v. General Serv. Admin.*, 1998 WL 726000, *8 (S.D.N.Y. Oct. 15, 1998) (explaining that Exemption 7(A) applies to both prospective law enforcement proceedings and to pending proceedings); *Kilroy v. NLRB*, 633 F. Supp. 136, 143 (S.D. Ohio 1985) (holding that documents related to closed cases do not qualify for protection under Exemption 7(A), since courts have uniformly recognized that this exemption applies only to pending enforcement proceedings).

[26] *Scheer v. U.S. Dep't of Justice*, 35 F. Supp. 2d 9, 12 (D.D.C. 1999); *see also In Def. of Animals v. HHS*, 2001 U.S. Dist. LEXIS 24975, *9 (D.D.C. Sept. 28, 2001) (concluding that an "anticipated filing satisfies FOIA's requirement of a reasonably anticipated, concrete prospective law enforcement proceeding"; *Ehringhaus*, 525 F. Supp at 22-23 (finding "a concrete and foreseeable possibility . . . that enforcement litigation will ensue" where the agency was engaged in an active investigation and devoted substantial resources to it).

The exemption remains viable throughout the duration of long-term investigations.[27] Moreover, even after a proceeding is finally closed, the exemption may remain applicable if the agency can demonstrate that disclosure of requested information could be expected to interfere with a related, pending proceeding.[28] This is especially so where, for example, the cases involve similar or interrelated facts, the same employer, and a close temporal relationship.[29] Exemption 7(A) may also be invoked when an investigation has been terminated but an agency retains oversight or some other continuing enforcement-related responsibility. Thus, a district court found that although the election was over and the unfair labor practice case settled, the exemption protected impounded ballots because disclosure could interfere with the Board's authority to conduct future representation elections.[30]

2. Need to Articulate Potential Harm if Information is Disclosed

Even where law enforcement proceedings are pending or prospective, the government must establish that the release of information could reasonably be expected to cause some articulable harm. The government does not have to establish harm on a document-by-document basis, but may instead specify generic categories of documents and the harm that would result from their release.[31] However, an agency must review each document in order to assign the document to the proper category and explain to the

[27] *Africa Fund v. Mosbacher*, 1993 WL 183736, *4 (S.D.N.Y. May 26, 1993) (finding that documents that would interfere with lengthy or delayed investigation fall within protective ambit of Exemption 7(A)).

[28] *See, e.g.*, *New England Med. Ctr. Hosp. v. NLRB*, 548 F.2d 377, 385-386 (1st Cir. 1976); *Solar Sources v. United States*, 142 F.3d 1033, 1040-1041 (7th Cir. 1998).

[29] *New England Med. Ctr.*, 548 F.2d at 385-386.

[30] *Injex Indus.*, 699 F. Supp at 1419-1420.

[31] *Robbins Tire*, 437 U.S. at 236 (1978); *Powers v. U.S. Dep't of Justice*, 2006 U.S. Dist. LEXIS 62756, *28-29 (E.D. Wis. Sept. 1, 2006); *Maydak v. U.S. Dep't of Justice*, 218 F.3d 760, 763 (D.C. Cir. 2000); *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64, 66-67 (D.C. Cir. 1986); *see also U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776-780 (1989) (allowing a categorical balancing approach in Exemption 7(C)).

reviewing court how each category would interfere with enforcement proceedings.[32] The fact that the government may justify non-disclosure on a categorical basis does not, however, eliminate the need to review each document line-by-line and to disclose those portions of each document that are reasonably segregable and not otherwise exempt.[33]

Regarding Board records for which Exemption 7(A) is claimed, "[f]oremost among the purposes of Exemption 7 is to prevent harm to the government's case in court."[34] In *Robbins Tire*, the Supreme Court observed that "the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding was precisely the kind of interference that Congress [wanted] to protect against."[35] Accordingly, the Court found that witness statements in pending unfair labor practice proceedings were exempt under the FOIA because of the risk that witness intimidation might interfere with enforcement proceedings, and because premature disclosure of witness statements could provide a suspected violator with advance access to an agency's case.[36]

3. FOIA Is Not A Discovery Tool

The FOIA is not intended to function as a private discovery tool.[37] Thus, protections extend to any documents whose release would enable potential litigants to tailor their defense or otherwise obtain an unfair litigation advantage by premature disclosure. For example, documents that would reveal preliminary evidence supporting a

[32] *Bevis v. U.S. Dep't of State*, 801 F.2d 1386, 1389-1390 (D.C. Cir. 1986); *In re U.S. Dep't of Justice*, 999 F.2d 1302, 1309-1310 (8th Cir. 1993); *Gavin v. SEC*, 2005 WL 2739293, *3-4 (D. Minn. Oct. 24, 2005); *Kay v. FCC*, 867 F. Supp. 11, 18 (D.D.C. 1994); *but see Owens v. U.S. Dep't of Justice*, 2006 WL 3490790, *5-6 (D.D.C. Dec. 1, 2006) (finding that Agency failed to complete the three requirements necessary for adopting a generic approach to categorizing documents).

[33] *See generally, Curran v. U.S. Dep't of Justice***,** 813 F.2d 473, 475 (1st Cir. 1987).

[34] *Kilroy v. NLRB*, 633 F. Supp. 136, 142 (S.D. Ohio 1985), *aff'd*, 823 F.2d 553 (6th Cir. 1987); *see also Maydak*, 218 F.3d at 762.

[35] *Robbins Tire*, 437 U.S. at 232.

[36] *Id.* at 239-241.

[37] *Id.* at 242; *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 644 F.2d 969, 982 (3d Cir. 1981).

contemplated agency action, the focus of the investigation, strategy, the strengths and weaknesses of an agency's case, and the amount of resources devoted to the investigation are protected to prevent potential litigants from altering their litigation strategy and pre-complaint activities to frustrate the imposition of effective remedies, or from changing their responses to subsequent information requests.[38]

4. Compliance Cases

Compliance cases require a different analysis in determining whether the Agency can rely on Exemption 7(A) to protect documents from disclosure. Where the underlying unfair labor practice controversy has been resolved and when "all that remains is the largely objective task" of calculating back pay, Exemption 7(A) is generally inapplicable because no harm would occur from disclosing requested information.[39] However, where there is an ongoing investigation as to compliance with an enforced Board order, the documents sought under the FOIA may be protected under Exemption 7(A) even though the underlying unfair labor practice proceeding had been concluded because "reinstatement of the employees depends on their explanation for retiring, resigning or refusing employment."[40] Consequently, where the compliance issue is more complex than the mere mathematical computation of back pay, Exemption 7(A) would be applicable. Where an issue arises whether Exemption 7(A) can be asserted to protect

[38] *Ehringhaus v. FTC*, 525 F. Supp. 21, 23-24 (D.D.C. 1980) (disclosure of documents relating to a survey to gather potential evidence for use in a future law enforcement adjudication would allow potential litigants insights into the FTC's strategy and evidence which it would not be able to obtain through established discovery procedures); *J.P. Stevens & Co. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983) (premature disclosure would "hinder [agency's] ability to shape and control investigations"); *Kay v. FCC*, 867 F. Supp. 11, 19 (D.D.C. 1994) (finding that disclosure of the documents "could interfere with enforcement proceedings by exposing the scope and nature of the pending investigation").

[39] In *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131 (4th Cir. 1977), the court, applying the reasoning of *Robbins Tire*, categorized the pure calculation of back pay as being a "mathematical computation[]," which would not be protected by Exemption 7(A).

[40] *Alaska Pulp Corp. v. NLRB*, No. 90-1510D, slip op. at 2 (W.D. Wash. Nov. 4, 1991) (unpublished).

from disclosure documents in a compliance case, the Region is required to contact the General Counsel's FOIA officer in Washington for guidance.

5. Summary

In conclusion, where the release of information could reasonably be expected to cause some articulable harm to a pending or prospective law enforcement proceeding, the information can be withheld under Section 7(A). However, if a case is no longer open and there is no foreseeability of interfering with other future proceedings, Exemption 7(A) can not be claimed. For purposes of this FOIA Manual, representation proceedings are not considered closed so long as there is a reasonable expectation that a "test of certification" 8(a)(5) charge may result or an open related case exists.

C. Exemption 7(C)

Exemption 7(C) permits an agency to withhold information compiled for law enforcement purposes where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Exemptions 6 and 7(C) are worded similarly and both involve balancing the need for protection of private information against the public benefit to be obtained by disclosure of information concerning the Agency's "performance of its statutory duties."[41] Thus, much of what is discussed in Exemption 6, *supra*, is applicable to Exemption 7(C).[42]

Initially, both exemptions require identification of the privacy interest involved; all of the privacy interests and principles discussed in connection with Exemption 6,

[41] *Reporters Comm.*, 489 U.S. at 773; *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, 73 F.3d 93, 96 (6th Cir. 1996), *reh'g and suggestion for reh'g en banc denied* Apr. 15, 1996.

[42] *See U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 496 & n.6 (1994); *McDonnell v. United States*, 4 F.3d 1227, 1252-1253 (3d Cir. 1993).

above, apply to Exemption 7(C).[43] In particular, individuals have an obvious privacy interest in keeping secret the fact that they were subjects of a law enforcement investigation.[44] The courts have recognized that government informants and third persons mentioned in government files have a strong 7(C) privacy interest and deserve protection of their identities in conjunction with or in lieu of protection under Exemption 7(D), which protects confidential sources.[45] Further, the courts of appeals have instructed that the "personal identifiers" of government informants, third persons, and government employees, that is, information about the individuals in Agency files that could reveal their identities, must also be protected under 7(C).[46]

Moreover, the passage of time will not ordinarily diminish the privacy interests at stake in Exemption 7(C).[47] In addition, persons mentioned in law enforcement records

[43] *See FLRA v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 509 (2d Cir. 1992) ("That Exemptions 6 and 7(C) provide differing levels of protection once a privacy interest is implicated is irrelevant to determining the sort of privacy interest that must first be shown before protection is afforded at all.").

[44] *See, e.g.*, *NARA v. Favish*, 541 U.S. 157, 166 (2004).

[45] *See Favish*, 541 U.S. at 166; *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Neely v. FBI*, 208 F.3d 461, 464 (4th Cir. 2000); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third parties mentioned in governmental files have a "strong" privacy interest in non-disclosure of their identities); *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991); *Cuccaro v. Sec'y 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 of their names where disclosure could cause harassment or embarrassment); *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985) (disclosure of authors and subjects of affidavits that described "in painful detail the personalities, activities, biases and proclivities of employers, union members and officials" could cause substantial risk of embarrassment and reprisal); *L & C Marine Transp. Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984) (explaining that "[t]he privacy interest does not encompass . . . only those matters which involve intimate details of an individual's life" and protecting the identities of employee-witnesses in an OSHA investigation); *Alirez v. NLRB*, 676 F.2d 423, 427 (10th Cir. 1982) (disclosure of statements that described threats of violence against employees involved in employment dispute, allegations of assault by discriminatee, charges of sexual deviancy by an employee, and statements regarding the union would potentially subject Board informants and others to embarrassment or reprisals); *Kilroy v. NLRB*, 633 F. Supp. 136, 145 (S.D. Ohio 1985) (names and telephone numbers of affiants exempt), *aff'd*, 823 F.2d 553 (6th Cir. 1987) (unpublished table decision).

[46] *See SafeCard Servs.*, 926 F.2d at 1205-1206; *Nation Magazine*, 71 F.3d at 896; *Van Bourg, Allen, Weinberg & Roger*, 751 F.2d at 985. *See* Chapter XVI. Processing FOIA Requests, Section E. for a discussion of redactions.

[47] *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999) ("Confidentiality interests cannot be waived through . . . the passage of time."); *McDonnell*, 4 F.3d at 1256 (passage of 49 years does not negate

do not lose all their rights to privacy merely because their names have been disclosed.[48] In addition, the "practical obscurity" concept expressly recognizes that the passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge but has long since faded from memory.[49] However, because the deceased are considered to have little or no privacy rights (*see* Chapter IX. Exemption 6), if it appears reasonable to conclude that the person whose privacy is at issue may have passed away, the FOIA processor should contact the General Counsel's FOIA officer in Washington, regarding appropriate searches and responses.

Assuming a cognizable privacy interest has been identified, both exemptions next require a determination of whether the requester has asserted the type of public interest described in the *Reporters Committee* decision (*see* Chapter IX. Exemption 6 discussion).

individual's privacy interest); *Maynard v. CIA*, 986 F.2d 547, 566 n.21 (1st Cir. 1993) (effect of passage of time upon individual's privacy interests found "simply irrelevant" when FOIA requester was unable to suggest a public interest in disclosure).

[48] *See, e.g.*, *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1047 (9th Cir. 1999) (concluding that privacy interests are not lost by reason of earlier publicity); *Halpern*, 181 F.3d at 297; *Kimberlin v. U.S. Dep't of Justice*, 139 F.3d 944, 949 (D.C. Cir. 1998) (finding that even after subject's public acknowledgment of charges and sanction against him, he retained privacy interest in non-disclosure of "'details of investigation, of his misconduct, and of his punishment,'" and in "preventing speculative press reports of his misconduct from receiving authoritative confirmation from official source"). *But see Detroit Free Press, Inc.*, 73 F.3d at 97 (mug shots not exempt from disclosure where indictees had already been identified by name by federal government and their faces revealed during prior judicial appearances); *Nation Magazine*, 71 F.3d at 894 n.8 (individual waived his right to 7(C) protection of his identity by publicly claiming to have done the things that documents responsive to the FOIA request discuss); *Akron Standard Div. of Eagle-Picher Indus. v. Donovan*, 780 F.2d 568, 572 (6th Cir. 1986), *reh'g denied*, 788 F.2d 1223 (6th Cir. 1986) (information relating to job performance that "had been fully explored in public proceedings" not exempt where public had an interest in disclosure of nature and extent of agency investigation of alleged retaliation). *See also* Chapter XIII. Waiver.

[49] *See Reporters Comm.*, 489 U.S. at 767; *Rose v. U.S. Dep't 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."), *aff'd*, 425 U.S. 352 (1976); *see also Assassination Archives & Research Ctr. v. CIA*, 903 F. Supp. 131, 133 (D.D.C. 1995) (finding that passage of 30 or 40 years "may actually increase privacy interests, and that even a modest privacy interest will suffice" to protect identities); *see generally Favish*, 541 U.S. at 173-174 (according full privacy protection without any hesitation, notwithstanding 10 years' passage since Vincent Foster's death). Thus, even though information may have been made available to the general public at some place and time, if such information actually were "freely available," there would be no reason to invoke the FOIA to gain access to it. *Reporters Comm.*, 489 U.S. at 762-763, 780.

Then, if both privacy and public interests exist in a particular case, these interests must be weighed against one another. It is in this balancing where the statutory differences between the two exemptions come into play, creating a lesser burden to withhold information under Exemption 7(C).

Exemption 7(C)'s language establishes a lesser burden of proof to justify withholding in two distinct respects.[50] First, it is well established that the omission of the word "clearly" from the language of 7(C) eases the burden of the agency and stems from the recognition that law enforcement records are especially invasive of privacy. As the Supreme Court explained:

> Law enforcement documents obtained by Government investigators often contain information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance. There is special reason, therefore, to give protection to this intimate personal data, to which the public does not have a general right of access in the ordinary course. [*Reporters Committee*, 489 U.S. at 773.] In this class of cases where the subject of the documents 'is a private citizen,' 'the privacy interest. . . is at its apex.' *Id.* at 780.

Favish,[51] Second, the Freedom of Information Reform Act of 1986 further broadened Exemption 7(C)'s protection by lowering the risk-of-harm standard from "would" to "could be reasonably expected to," thereby easing the standard for evaluating a threatened privacy invasion from disclosure of law enforcement records.[52] One court, in interpreting the amended language, opined that it affords the agency "greater latitude in

[50] *See Favish*, 541 U.S. at 165-166 (explaining Exemption 7(C)'s "comparative breadth").

[51] *Id*. at 166. *See also Iglesias v. CIA*, 525 F. Supp. 547, 562-563 (D.D.C. 1981) (withholding information consisting of "names or other personal identifying data of witnesses, affiants, interviewees, persons under investigation or suspected of criminal activity and unidentified third persons" because such individuals are "arguably entitled to the highest degree of privacy, since the release of their names would connect them with various investigations"); *Cong. News Syndicate v. U.S. 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.").

[52] *See Reporters Comm.*, 489 U.S. at 756 n.9; *Stone v. FBI*, 727 F. Supp. 662, 665 (D.D.C. 1990) (stating that the 1986 FOIA amendments have "eased the burden of an agency claiming that exemption"), *aff'd*, No. 90-5065 (D.C. Cir. Sept. 14, 1990).

protecting privacy interests" in the law enforcement context.[53] Such information "is now evaluated by the agency under a more elastic standard; exemption 7(C) is now more comprehensive."[54]

In *Reporters Committee* (detailed discussion in Chapter IX. Exemption 6, *supra*), the Supreme Court also emphasized the desirability of establishing "categorical balancing" under Exemption 7(C) as a means of achieving "workable rules" for processing FOIA requests.[55] In doing so, the Supreme Court recognized that entire categories of types of information 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."[56] 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.[57] Some well-established types of information that have been held suitable for this type of balancing include: *Excelsior* lists, voter affidavits, home addresses, home telephone numbers and social security numbers (*see* Chapter IX. Exemption 6). In order to have uniformity throughout the Agency, all FOIA processors

[53] *Wash. Post Co. v. U.S. Dep't of Justice*, No. 84-3581, 1987 U.S. Dist. LEXIS 14936, at *32 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), *adopted* (D.C. Cir. Dec. 15, 1987), *rev'd on other grounds and remanded*, 863 F.2d 96 (D.C. Cir. 1988).

[54] *Id.*; *see also Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 346 (D.C. Cir. 1987); *Nishnic v. U.S. Dep't 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 phrase "likely to materialize").

[55] *Reporters Comm.*, 489 U.S. at 776-780.

[56] *Id.* at 780.

[57] *SafeCard Servs.*, 926 F.2d at 1206 (holding "categorically 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 exempt from disclosure").

Categorical withholding may also be used for certain types of information under Exemption 6, such as *Excelsior* lists. *Reed v. NLRB*, 927 F.2d 1249, 1251-1252 (D.C. Cir. 1992). *See* Chapter IX. Exemption 6.

should contact the General Counsel's FOIA officer in Washington for approval when recommending the use of categorical withholding for any other "type of information," in addition to the types listed herein.

When a request is focused on records concerning identifiable individuals whose privacy is at issue, it may be necessary to go beyond a mere denial of access to the records or redaction of certain parts of the records and to refuse to confirm or deny that any responsive records exist (a "Glomar" response).[58] This approach is appropriate whenever the mere acknowledgment of the existence of records would cause an invasion of privacy. In order to have uniformity throughout the Agency, all FOIA processors should contact the General Counsel's FOIA officer in Washington, who will consult with the Region regarding the issuance of "Glomar" responses. *See* Chapter X. The "Glomar" Principle.

D. Exemption 7(D)

As previously stated, to qualify under Exemption 7, documents must meet the threshold test of being "records or information compiled for law enforcement purposes but only to the extent that the production of such law enforcement records or information could reasonably" threaten one of the enumerated harms set forth in subsections 7(A) through 7(F).[59] It is settled that Board documents, such as confidential witness affidavits taken in the course of a pending unfair labor practice investigation, meet this threshold.[60]

[58] *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (dealing with request for records regarding CIA's secret operations using Glomar Explorer submarine-retrieval ship).

[59] 5 U.S.C. § 552(b)(7).

[60] *See generally NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978); *Electri-Flex Co. v. NLRB*, 412 F. Supp. 698, 703-704 (N.D. Ill. 1976) (affidavits protected under Exemption 7(A)). Exemption 7 also applies to documents created during the investigation of a representation proceeding, since the conduct of a representation proceeding indisputably lies at the heart of the Board's regulatory responsibilities under the NLRA. Exemption 7(D) may therefore be used to withhold source-identifying information in confidential witness affidavits during the investigation of a representation case where there

Exemption 7(D) permits an agency to withhold from disclosure records or information that "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 . . . ."[61] This first clause of Exemption 7(D), which applies to any civil or criminal law enforcement records, focuses on the identity of a confidential source, rather than the information provided by the source. [62] The 1974 legislative history of Exemption 7(D) plainly evidences Congress' intent to absolutely and comprehensively protect the identity of anyone who provided information to a government agency in confidence.[63] The relevant inquiry is "not whether the requested document is the type the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential."[64]

It is established that the term "confidential" should be given a broad construction. Indeed, the Supreme Court has explained that "the word 'confidential,' as used in Exemption 7(D), refers to a degree of confidentiality less than total secrecy."[65] In

is a pending unfair labor practice proceeding at the time of the FOIA request. *See* Chapter XI. Exemption 7, Section D. FOIA processors should contact the General Counsel's FOIA officer in Washington before claiming Exemption 7(D) in representation cases where there is no corresponding ULP case.

[61] 5 U.S.C. § 552(b)(7)(D).

[62] Accordingly, the first clause of Exemption 7(D) applies to Board records or information. *See Martinez v. EEOC*, 2004 WL 2359895, * 2 (W.D. Tex. Oct. 19, 2004) (the first prong of the 7(D) exemption applies to civil investigations). The second clause is limited to criminal or lawful national security intelligence investigations and additionally protects the information furnished by the confidential source.

[63] *See* S. Conf. Rep. No. 93-1200, at p. 13; U.S. Code Cong. & Admin. News, pp. 6267, 6291; *Ortiz v. HHS*, 70 F.3d 729, 733, 735 (2d Cir. 1995).

[64] *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993) (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."); *Billington v. U.S. Dep't of Justice*, 233 F.3d 581, 585 (D.C. Cir. 2000) (the "confidentiality analysis proceeds from the perspective of an informant, not [that of] the law enforcement agency").

[65] *See Landano*, 508 U.S. at 174. *See also Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 551 (6th Cir. 2001) 551 (same); *Radowich v. U.S. Attorney*, 658 F.2d 957, 959 (4th Cir. 1981) ("confidential," as used in the exemption, is not to be construed as "secret" but as "given in confidence" or "in trust").

addition, the term "source" has been held to include a broad range of individuals and institutions, including persons who give witness statements to the Board, *i.e.*, "employee-informants."[66] Thus, given the breadth of the exemption's application, Exemption 7(D) may protect Board witnesses even if they are advised that they might later be expected to testify at an eventual hearing.[67]

Thus, Exemption 7(D) permits the Agency to withhold any information furnished by the confidential source that might disclose or point to the source's identity.[68] Protection for source-identifying information extends well beyond the obviously identifying material such as the source's name and address; it also includes information that could reasonably lead to the source's identity, including telephone numbers, time and place of events and meetings, and other information provided by the source that could allow the source's identity to be deduced.[69] 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.[70]

Exemption 7(D) assures that confidential sources are protected from retaliation so as to prevent the loss of valuable sources of information.[71] Moreover, given the broad

[66] *See United Techs. Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985).

[67] *See Landano*, 508 U.S. at 172, and cases cited in this Chapter at nn.108 and 109.

[68] *See Radowich v. U.S. Attorney*, 658 F.2d at 960 n.10.

[69] *See, e.g.*, *Ajluni v. FBI*, 947 F. Supp. 599, 606 (N.D.N.Y. 1996) (information that was of a sufficiently specific and particularized nature such that disclosure would result in, at the very least, the narrowing to a limited group of individuals who may have revealed information to FBI, properly withheld); *Hale v. U.S. Dep't of Justice*, 226 F.3d 1200, 1204 n.2 (10th Cir. 2000) (court allowed government to submit separate in camera affidavit so as not to jeopardize witness confidentiality where "case took place in small town where most everyone knew everyone else. . . ."); *L & C Marine Transp., Ltd. v. U.S.*, 740 F.2d 919, 923-925 (11th Cir. 1984) (names and other identifying information that could "match" the identity of employee-witnesses to their statements found exempt); *cf. Alirez v. NLRB*, 676 F.2d 423, 427 (10th Cir. 1982) (protecting under Exemption 7(C) identifying information that could "potentially subject [ ] Board informants . . . to embarrassment or reprisals" within small, intimate workplace setting).

[70] *See United Techs. Corp.*, 777 F.2d at 95 (Board agent identity properly withheld where only purpose of disclosure would be to facilitate discovery of confidential source).

[71] *See id.* ("Employees are the principal, and in many cases the sole, source of the Board's information in unfair labor practice cases . . . . The Board's ability to grant adequate assurances of

scope of this exemption, Exemption 7(D) may effectively cover all information contained in confidential witness affidavits and other submitted information from which the source can be identified, regardless of whether a requester is speculating or is certain that it already knows the name of the confidential witness, or if the witness' identity has previously been disclosed.[72] *See also* cases cited in Chapter XIII. Waiver.

Significantly, because the applicability of Exemption 7(D) hinges on the circumstances under which the information is provided and not on the public interest in the record, no balancing is required under the case law of Exemption 7(D).[73] This is in contrast to Exemptions 6 and 7(C), which protect against unwarranted invasion of personal privacy. Additionally, unlike under Exemptions 6 and 7(C), the safeguards of Exemption 7(D) remain wholly undiminished by the death of the source.[74]

Accordingly, FOIA processors can withhold confidential witness affidavits in their entirety where merely redacting the document would not be sufficient to protect the

confidentiality is therefore essential to its ability to receive information"). *See also Brant Constr. Co. v. EPA*, 778 F.2d 1258, 1262 (7th Cir. 1985) ("The courts have thus recognized the need to provide a 'robust' 7(D) exemption to ensure that agencies are not unduly hampered in their investigations and that their confidential sources are not lost because of retaliation against the sources for past disclosure or because of the sources' fear of future disclosure"); *McDonnell v. United States*, 4 F.3d 1227, 1258 (3d Cir. 1993) ("the 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").

[72] *See, e.g., Neely v. FBI*, 208 F.3d 464, 466 (4th Cir. 2000) (Exemption 7(D) may be invoked to protect identities of confidential sources whose identities were previously disclosed); *Shafmaster Fishing Co. v. United States*, 814 F. Supp. 182, 185 (D.N.H. 1993) (Exemption 7(D) applies even where requester "allegedly knows the identities of the sources;" source's identity or information provided need not be "secret" to justify withholding).

[73] *See, e.g., Jones v. FBI*, 41 F.3d 238, 247 (6th Cir. 1994) (clarifying that Exemption 7(D) "does not involve a balancing of public and private interests; if the source was confidential, the exemption may be claimed regardless of the public interest in disclosure"); *McDonnell v. United States*, 4 F.3d at 1257 (stating that Exemption "7(D) does not entail a balancing of public and private interests"); *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1487 n.8 (11th Cir. 1992) (holding that "[o]nce 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.").

[74] *McDonnell*, 4 F.3d at 1258; *Blanton v. U.S. Dep't of Justice*, 63 F. Supp. 2d 35, 49 (D.D.C. 1999).

source's identity.[75] In short, Exemption 7(D) safeguards all information provided by the source that could allow the source's identity to be deduced.[76]

1. Witness Confidentiality Assurances

As stated above, the relevant inquiry for Exemption 7(D) protection is "whether the particular source spoke with an understanding that the communication would remain confidential."[77] That is, the identity of a source will be protected under Exemption 7(D) whenever an agency can show that the source either "provided information under an express assurance of confidentiality or in circumstances from which an assurance could be reasonably inferred."[78] As discussed below, as a matter of the Agency's FOIA policy and practice, the Agency generally claims Exemption 7(D) based on the written express assurances of confidentiality given to witnesses during the investigation of a case. As explained below, the Agency claims implied assurances of confidentiality in very limited circumstances.

a. Express Assurances of Confidentiality

"[A]n express promise of confidentiality is 'virtually unassailable' [and is] easy to prove: 'The [agency] need only establish the informant was told his name would be held

[75] *See Martinez*, 2004 WL 2359895 at *5 ("Release of the witness statements with redacted identifying information would allow Plaintiff, or others with knowledge of the investigation, including Plaintiff's former employer, to narrow the list of employees and risk divulging the identities "); *Ibarra-Cortez v. DEA*, 36 F.App'x 598, 599 (9th Cir. 2002) (documents withheld in full because the requester "might be able to deduce the identity of the informants because they deal with specific events and circumstances").

[76] *See also Akron Standard Div. of Eagle-Picher Indus., Inc. v. Donovan*, 780 F.2d 568, 573 (6th Cir. 1986) (OSHA withheld full text of affidavit where "it would be too easy to figure out who made each statement" because so few witnesses were involved and because too many unique details would be found in each statement; circuit remanded issue whether remaining witness statements could be redacted "safely" to protect the identity of persons who furnished information); *Pollard v. FBI*, 705 F.2d 1151, 1155 (9th Cir. 1983) (court held entire document protected since it would tend to reveal source's identity); *Lloyd and Henniger v. Marshall*, 526 F. Supp. 485, 487 (M.D. Fla. 1981) (relying in part on *NLRB v. Robbins Tire*, court affirmed OSHA's refusal to release "any statement that might reveal [employee-witnesses'] identities" under 7(D)).

[77] *Landano*, 508 U.S. at 172.

[78] *Id.* (citation omitted); *United Techs. Corp*, 777 F.2d at 93.

in confidence.'"[79] To support such a promise, the Agency must present "probative evidence that the source did in fact receive an express grant of confidentiality."[80] Such evidence can take a wide variety of forms, including notations on the face of the withheld document indicating an express promise;[81] statements from the actual investigating agent, witness, or source involved in which they attest to their personal knowledge of the express assurance of confidentiality;[82] specific Agency practices or procedures regarding our consistent treatment of confidential source;[83] or by some combination of the above.[84]

The express assurance of confidentiality is integral to the functioning of the Agency. The Agency's investigations are dependent on informants' information, and assuring the confidentiality of these witnesses is necessary to allay, as much as possible, the fears that they may be subject to retaliation, harassment, or violence for their cooperation with the Agency.[85] Absent such an express assurance of confidentiality, a witness might not be willing to come forward and provide a signed statement. It is long settled that Board witnesses—both employees and non-employees—are subject to

[79] *See Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 814 (9th Cir. 1995), quoting *Wiener v. FBI*, 943 F.2d 972, 986 (9th Cir. 1991).

[80] *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1061 (3d Cir. 1995).

[81] *See, e.g., Neely*, 208 F.3d at 466 (remanding with instructions that if the "district court finds that the [withheld] documents . . . do in fact, as the FBI claims, bear evidence 'on their face' of 'express promises of confidentiality,' . . . then the FBI would most likely be entitled to withhold such documents").

[82] *Martinez*, 2004 WL 2359895, at *4 (investigator affidavit); *Billington v. U.S. Dep't of Justice*, 301 F. Supp. 2d 15, 22 (D.D.C. 2004) (finding that in camera affidavit of source "confirms that the source . . . was assured [with] an express grant of confidentiality"); *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 906 (D.C. Cir. 1996) (affidavits from Agency official and source confirming source received confidentiality assurance).

[83] *Campbell v. U.S. Dep't of Justice*, 193 F. Supp. 2d 29, 42 (D.D.C. 2001) (express promise of confidentiality established in part by "Bureau Bulletins issued by the FBI headquarters" and the FBI's "Manuals of Rules and Regulations that deal with confidential sources that were in effect at the time the information . . . was gathered"); *Providence Journal v. U.S. Dep't of Army*, 981 F.2d at 555, 565 (1st Cir. 1992) (finding express promises of confidentiality for 24 individuals based upon Inspector General regulation); *L & C Marine Transp., Ltd.*, 740 F.2d at 924 n.5 (express assurance found based on investigator's affidavit discussing established OSHA procedure).

[84] *Ferguson v. FBI*, 83 F.3d 41, 42-43 (2d Cir. 1996) (information withheld under Exemption 7(D) based on express assurances supported by detailed affidavit, information in the documents themselves or in the source's informant file).

[85] *United Techs. Corp.*, 777 F.2d at 94; *L & C Marine Transp. Ltd.*, 740 F.2d at 924; *T.V. Tower v. Marshall*, 444 F. Supp. 1233, 1235-1236 (D.D.C. 1978).

coercion or intimidation by employers and/or unions for participating in NLRB proceedings.[86] As a result of such pressures, if a witness knows his statement will be disclosed, "he is less likely . . . to make an uninhibited and non-evasive statement" to the Board.[87]

As part of the Agency's standard investigatory practice and in conformity with Agency procedures, Board agents routinely provide Board witnesses with an express written assurance of confidentiality on the face of their signed witness affidavit. After appropriate review, FOIA processors can protect confidential witness affidavits by claiming Exemption 7(D) based on express assurances of confidentiality in virtually every case. In the event a FOIA request becomes the subject of a lawsuit, the Region should be prepared to provide a supporting declaration from the Board agent or other Regional official who has personal knowledge or is familiar with the witness to further support the existence of such assurance.[88] The Agency would only consider claiming implied confidentiality where an express assurance was not given, and where all of the surrounding circumstances of a case are such that an expectation of confidentiality by a particular witness can be inferred.

b. Implied Assurances of Confidentiality

Absent proof that an express assurance was given to a witness, the Agency may rely on the particular circumstances under which a witness provided information to the Board agent to argue that an implied assurance of confidentiality should be inferred as a basis for claiming Exemption 7(D). This could occur if a source's identity could be

[86] *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-240 (1978).
[87] *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 430 (4th Cir. 1974).
[88] *Martinez*, 2004 WL 2359895, at *4 (agency's statement of the actual investigator who made the assurances to the witnesses was sufficient to establish express assurance even where there was no evidence that an assurance of confidentiality was memorialized in another document).

revealed through documents submitted as evidence (*e.g.*, handwritten notes) and there are circumstances present that show that the witness understood that the evidence was submitted in confidence.[89] Proving an implied grant of confidentiality will require the Agency to meet a higher evidentiary standard set forth in *Landano* by analyzing confidentiality on a case-by-case basis.[90]

In *Landano*, the Supreme Court considered the Exemption 7(D) status of sources who furnish information to federal law enforcement agencies with only implied assurances of confidentiality.[91] Most of the law enforcement sources involved in *Landano* fell into this category and, based upon then-existing case law, were simply presumed by the defendant Federal Bureau of Investigation to be confidential sources entitled to Exemption 7(D) protection. The Supreme Court flatly rejected the use of such a "presumption of confidentiality" under Exemption 7(D). Instead, the Supreme Court held that an agency seeking to establish the applicability of Exemption 7(D) must take a "more particularized approach" in order to satisfy the exemption's confidentiality requirement.[92] Where the source in question was not expressly assured of confidentiality by the agency, the agency must examine all of the surrounding "circumstances" under which the information was furnished by the source, leading to a case-by-case judgment as to whether the expectation of confidentiality by that source reasonably can be inferred.[93] In its decision, the Supreme Court identified the "factors" to be examined in this process--most prominently, the "nature of the crime that was investigated" and "the source's

[89] *See, e.g.*, *Stone v. Def. Investigative Serv.*, 816 F. Supp. 782, 788 (D.D.C. 1993) (identity of informant and the information provided under an implied promise of confidentiality held protected where the information was "so singular that to release it would likely identify the individual, particularly to a knowledgable party").

[90] *See Wiener*, 943 F.2d at 986.

[91] *Landano*, 508 U.S. at 172.

[92] *Id.* at 180.

[93] *Id.*

relation to the crime."[94] The Court did state that such specific showings of confidentiality can be made on a "generic" basis when "certain circumstances characteristically support an inference of confidentiality."[95] Since *Landano*, courts have recognized that a key consideration in determining whether implied confidentiality exists is the potential for retaliation against the source, for instance, threats to a witness' physical safety.[96] In situations where revealing a witness' identity could threaten the witness' physical safety, FOIA processors should also claim Exemption 7(F). *See* Chapter XI. Exemption 7, section F. Further, the "danger of retaliation encompasses more than the source's physical safety"[97] and this includes findings of implied confidentiality in workplace retaliation cases.[98]

2. Exemption 7(D) Protection Is Rarely Waived

Once the existence of confidentiality under Exemption 7(D) is established, "almost nothing can eviscerate the Exemption 7(D) protection."[99] Courts have consistently recognized that its protections are not lost through the passage of time[100] or by the fact that an investigation has been closed.[101]

[94] *Id.* at 179.

[95] *Id.* at 177, 179.

[96] *See, e.g.*, *Wilson v. DEA*, 414 F. Supp. 2d 5 (D.D.C. 2006) (implied promise for informant who provided information in an illegal drug trade investigation because of the violence and risk of reprisal attendant to this type of crime); *Dohse v. Potter*, 2006 WL 3799801 (D.Neb. Feb. 16, 2006) (implied promise of confidentiality in the context of an investigation into threats by a disgruntled former postal contractor).

[97] *Ortiz v. HHS*, 70 F.3d 729, 733 (2d Cir. 1995), citing *Irons v. FBI*, 880 F.2d 1446, 1451 (1st Cir. 1989) (en banc).

[98] *See Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 488 (2d Cir. 1999) (recognizing that retaliation "may constitute workplace harassment, demotions, job transfers or loss of employment"); *United Techs. Corp.*, 777 F.2d at 94 (finding that fear of employer retaliation may give rise to a justified expectation of confidentiality); *Halpern*, 181 F.3d 279, 299-300 (2d Cir. 1999) (holding that fear of retaliation in meatpacking industry during union movement in 1930's and 1940's satisfied *Landano* standard).

[99] *Reiter v. DEA*, 1997 WL 470108, at *6-7 (D.D.C. Aug. 13, 1997) (unreported) (finding continued, "indefinite" protection for "publicly identified informants" who had testified in open court), *aff'd*, 1998 WL 202247 (D.C. Cir. Mar. 3, 1998). *See also* Chapter XIII. Waiver.

[100] *Halpern*, 181 F.3d at 300.

[101] *See Ortiz*, 70 F.3d at 733.

Nothing in the FOIA supports the doctrine of waiver of express or implied assurances of confidentiality, and Exemption 7(D) case law explicitly rejects it. That is, as set forth by the First Circuit in *Irons v. FBI*, the statute contains no waiver language, the legislative history indicates that Congress intended the FOIA to be literally interpreted in order to protect the source and the flow of information to the government, the courts have broadly applied Exemption 7(D) and almost all have rejected waiver even where the source has been publicly identified,[102] and any judicial effort to create a waiver exception would be contrary to the statute's intent to provide workable rules.[103] As a result, in most circumstances, the identity of a confidential source is not waived,[104] and can be withheld under Exemption 7(D), even if the identity of the source becomes known through other means, such as discovery in court proceedings,[105] the disclosure during the course of an agency proceeding under the *Jencks* rule,[106] news leaks,[107] or the source's

[102] *See Neely v. FBI*, 208 F.3d at 466 (observing that, "as our sister circuits have held, the statute by its terms does not provide for . . . waiver."); *Jones v. FBI*, 41 F.3d 238, 249 (6th Cir. 1994) (concluding that "the majority of appellate decisions construe the language of 7(D) to provide for exemption if the source cooperated with the FBI with an understanding of confidentiality and do not engage in any calculus as to the extent to which that source has already been revealed."); *Parker v. U.S. Dep't of Justice*, 934 F.2d 375, 380-381 (D.C. Cir. 1991) (finding First Circuit's analysis of waiver in *Irons* persuasive and consistent with the interpretation of its own and other circuits).

[103] *Irons*, 880 F.2d at 1449-1456. *See also Ferguson v. FBI*, 957 F.2d 1059, 1067 (2d Cir. 1992) (adopting *Irons*); *Parker*, 934 F.2d at 380 (reaffirming its rejection of waiver in the context of Exemption 7(D)).

[104] *See Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 377 (S.D.N.Y. 2002) (neither source's public testimony nor the government's inconsistent redactions amounted to waiver). *Cf. Blanton v. U.S. Dep't of Justice*, 63 F. Supp. 2d 35, 49 (D.D.C. 1999) (sources waived their confidential status by writing books about their experiences as FBI confidential informants).

[105] *See L & C Marine Transp., Ltd.*, 740 F.2d at 925 (holding Exemption 7(D) applicable to employee witnesses in an OSHA investigation, even where their identities can be legitimately obtained through use of civil discovery); *Glick v. U.S. Dep't of Justice*, 1991 WL 118263, at *4 (D.D.C. 1991) (finding that disclosure "pursuant to discovery in another case . . . does not waive the confidentiality of the information or those who provided it").

[106] *Jencks v. U.S.*, 353 U.S. 657 (1957). *See Manna v. U.S. Dep't of Justice*, 815 F. Supp. 798 (D.N.J. 1993) (court held that disclosure of information during criminal proceeding as *Jencks* material does not constitute a waiver of a FOIA exemption, citing *Irons v. FBI*).

[107] *See Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1487 n.8 (11th Cir. 1992) (court upheld protection of source identities; court rejected as factually and legally incorrect the argument that such protection was waived since the information was discussed at length in newspapers); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491 (D.C. Cir. 1980) (court, finding no waiver of exemption 7(D), held that

open testimony at trial.[108] As stated above, Exemption 7(D) "provides for nondisclosure of all sources who provided information with an understanding of confidentiality, not merely those sources whose identity remains a secret at the time of future FOIA litigation. To hold otherwise would discourage sources from cooperating with the [government] because of fear of retaliation."[109]

Moreover, the Agency's release of the source's identity to a party aligned with it in an administrative proceeding, *e.g.*, union or company counsel, does not diminish our ability to invoke Exemption 7(D).[110] Nor does the Agency's inadvertent disclosure of source-identifying information amount to a waiver of Exemption 7(D).[111]

It is very important not to respond to a FOIA request to which Exemption 7(D) is applicable in a manner that implicitly identifies the source. If a requester simply requests "all documents in a file," this is not usually a problem. FOIA processors should

"assuming arguendo that some of the information found its way into the public domain by one means or another, that does not alter the fact that the information originally was obtained in confidence.")).

[108] *See Neely*, 208 F.3d at 466 (identity previously disclosed at trial; public availability does not waive Exemption 7(D)); *Jones*, 41 F.3d at 249 (source identity held protected, even though it became known when source became the lead government witness); *Kirk v. U.S. Dep't of Justice*, 704 F. Supp. 288, 293 (D.D.C. 1989) (noting the limited mention of sources in documentation and the fact that certain sources may have testified at trial, the court held that "disclosure of identity, by whatever means, does not automatically obliterate the remaining protection against confidentiality."); *Parker*, 934 F.2d at 379 (confidential informants' acts of testifying at public trial did not waive government's right to invoke 7(D) to withhold their identities); *Irons*, 880 F.2d at 1457 (court found first clause source identity protection is not waived by public testimony).

[109] *Jones*, 41 F.3d at 249. *Landano* resolved the conflict in the case law as to the availability of Exemption 7(D) protection for a witness, even if he is advised that the agency might later call him to testify at an eventual trial (the potential witness rule), and is consistent with a line of cases that had previously reached the same conclusion. *Landano*, 508 U.S. at 172. *See also Parker*, 934 F.2d at 380-381 (confidential sources' acts of testifying at public trials did not waive FBI's right to withhold identities under Exemption 7(D)); *Ferguson*, 957 F.2d 1059 (trial testimony of source did not require FBI to disclose identity); *Irons*, 880 F.2d 1446 (en banc) (public testimony by the source does not waive Exemption 7(D)); *United Techs. Corp. v. NLRB*, 777 F.2d at 95; *T.V. Tower, Inc. v. Marshall*, 444 F. Supp. 1233, 1236-1237 (D.D.C. 1978). *See also Wayland v. NLRB*, 627 F. Supp. 1473, 1479-1480 (M.D. Tenn. 1986); *Borton, Inc. v. OSHA*, 566 F. Supp. 1420, 1422 (E.D.La. 1983).

[110] *See United Techs. Corp.*, 777 F.2d at 96 (finding the Board did not waive Exemption 7(D) by disclosing to union counsel the identities of confidential employee informant —"the privilege belongs to the beneficiary of the promise of confidentiality and continues until he or she waives it.").

[111] *See, e.g.*, *Garcia*, 181 F. Supp. 2d at 377 (finding that the government's inadvertent disclosure of the names of confidential sources through inconsistent redactions did not waive its right to invoke Exemption 7(D)).

appropriately use Exemption 7(D) to withhold all identity and source-identifying information so that the requester will not be able to identify the Board witness. However, if a requester identifies the individual whose confidential information or affidavit is sought, simply withholding the information or affidavit will have the unintended consequence of showing that the witness did in fact act as a confidential source. In these circumstances, whether or not the information or affidavit exists, a "Glomar" response should be supplied. Specifically, the FOIA processor should respond by refusing to confirm or deny the very existence of the information or affidavit given by the named individual—since a more specific response would reflect that the individual acted as a confidential Board informant.[112] In order to have uniformity throughout the Agency, all FOIA processors should contact the General Counsel's FOIA officer in Washington, who will consult with the Region regarding the issuance of Glomar responses. *See* Chapter X. The "Glomar" Principle.

E. Exemption 7(E)

Exemption 7(E) protects from disclosure all law enforcement information that "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." The first clause of Exemption 7(E) provides "categorical" protection for "techniques and procedures" not already well known to the public and does not require a

[112] *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). *See also Benavides v. DEA*, 769 F. Supp. 380, 381-382 (D.D.C. 1990), *rev'd and remanded on procedural grounds*, 968 F.2d 1243 (D.C. Cir. 1992), *modified*, 976 F.2d 751, 753 (D.C. Cir. 1992) (Glomarization permitted where the informant's status has not been officially confirmed).

showing of harm. Even generally known procedures, however, have been protected from release when "the circumstance of their usefulness . . . may not be widely known."[113]

Exemption 7(E)'s second clause separately protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law." This clause has a distinct harm standard built into it that is comparable to the "anti-circumvention" standard used in the "high 2" aspect of Exemption 2.[114] Under both clauses in Exemption 7(E), the FOIA processor must be careful to disclose all reasonably segregable, nonexempt information.

Operations-Management and General Counsel memoranda that have not been released to the public may contain information privileged from disclosure under Exemption 7(E). (Such memoranda are also likely to be protected under the "high 2" category of Exemption 2. *See* Chapter VI. Exemption 2.) For this reason, as well as for the reasons noted above, requests for OM and GC memoranda that have not already been released to the public should be referred to the General Counsel's FOIA officer in Washington.

OM and GC memoranda, and their status regarding public release, can be found on the Board's website, on both the intranet and the internet. The intranet (click on the "Operations" tab at the top) lists most OM/GC memos,[115] states whether they have been released to the public, and contains links to all OM/GC memoranda issued since 1997.

[113] *Wickline v. FBI*, No. 92-1189, 1994 WL 549756 (D.D.C. Sept. 30, 1994) (quoting *Parker v. U.S. Dep't of Justice*, No. 88-0760, slip op. at 8 (D.D.C. Feb. 28, 1990), *aff'd in rel. part*, No. 90-5070 (D.C. Cir. June 28, 1990)); *see, e.g.*, *Brunetti v. FBI*, 357 F. Supp. 2d 97, 108 (D.D.C. 2004) (withholding of FBI accomplishment report containing information on use and effectiveness of investigative techniques proper).

[114] *See supra*, Chapter VI. Exemption 2, "high 2" risk of circumvention standard. Note, however, that because of the law enforcement context of Exemption 7, the more relaxed harm standard of "could reasonably be expected to risk circumvention" applies in 7(E), rather than the "significantly risks circumvention" standard used in "high 2," Exemption 2.

[115] Some older memoranda may not be listed, but are available by request. Contact the General Counsel's FOIA officer in Washington for assistance.

For memoranda issued prior to 1997, generally only memos that have been released to the public are linked, and memos deemed "Of Minimal Public Interest" are listed but not linked. The internet contains links only to OM/GC memoranda that have been released to the public, but lists all of the memoranda from 1996 to the present; in some years prior to 1996, the internet lists only memoranda that have been released.[116] If a requester seeks a memo that has not been released to the public because it is identified as being "Of Minimal Public Interest," contact the General Counsel's FOIA officer in Washington to determine whether the memo can be released. Moreover, if there is any other question regarding the public availability of memoranda, manuals, or parts thereof, contact the General Counsel's FOIA officer in Washington.

F. Exemption 7(F)

If there have been documented violent threats or acts, or a climate of violent hostility related to a case, Exemption 7(F) might apply to protect the names and identifying information of persons mentioned in NLRB files whose safety could be jeopardized upon disclosure. FOIA processors should give careful consideration to utilizing this added measure of protection in response to FOIA requests. Because we do not have extensive experience in applying Exemption 7(F) to NLRB case files, contact the General Counsel's FOIA officer in Washington or the Special Litigation Branch if Exemption 7(F) could apply in your case.

1. Exemption 7(F) Standard

Exemption 7(F) protects from disclosure records or information compiled for law enforcement purposes to the extent that disclosure "could reasonably be expected to

[116] The Division of Operations may add a listing of all OM/GC memoranda issued prior to 1996 on the internet at a later date.

endanger the life or physical safety of any individual."[117] In other words, Exemption 7(F) applies "where the safety of the individual in question would be jeopardized if his or her identity were revealed."[118]

2. The Application of Exemption 7(F) to "Any Individual"

The Freedom of Information Reform Act of 1986 broadened Exemption 7(F)'s terms to protect "any individual" and not just simply "law enforcement personnel."[119] Accordingly, in appropriate circumstances, the NLRB can shield the names and identifying information relating to witnesses who provide information to the NLRB during the course of an unfair labor practice investigation,[120] other individuals named in NLRB files,[121] or the NLRB agents involved in the case (including retired agents).[122] For example, requested information that reveals the identities of union informants should be protected under Exemption 7(F) (in addition to other applicable exemptions) if there is

[117] 5 U.S.C. § 552(b)(7)(F).

[118] *Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002); *see also Malizia v. U.S. Dep't of Justice*, 519 F. Supp. 338, 351 (S.D.N.Y. 1981).

[119] Compare Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974) (old law) to Pub. L. No. 99-570, s. 1802, 100 Stat. 3207, 3207-3248 to 3207-3249 (1986) (1986 amendment).

[120] *See, e.g.*, *Blanton v. U.S. Dep't of Justice*, 182 F. Supp. 2d 81, 86 (D.D.C. 2002) ("[w]ithheld identities also may include non-law enforcement persons who assist the government in its criminal investigation. . . ."); *Garcia*, 181 F. Supp. 2d at 378 (applying Exemption 7(F) to protect "the names and/or identifying information concerning private citizens and third parties who provided information to the FBI concerning the criminal activities of plaintiff"); *Jiminez v. FBI*, 938 F. Supp. 21, 30 (D.D.C. 1996) (holding Exemption 7(F) protects the identity of confidential sources who supplied information concerning the investigation or prosecution of the FOIA requester); *Foster v. U.S. Dep't of Justice*, 933 F. Supp. 687, 693 (E.D. Mich. 1996) (protecting the identifying information of informants who gave information to the IRS).

[121] *See Jiminez*, 938 F. Supp. 2d at 30 (recognizing that Exemption 7(F) "affords broad protection to the identities of individuals mentioned in law enforcement files"); *see also McQueen v. United States*, 264 F. Supp. 2d 502, 521 (S.D. Tex. 2003) (same); *Perrone v. FBI*, 908 F. Supp.24, 28 (D.D.C. 1995) (permitting the FBI to withhold the names and identifying information of persons who were of investigative interest to the FBI or who were otherwise mentioned in the FBI file where the requester made only vague allegations of bad faith in opposition to the government's claimed exemption).

[122] *See Blanton v. U.S. Dep't of Justice*, 182 F. Supp. 2d 81, 86 (D.D.C. 2002) ("[p]ortions of documents that contain identities of law enforcement personnel are properly withheld if disclosure would endanger the life or physical safety of such individuals"); *Garcia*, 181 F. Supp. 2d at 378 (protecting under Exemption 7(F) the names and other identifying information of FBI special agents who investigated the case and other non-FBI government agents); *Badalamenti v. U.S. Dep't of State*, 899 F. Supp. 542, 550 (D.Kan. 1995) (protecting the names of law enforcement personnel); *Moody v. DEA*, 592 F. Supp. 556, 558-59 (D.D.C. 1984) (withholding the identification of DEA agents, retired DEA agents, and members of law enforcement from other government agencies).

evidence that the requester or agent of the requester threatened a union supporter with violence or assaulted a union supporter in the past.

3. Interplay Between 7(F), 7(C), and 7(D)

Material that is privileged from disclosure under Exemption 7(F) is often also privileged from disclosure under Exemption 7(C) or 7(D).[123] However, Exemption 7(F) is potentially broader, in that unlike Exemption 7(C), Exemption 7(F) does not require balancing the interest of non-disclosure against the public interest in disclosure.[124] But where harassment and other forms of retaliation do not rise to the level of a threat to life or physical safety and 7(F) is therefore not available, Exemptions 7(C) and 7(D) should be utilized to protect these individuals.[125]

4. When to Claim 7(F)

"In evaluating the validity of an agency's invocation of Exemption 7(F), the court should 'within limits, defer to the agency's assessment of danger.'"[126] However, the Agency should have a solid factual basis for claiming 7(F), explicitly identifying the reasons disclosure could endanger the individual's life or physical safety. Evidence of the FOIA requester's past history of violence or propensity to harm others and/or specific

[123] *See Blanton*, 182 F. Supp. 2d at 86-87 ("[t]he same information that is withheld under Exemption 7(C) may be withheld under Exemption 7(F)").

[124] *See Shores v. FBI*, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (recognizing that although Exemption 7(F) "applies equally to information subject to Exemption 7(C), it does not require any balancing test."); *see also Raulerson v. Ashcroft*, 271 F. Supp. 2d 17, 29 (D.D.C. 2002) (same); *Anderson v. U.S. Dep't of Justice*, 1999 U.S. Dist. LEXIS 4731 *11, n.5 (D.D.C. March 31, 1999) (same).

[125] *See Ortiz v. HHS*, 70 F.3d 729, 733-34 (2d Cir. 1995) (Exemption 7(D) "protection extends to situations where the danger of retaliation encompasses more than the source's physical safety [emphasis supplied]"); *New England Apple Council v. Donovan*, 725 F.2d 139, 143 (1st Cir. 1984) (contrasting Exemptions 7(C) and 7(F) and recognizing that unlike Exemption 7(F)'s protections, the potential for "annoyance or harassment need not rise to the level of physical endangerment before the protection of 7(C) may be invoked"); *Nix v. United States*, 572 F.2d 998, 1006 n.8 (4th Cir. 1978) (same).

[126] *Garcia*, 181 F. Supp. 2d at 378, citing *Linn v. U.S. Dep't of Justice*, 1995 WL 631847, at *9 (D.D.C. Aug. 22, 1995); *see also Gardels v. CIA*, 689 F.2d 1100, 1104-1105 (D.C. Cir.1982)); *Amro v. U.S. Customs Serv.*, 128 F. Supp. 2d 776, 789 (E.D. Pa. 2001).

threats of violence in the case under consideration are sufficient cause for invoking Exemption 7(F).[127]

Further, courts have held that Exemption 7(F) protection is not waived where a witness testified at the FOIA requester's trial.[128] Similarly, in some cases courts have applied Exemption 7(F) despite the requester's assertion that the information sought was otherwise publicly disclosed.[129] *See* Chapter XIII. Waiver.

5. Applicability of Glomar

Finally, FOIA processors should be cognizant of using a "Glomar" response when a request seeks records concerning an individual whose life or physical safety may be jeopardized by disclosure, and the mere acknowledgment of the existence of records could risk an individual's physical safety. *See* Chapter X. The "Glomar" Principle. In order to have uniformity throughout the Agency, all FOIA processors should contact the General Counsel's FOIA officer in Washington, who will consult with the Region regarding the issuance of "Glomar" responses.

[127] *See, e.g.*, *Garcia*, 181 F. Supp. 2d at 378 (deferring to the government's assessment of the danger of physical harm given the plaintiff's violent history and propensity for retaliation); *Blanton*, 182 F. Supp. 2d at 87 (recognizing that even though the plaintiff was incarcerated, his threats make it possible that those responsible for his arrest could be targets of physical harm should their identities be revealed); *Russell v. Barr*, No. 92-2546, slip op. at 11-12 (D.D.C. August 28, 1998) (unreported) (protecting the identities of individuals who cooperated in the investigation and prosecution involving spousal murder where the agency demonstrated the requester's reputation for violent behavior); *Housley v. FBI*, 1988 WL 30751 at *3 (D.D.C. March 18, 1988) (unreported) (protecting the identities of confidential informants because the plaintiff threatened to harm them); *see also Stottler v. Potter*, 2006 WL 994581, *2 (unreported) (D.Neb. April 10, 2006) (permitting the withholding of documents showing co-workers' perceived threats by the FOIA requester who had brought a Title VII lawsuit).

[128] *See Linn v. U.S. Dep't of Justice*, 1995 WL 417810 at * 12 (D.D.C. June 6, 1995) (unreported) (rejecting requester's argument that Exemption 7(F) was waived because the third parties testified at his trial, adding "the Court can imagine no situation in which an individual would waive his or her right to physical safety"); *Linn v. U.S. Dep't of Justice*, No. 92-1406, 1997 U.S. Dist. LEXIS 9321, at *17 (D.D.C. May 29, 1997) (protecting witnesses who testified) (Exemptions 7(C) and 7(F)), *appeal dismissed voluntarily*, No. 97-5122 (D.C. Cir. July 14, 1997); *Prows v. U.S. Dep't of Justice*, No. 87-1657, 1989 WL 39288, at *2 (D.D.C. Apr. 13, 1989) (finding, as under Exemption 7(C), DEA agents' identities protectible even though they testified at trial), *aff'd*, No. 89-5185 (D.C. Cir. Feb. 26, 1990).

[129] *Fisher v. U.S. Dep't of Justice*, 772 F. Supp. 7, 12-13 (D.D.C. 1991), *summarily aff'd*, 968 F.2d 92 (D.C. Cir. 1992); *Freeman v. U.S. Dep't of Justice*, 1993 WL 260694, *4 (D.D.C. June 28, 1993), *vacated in part on denial of reconsideration*, 1994 WL 35871 (D.D.C. Jan. 26, 1994) (unreported).

XII. First-Party Requesters

A. General Principle: Treat All Requesters Alike

The Supreme Court has instructed that a FOIA requester's identity can have "no bearing on the merits of his or her FOIA request."[1] Indeed, the Supreme Court has "repeatedly stated [that] Congress clearly intended the FOIA to give any member of the public as much right to disclosure as one with a special interest in a particular document."[2] Thus, the general principle under the FOIA is that government agencies must treat all FOIA requesters alike regardless of their relationship to the requested records when making FOIA disclosure decisions. For instance, consistent with established *Reporters Committee* principles, it is settled that a corporation FOIA requester has no special rights to disclosure of its corporate documents or its alleged agents' statements.[3]

B. First-Party Requester Exception

There is one exception to the rule that all requesters must be treated alike under the FOIA. The Supreme Court noted an agency should not withhold from a requester any information that implicates that requester's own privacy interest; making a disclosure to such a "first-party" requester in such a circumstance "is consistent with denying access to

[1] *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (hereinafter "*Reporters Comm.*").

[2] *Id.* (internal citations omitted).

[3] *See, e.g.*, *Swan v. SEC*, 96 F.3d 498, 499-500 (D.C. Cir. 1996) (records relating to statements made by the FOIA requester's attorney to the SEC were exempt from disclosure under the FOIA since it is "of no moment if the agency's records reflect statements of the requester's attorney, of some other agent of the requesters, or of the requesters themselves"); *Frets v. U.S. Dep't of Transp.*, 1989 WL 222608, *6 (W.D.Mo. December 14, 1989) (unreported) (FOIA plaintiffs' own statements given to the FAA must be partially redacted to safeguard the interests of other parties whom plaintiffs mentioned in the statements); *Tanoue v. IRS*, 904 F. Supp. 1161, 1166-1167 (D. Haw. 1995) (refusing to disclose plaintiff's own statements under the FOIA, explaining that under *Reporters Committee*, "the fact that Plaintiff is asking for information that he provided the agency affords him no special treatment under the FOIA").

all other members of the general public."[4] The fact that a requester has furnished documents to the Agency does not necessarily make that requester a first-party requester as to these documents. A first-party requester can be **any** individual who makes a FOIA request for information that would otherwise be withheld because it would reveal the requester's private information. Thus, a first-party requester could be a charging party, witness, or any other third person whose private information is referenced in an agency record. The question of whether someone is a first-party requester is analyzed by looking at the specific **information** that would otherwise be withheld. Indeed, if the Region receives multiple requests for a document, that document could have several different first-party requesters. Accordingly, the Agency's FOIA responses to each requester will vary depending on the requester's relationship to the specific private information mentioned in the document.

First-party requests may arise in the NLRB context when a FOIA request is made for information, inter alia, in: (1) the ULP Regional Office file where the request is made by either an individual charging party or charged party, or an individual affiant, or (2) the Regional Office representation case file where the request is made by an individual employer[5] or individual petitioner. *See* Chapter III. Related Statutes, Section A. It is important to remember that an individual charging party is not a first-party requester as to all of the information in the Regional Office file relating to his charge. Further, corporations, business associations and unions generally can not be first-party requesters because they have no privacy rights under the FOIA and are not "covered individuals"

[4] *Reporters Comm.*, 489 U.S. at 771.

[5] An individual employer could include a person who is a sole proprietor, partner, or principal shareholder of a closely held corporation.

under the Privacy Act.[6] However, where the closely held corporation is so personally identified with the individual that revealing information about the corporation would reveal private information about the individual, that individual's request for such information about the corporation would qualify as a first-party request.[7]

Despite this exception, private information relating to a first-party requester may still be withheld under the FOIA if exemptions other than those relating to the requester's own privacy interest apply. For instance, a first-party requester's private information may still be withheld under the FOIA if revealing the information would allow the requester to deduce the identity of another individual entitled to Exemptions 6, 7(C), 7(D), or 7(F) protection, or if the context of the information is protectable, for example, under Exemption 7(A) or Exemption 5.

C. Analyzing Requests by First-Party Requesters

A request from a first-party requester for his own information must be analyzed under the FOIA and under the Privacy Act when that individual is a "covered individual" under the relevant Agency system of records. The government may only withhold information protected from disclosure under both Acts. *See* Chapter III. Related Statutes, Section A. for a thorough discussion of the procedures for analyzing requests from first-party requesters under both the FOIA and Privacy Act.

D. First-Party Requester Fees

Requests for documents from Regional Office Files are analyzed only under the FOIA, and not the Privacy Act, because a Privacy Act exemption is applicable to Regional Files. *See* Chapter III, Related Statutes, Section A. (discussing under what

[6] *See* Chapter VIII. Exemption 6.
[7] *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188-1189 (8th Cir. 2000).

circumstances the FOIA and/or Privacy Act apply to a request). Accordingly, FOIA fees will be charged for requests for documents from a Regional Office File, even for requests by first-party requesters. *See* Chapter XV. Fees and Fee Waivers (discussing applicable FOIA fee guidelines and charges). However, for the minority of requests that are made for documents from files other than Regional Office Files, it is important to note that there is a special rule for first-party requesters: the FOIA fee guidelines and charges do not apply to individuals obtaining access to their own records under the Privacy Act. *See* Chapter XV. Fees and Fee Waivers. For Privacy Act charges, the Board's Rules and Regulations provide that the "first copy of any such record or information will ordinarily be provided without charge to the individual or representative in a form comprehensible to the individual. Fees for any other copies of requested records shall be assessed at the rate of 10 cents for each sheet of duplication. 29 C.F.R. § 102.119(c).

For requests made for documents from files other than Regional Office Files, the Region should charge the first-party requester Privacy Act fees if the Region determines that records may be disclosed to the requester under: (1) both the FOIA and the Privacy Act, or (2) the Privacy Act but not the FOIA. **The Region should charge the requester FOIA fees if the records are only disclosable under the FOIA and not the Privacy Act.** If you have any questions about which fees are applicable, please contact the General Counsel's FOIA officer in Washington and/or the Special Litigation Branch.

XIII. Waiver

Waiver of an exemption applicable to requested information depends on two factors: (1) the specific nature of the information at issue, and (2) the circumstances surrounding the prior disclosure.[1]

As to the first factor, courts are more likely to accept waiver arguments challenging an exemption that protects the government's interest in non-disclosure, such as Exemptions 2, 5, and 7(A). By contrast, courts are reluctant to accept waiver arguments as applied to exemptions that protect personal privacy interests, such as Exemptions 6 and 7(C).[2] Other exemptions, such as Exemptions 4 and 7(D), protect both governmental and informational privacy interests. Accordingly, waiver of those exemptions will likely depend on the resolution of the second factor.

Waiver is nearly automatic when the requested information in question does not relate to personal privacy and has been intentionally released to a previous FOIA requester.[3] In addition, where privacy interests are at stake, waiver can occur when the person whose private information is at issue executes an express authorization. Most significantly, however, waiver can also occur when an agency makes a non-FOIA discretionary (or "selective") disclosure to outsiders. In such circumstances, resolution of a waiver inquiry will be fact specific as set forth in prong two of the analysis.[4] As

[1] *Carson v. U.S. Dep't of Justice*, 631 F.2d 1008, 1015 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.").

[2] *See Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 363 (5th Cir. 2001) (concluding that prior selective disclosures by government agencies amount to waiver only with respect to those exemptions "that protect *the government's interest* in non-disclosure of information").

[3] *See* U.S. Department of Justice, *Freedom of Information Act Guide*, 875 (March 2007 Edition) (concluding that "true discretionary disclosures under the FOIA . . . should be made available, if at all, to anyone").

[4] *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 700 (9th Cir. 1989) ("The inquiry into whether a specific disclosure constitutes waiver is fact specific.").

explained below, among the relevant considerations are whether the prior disclosure matches the requested information, whether the prior disclosure was voluntary or compelled, whether it would be unfair to deny the requesting party access to the same information in light of the prior disclosure, and whether the agency's prior disclosure furthered a legitimate governmental purpose.

A. Express Authorization

As an initial matter, courts have recognized that an individual may voluntarily surrender the application of exemptions that protect that person's privacy or confidentiality interests and may specify the FOIA requesters to whom disclosures of their own personal information can be made.[5] However, when the requester is a company, a labor organization, or an agent thereof, and the holder of the privacy or confidentiality interest is a low-level employee or agent, it is difficult to determine whether the executed waiver is truly voluntary or, instead, the product of express or implied coercion. Therefore, when a FOIA request is made by or on behalf of a company or labor organization, waivers from only high-level officers, directors, or agents of that company or labor organization should be accepted.[6] But, where a superior-subordinate

[5] *See, e.g.*, *Providence Journal Co. v. U.S. Dep't of the Army*, 981 F.2d 552, 566-567 (1st Cir. 1992) (source statements not entitled to Exemption 7(D) protection when individuals expressly waived confidentiality); *Fiumara v. Higgins*, 572 F. Supp. 1093, 1101 (D.N.H. 1983) (concluding that agency must honor request by third parties that information protected by Exemptions 7(C) and 7(D) "be made available to plaintiff"); *see also Sherman*, 244 F.3d at 364 (holding that "only the individual whose informational privacy interests are protected by exemption 6 can effect a waiver of those privacy interests when they are threatened by an FOIA request").

[6] *See, e.g.*, *Church of Scientology v. IRS*, 995 F.2d 916, 921 (9th Cir. 1993) (ruling that although individual government agents consented to release of handwritten documents, this waiver "did not relieve the court of its duty to balance the [privacy] interests"); *Rural Hous. Alliance v. U.S. Dep't of Agric.*, 498 F.2d 73, 82-83 (D.C. Cir. 1973) (recognizing pressures on individuals to sign Exemptions 6 and 7(C) waivers may be present, noting "[w]e impute no bad motives or actions to RHA: we merely state a possibility true for any interested organization"); *see also Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 813 (9th Cir. 1995) (stating that "it is better to err on the side of subjects' privacy interests even in cases where" the subjects themselves have publicized their own private information).

relationship does not exist between the FOIA requester and the executor of a waiver, the third-party's waiver should generally be honored.

B. Prior Disclosure of Requested Information

1. General Consideration: Prior Disclosure Must "Match" Requested Information

In all other cases that do not involve the execution of privacy waivers, the party asserting waiver bears the burden of production to show that the information sought is publicly available or that the exemption claimed by the agency has been otherwise waived.[7] This is significant because, as many courts have held, an agency's prior disclosure of an exempt record can waive only that very record and not "related" records or previously redacted portions of the same record.[8] As a result, placing the burden of production on the proponent of a waiver argument obligates the profferer to show that the prior disclosure "matches" the assertedly exempt information in question. Where only the general subject matter of exempt information has been released or publicly discussed, a waiver argument will likely fail.[9] Accordingly, the difference between the scope of the

[7] *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 342 (D.C. Cir. 1989) ("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."). By contrast, the burden of persuasion ultimately remains on the party resisting disclosure. *Id.*

[8] *See Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989) ("[A]gency release of certain documents . . . does not necessarily waive any applicable exemption as to other documents."); *Mehl v. EPA*, 797 F. Supp. 43, 47 (D.D.C. 1992) ("It follows that an agency voluntarily may disclose a portion of an exempt document without waiving the exemption for the entire document."); *see also Shell Oil Co. v. IRS*, 772 F. Supp. 202, 205 (D. Del. 1991) ("[T]o the extent that the document was read aloud, the government did waive that right and . . . it must turn over to Shell that portion of the disputed document.").

[9] *See, e.g.*, *Pub. Citizen v. U.S. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993); *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) (holding that very general information about agency's intelligence gathering methods in Senate report "cannot be equated with [more specific] disclosure by the agency itself"); *Kay v. FCC*, 867 F. Supp. 11, 20-21 (D.D.C. 1994) (finding that prior disclosure of some informants' identities does not waive Exemption 7(A) protection for information related to other informants); *Kimberlin v. U.S. Dep't of Justice*, 921 F. Supp. 833, 836 (D.D.C. 1996) (holding that public acknowledgment of ongoing investigation by authorized agency official does not waive use of Exemption 7(C) to shield underlying documents).

prior disclosure and the information later sought by a subsequent FOIA requester may constitute a sufficient basis for concluding that no waiver has occurred.[10]

Where, however, there is a match between the prior disclosure and the requested information, the following settled principles apply:

2. Prior Selective Disclosure: Specific Factors

a. Voluntary and Official vs. Mistaken or Unauthorized

As a general rule, a voluntary and official selective disclosure (*i.e.*, a direct acknowledgment given by an authoritative government official) waives an otherwise applicable FOIA exemption.[11] This is true even where the disclosure is made to the press "off-the-record."[12] By contrast, courts have consistently held that an agency does not waive a FOIA exemption as a result of an agency employee's unauthorized disclosure (*i.e.*, a leak).[13] An official, but mistaken, agency disclosure may result in waiver depending on the scope and duration of the accidental disclosure. Generally, where the mistake is limited in nature and quickly corrected, the exemption will be preserved.[14] On

[10] *Mehl v. EPA*, 797 F. Supp. 43, 47 (D.D.C. 1992) ("The existence and scope of a waiver depends upon the scope of the disclosure.").

[11] *See Kimberlin*, 921 F. Supp. at 835-836 (holding exemption waived when material was released pursuant to "valid, albeit misunderstood authorization"); *see also Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007) (concluding that CIA director's official acknowledgement that records related to assassinated foreign official exist waived the agency's ability to issue a "Glomar" response to a FOIA request for records about that official).

[12] *See Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 569 (S.D.N.Y. 1989).

[13] *See, e.g.*, *Simmons v. U.S. Dep't of Justice*, 796 F.2d 709, 712 (4th Cir. 1986) (concluding that an unauthorized and limited disclosure does not constitute waiver); *Murphy v. FBI*, 490 F. Supp. 1138, 1142 (D.D.C. 1980) (reasoning that a finding of waiver in such circumstances would only lead to "exacerbation of the harm created by the leaks").

[14] *Astley v. Lawson*, No. 89-2806, 1991 WL 7162, at *8 (D.D.C. Jan. 11, 1991) (holding that inadvertent attachment of Exemption 5 materials to document filed in court does not waive exemption where there was no evidence that plaintiff, a pro se prisoner, received a copy of the court filing and where agency remedied mistake immediately by requesting that the materials "be removed from the public record and filed in camera"); *see also Nation Magazine v. U.S. Dep't of State*, 805 F. Supp. 68, 73 (D.D.C. 1992) (dicta) ("[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 Med. Ctr. v. Sullivan*, 958 F.2d 537, 548 n.24 (3d Cir. 1992)).

the other hand, where mistake[15] or agency carelessness[16] results in widespread disclosure that cannot be remedied, otherwise applicable exemptions may be waived.

b. Prior Disclosure to One Party Results in Unfairness to Another

Courts have also found that waiver occurs when a prior selective disclosure—whether mistaken or intentional—to one party results in unfairness to a second party that subsequently seeks the same information under the FOIA. This is particularly so when the recipient of the selective disclosure and the subsequent FOIA requester are engaged in litigation with one another.[17] An agency that fails to disclose under such circumstances would exhibit "[p]referential treatment of persons or interest groups," which is the precise harm that "the FOIA was intended to obviate."[18]

c. Prior Disclosure Furthers Legitimate Governmental Purpose or Promotes Effective Agency Functioning

However, waiver arguments typically fail where an agency acted responsibly and the information was the subject of a limited release in furtherance of a legitimate governmental purpose.[19] Accordingly, no waiver results when otherwise exempt Agency records are selectively disclosed to charging parties during unfair labor practice cases because, as one court has stated, the charging party and the Region "share[] common interests and [are] aligned together as [the charged party's] adversaries."[20] By this same

[15] *See, e.g.*, *Dresser Indus. Valve Operations, Inc.*, 2 Gov't Disclosure Serv. (P-H) 82,197, at 82,575 (W.D. La. Jan. 19, 1982).

[16] *See, e.g.*, *Cooper v. Dep't of the Navy of the U.S.*, 594 F.2d 484, 488 (5th Cir. 1978) (holding that careless prior disclosure to one party in litigation is unfair and, therefore, results in waiver).

[17] *See, e.g.*, *N.D. ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978); *Cooper*, 594 F.2d at 488.

[18] *Andrus*, 581 F.2d at 182.

[19] *Cooper v. Dep't of the Navy of the U.S.*, 558 F.2d 274, 278 (5th Cir. 1977); *see also Badhwar v. U.S. Dep't of the Air Force*, 629 F. Supp. 478, 481 (D.D.C. 1986), *aff'd in part, vacated in part on other grounds*, 829 F.2d 182 (D.C. Cir. 1987).

[20] *United Techs. Corp. v. NLRB*, 632 F. Supp. 776 (D. Conn.), *aff'd*, 777 F.2d 90 (2d Cir. 1985).

reasoning, limited disclosures in furtherance of an investigation should not waive an applicable exemption.

In addition, circulation of a document within an agency does not constitute "public disclosure" resulting in waiver,[21] nor should other disclosures necessitated by effective agency functioning, such as disclosures to other federal agencies[22] or to a congressional committee under subpoena,[23] or even to advisory committees that include members of the public.[24] Moreover, unofficial and speculative disclosures in a congressional report will not waive an exemption if the agency itself has never publicly acknowledged the information.[25]

d. Disclosures in non-FOIA Litigation

Furthermore, if the agency has been compelled to disclose a document under limited and controlled conditions (*e.g.*, limited disclosure of a witness affidavit under the *Jencks* rule, or pursuant to a protective order in an administrative proceeding), then the disclosure is no longer discretionary or "selective," and the agency should retain the authority to withhold the document in the future.[26] In addition, it is well settled that

[21] *See, e.g.*, *Direct Response Consulting Serv. v. IRS*, No. 94-1156, 1995 WL 623282, at *3 (D.D.C. Aug. 21, 1995) (concluding that internal agency communications between district office and headquarters were properly withheld under Exemption 5).

[22] *See, e.g.*, *Chilivis v. SEC*, 673 F.2d 1205, 1211-1212 (11th Cir. 1982) ("We also reject plaintiff's argument that the SEC waived the right to invoke exemption 5 by disclosing documents to other federal agencies. . . . Waiver can occur when communications are disclosed to private individuals or nonfederal agencies.").

[23] *See, e.g.*, *Fla. House of Representatives v. U.S. Dep't of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992) (finding no waiver of exemption as a result of an involuntary disclosure to Congress).

[24] *See Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 107-108 (D.C. Cir. 1976).

[25] *See Military Audit Project v. Casey*, 656 F.2d 727, 744 (D.C. Cir. 1981); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 628 (S.D.N.Y. 1996), *aff'd*, 128 F.3d 788 (2d Cir. 1997) (per curiam).

[26] *See, e.g.*, *Fla. House of Representatives*, 961 F.2d at 946 (finding no waiver resulted from a court-ordered disclosure made pursuant to a protective order); *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 79 n.13 (2d Cir. 1979); *cf. FTC v Grolier*, 462 U.S. 19, 27-28 (1983) (rejecting argument that document disclosure ordered by a court in previous litigation means that the same documents "must be disclosed to anyone under the FOIA"); *Allnet Commc'n Servs., Inc. v. FCC*, 800 F. Supp. 984, 989 (D.D.C. 1992) (granting summary judgment to the agency where there was "specific, affirmative evidence that no unrestricted disclosure . . . occurred" during administrative proceeding).

public testimony of a confidential informant at trial does not result in the waiver of Exemption 7(D).[27]

3. Prior Disclosure Under the FOIA

As stated, waiver is almost automatic when an agency discloses, pursuant to a FOIA request or in FOIA litigation, information that falls within an exemption that protects the government's interest in non-disclosure. The circumstances surrounding the disclosure of information in the FOIA context (*e.g.*, made in the Board's "discretion," or as part of a stipulation in settlement) do not immunize the Board against waiver as to the released information. However, for reasons given above, the same rule does not necessarily apply to FOIA-based disclosures of information covered by exemptions that protect an individual's informational privacy interests. As to those exemptions, courts have held that "only the individual whose informational privacy interests are protected . . . can effect a waiver."[28]

Any questions concerning potential waiver in the FOIA, § 102.118 or in other contexts, should be addressed to the Special Litigation Branch.

[27] *Parker v. U.S. Dep't of Justice*, 934 F.2d 375, 379 (D.C. Cir. 1991) (upholding non-disclosure under Exemption 7(D) even though confidential informant may have testified at requester's trial). For further discussion of this topic, *see* Chapter XI. Exemption 7, Section D.

[28] *Sherman*, 244 F.3d at 364.

XIV. Section 102.118, Subpoenas, and the FOIA

A. Section 102.118 (29 C.F.R. § 102.118)

Section 102.118 of the Board's Rules and Regulations[1] forbids any Board employee from producing Agency documents or testifying without the written consent of the Board, its Chairman, or the General Counsel.[2] The consent of the Board or the Chairman is required if the individual or the documents are in Washington, D.C. and are under the control of the Board; the consent of the General Counsel is required if the individual or the documents are under the control of the General Counsel.[3] Requests for witness statements for purposes of cross-examination in unfair labor practice or post-election hearings generally are excluded from this prohibition.[4] However, only that portion of the witness statement that relates to the subject matter of the testimony of the witness may be turned over.[5] Requests for documents or testimony made pursuant to Section 102.118 must (1) be in writing; (2) identify the documents to be produced or person whose testimony is desired; (3) disclose the nature of any pending proceeding for

[1] 29 C.F.R. § 102.118.

[2] 29 C.F.R. § 102.118(a)(1). *See* Section 6 of the NLRA, 29 U.S.C. § 156 (authorizing promulgation of regulations); Federal Records Act, 44 U.S.C. § 3102 (authorizing controls over Agency records). The Supreme Court considered and upheld the validity of such regulations in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-469 (1951). Section 102.118 is the Board's "*Touhy*" regulation. Section 102.119, a separate subsection of this regulation, incorporates restrictions on disclosure of information imposed by the Privacy Act of 1974, 5 U.S.C. § 552a.

[3] 29 C.F.R. § 102.118(a)(1).

[4] 29 C.F.R. § 102.118(b)(1). Section 102.118(b)(1) is modeled on the Jencks Act, 18 U.S.C. § 3500(b). Pursuant to this section, after a witness called by the General Counsel or by the charging party has testified in an unfair labor practice hearing, the ALJ shall, upon motion of the respondent, order the production of any statement of the witness to the extent that it relates to the subject matter as to which the witness testified. Section 102.118(c) makes this exception applicable to post-election hearings. The definition of "statement" for purposes of the exceptions in Sections 102.118(b)(1) and (c) is found in Section 102.118(d).

[5] 29 C.F.R. § 102.118(b)(2).

which the documents or testimony are requested; and (4) state the purpose that the production or testimony would serve.[6]

B. Subpoenas

If a Board subpoena duces tecum or a Board subpoena ad testificandum is served on a Board employee or agent, unless otherwise directed by the Board, its Chairman, or the General Counsel, a petition to revoke the subpoena should be filed on the ground that the evidence sought is barred from disclosure by Section 102.118 and by any applicable privileges or provision of the Privacy Act.[7]

The effect of Section 102.118 on the enforceability of state and federal court subpoenas is more complicated. If a state or federal court subpoena or discovery request is issued to and served on the Board or its employees or agents, the Assistant General Counsel for Special Litigation should be contacted immediately, regardless of whether the person issuing the subpoena has requested the same information pursuant to Section 102.118. Upon receipt of a subpoena and Section 102.118 request for Agency materials or testimony, both the subpoena and the Section 102.118 request should be promptly forwarded to Special Litigation.[8]

Sovereign immunity generally precludes enforcement of a state court subpoena to the Board, in addition to any defense under applicable privileges, the Privacy Act, and Section 102.118.[9] However, notwithstanding the sovereign immunity defense to the state

[6] 29 C.F.R. § 102.118(a)(1).

[7] 29 C.F.R. § 102.118(a)(1). If, in preparing a response to a Section 11 subpoena served upon the Region, there are questions concerning privileges or Privacy Act protections, contact Special Litigation.

[8] If a federal court subpoena is for documents, objections must be served upon the subpoenaing party within 14 days of service or by the return date, if earlier. Fed. R. Civ. P. 45(c)(2)(B). If the federal court subpoena is for testimony, a motion to quash or for a protective order must be filed in a "timely" manner. Fed. R. Civ. P. 45(c)(3), 26(c).

[9] *Houston Bus. Jour. v. Office of Comptroller*, 86 F.3d 1208, 1211 (D.C. Cir. 1996). The Supremacy Clause (U.S. Const. art. VI, cl. 2) may also preclude enforcement of a state court subpoena. *See*

court subpoena, serious consideration should be given to whether any documents should be disclosed upon receipt of a Section 102.118 request. As noted above, only upon instruction from Special Litigation should the Region respond to a non-Board subpoena or a Section 102.118 request associated with such a subpoena.

When asserting applicable privileges to a state or federal court subpoena, the Board also traditionally has argued that its employees may not be compelled to testify or produce documents pursuant to such a subpoena, unless the subpoenaing party has first obtained Agency authorization for release of the documents or testimony through a Section 102.118 request.[10] However, particularly in federal court, the Agency cannot safely rely on such a regulation as a substantive basis for refusing to satisfy a third-party subpoena when the subpoenaing party has complied with the regulation's procedural requirements. Thus, when a Section 102.118 request has been properly made, that section should not be cited as a separate source of privilege to justify withholding documents or testimony.[11] It is therefore important when the Agency decides to withhold subpoenaed documents or testimony in such circumstances, that it does so under privileges and/or for policy reasons independent from Section 102.118.

Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989). The response to a state court subpoena will vary with the circumstances and may include a motion to quash. The Agency also can consider removal of a subpoena enforcement proceeding to federal court, particularly when the state court is considering a request for a contempt order for failing to comply with the subpoena. *See Louisiana v. Sparks*, 978 F.2d 226, 231-232 (5th Cir. 1992).

[10] *See Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600, 602-603 (5th Cir. 1966) (quashing third-party subpoena to Board regional director for failure to comply with the requirements of § 102.118); *accord United States v. Bizzard*, 674 F.2d 1382, 1387 (11th Cir. 1982) (no error in court's quashing third-party subpoena to former employee of DOJ in criminal case where defendant did not comply with DOJ's *Touhy* regulation).

[11] *See, e.g.*, *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 776-778 (9th Cir. 1994) (agency's *Touhy* regulation could not be asserted as a privilege for the agency's decision to withhold subpoenaed evidence, because request had been made to agency and denied).

Federal court subpoenas also require consideration of Rule 45 of the Federal Rules of Civil Procedure.[12] Some federal courts have held that the standard of review in considering cross motions to compel and to quash is the "relevancy" standard applicable to discovery requests, while others have applied the "arbitrary and capricious" standard applicable to Administrative Procedure Act review.[13]

C. Relationship of Section 102.118 and Board and Judicial Subpoenas to the FOIA

Section 102.117 of the Board's Rules & Regulations [14] governs FOIA requests for Agency records.[15] But, as described above, not all requests for records or other information are submitted under the FOIA. Requesters may seek Agency records, other documents, and Board agent testimony under Section 102.118, under the Privacy Act,[16] through a Board subpoena, through discovery requests in judicial litigation in which the Board is a party, and through third-party judicial subpoenas (*i.e.*, issued to obtain discovery or testimony in a case in which the Board is not a party).

Requests made explicitly under Section 102.118, of course, should be handled under the procedures set forth in Section 102.118. If a request explicitly is based on both the FOIA and Section 102.118, it should be separately processed under each provision. If a written request is made for Board records without the explicit invocation of the FOIA,

[12] *See Yousuf v. Samantar*, 451 F.3d 248, 257 (D.C. Cir. 2006) (United States is a "person" subject to discovery under Rule 45 "regardless whether it is a party to the underlying litigation").

[13] *See In re Apollo Group, Inc. Sec. Litig.*, 2007 WL 778653, at *7-8 (D.D.C. March 12, 2007) (finding the documents "relevant" and ordering a privilege log to assess whether they are exempt under a privilege). Compare *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 277-278 (4th Cir. 1999) (applying the APA's arbitrary and capricious standard); *U.S. EPA v. Gen. Elec. Co.*, 197 F.3d 592, 599 (2d Cir. 1999), *modified in part*, 212 F.3d 689, 690 (2d Cir. 2000) (leaving issue unresolved).

[14] 29 C.F.R § 102.117.

[15] *See* Chapter IV. Agency Records and Electronic FOIA, Section A. for a description of what constitutes an "agency record" under the FOIA.

[16] *See* Chapter III. Related Statutes, Section A. for information on access under the Privacy Act.

Section 102.118, or any other statute, rule, or regulation, it ordinarily should be handled as a FOIA request, even if not labeled as such.

XV. Fees and Fee Waivers Under the FOIA

A. Statutory "Use" Categories

The Freedom of Information Reform Act of 1986[1] ("1986 Reform Act") established a system, which placed all FOIA requests into one of three categories: (1) requests for commercial use; (2) non-commercial requests by the news media, educational institutions, or scientific institutions with a scholarly or scientific purpose; and (3) all other non-commercial requests.[2] The purpose of these categories is to assist the FOIA processor in determining fee assessments. It is the Agency's policy to place all requesters in the commercial user category unless a requester demonstrates that he should be placed in a different user category.[3]

When assessing fees, the most critical decision to be made is how to categorize requesters among the user categories. An agency's determination of the appropriate fee category for an individual requester is determined by the intended use of the information sought and the identity of the requester, except for the commercial use category which is determined exclusively by the intended use for which the requester has sought the information.[4] When any FOIA request is submitted by someone on behalf of another person—for example, by an attorney on behalf of a client—it is the underlying requester's identity and intended use that determine the user category.[5] Agency FOIA processors should be alert to the fact that a requester's category can change over time.[6] When the use to which

[1] Pub. L. No. 99-570, §§ 1801-04, 100 Stat. 3207, 3207-48 to 3207-50 (1986).
[2] 5 U.S.C. § 552(a)(4)(A)(ii).
[3] 29 C.F.R. § 102.117(d)(2)(ii)(E).
[4] 5 U.S.C. § 552(a)(4)(A)(ii).
[5] Office of Management and Budget's Uniform Freedom of Information Act Fee Schedule and Guidelines ("OMB Fee Guidelines" http://www.usdoj.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm) , 52 Fed. Reg. 10,012, 10,017-18 (Mar. 27, 1987). *See also Dale v. IRS*, 238 F. Supp. 2d 99, 107 (D.D.C. 2002).
[6] *See Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1388 (D.C. Cir. 1989) (court's determination of requester's news media status is "not chiselled in granite"); *Long v. U.S. Dep't of Justice*, 450 F. Supp. 2d 42, 85 (D.D.C. 2006) (recognizing that entity's status can change).

the requester intends to put the document sought is unclear, or where there is reasonable cause to doubt the asserted use to which the records will be put, additional clarification of such use should be sought.[7] There is no need to undertake a "fee category" analysis where a full fee waiver has been granted.[8]

It is important to note that the FOIA fee schedule and guidelines do not apply to individuals entitled to obtain their own records under the Privacy Act.[9] Only "records" kept in a "system of records" may be subject to 5 U.S.C. § 552a(d) (concerning access to records). However, it is unlikely that individual requesters of Agency case file records about themselves will be entitled to access such records pursuant to the Privacy Act. Much of the Agency's case files, including the entirety of CATS, RAILS (used by the Division of Advice), and ACTS (used by the Office of Appeals), as well as the paper files associated with these electronic systems (including the Regional Office C-case and R-case Files), are exempt from disclosure under Privacy Act Exemption (k)(2).[10] Despite this broad Privacy Act exemption, if first-party requesters are provided documents from these systems of records pursuant to the FOIA (because no FOIA exemption applies), FOIA fees should be charged.

For individual requesters seeking information about themselves from other records—that is, for records in Privacy Act systems that are not exempt from disclosure under the Act—Privacy Act fees should be charged, rather than FOIA fees. Under the Privacy Act, 5 U.S.C. § 552a(f)(5), agencies may establish fees for making copies of an individual's record

[7] OMB Fee Guidelines, 52 Fed. Reg. at 10,013, 10,018.

[8] *See, e.g.*, *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 814 n.3 (2d Cir. 1994) (doubting requester's status as "news media," but stating that there was no need to resolve issue given his entitlement to fee waiver); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 27 n.5 (D.D.C. 2006) ("no need to analyze" entitlement to news media status where plaintiff was entitled to full fee waiver).

[9] OMB Fee Guidelines, 52 Fed. Reg. at 10,012.

[10] *See* Chapter III. Related Statutes, Section A.

but not for the cost of searching for a record or reviewing it.[11] Under the Board's Rules and Regulations, the "first copy of any such record or information will ordinarily be provided without charge to the individual or representative in a form comprehensible to the individual. Fees for any other copies of requested records shall be assessed at the rate of 10 cents for each sheet of duplication."[12]

1. Commercial Use

The Board has adopted the OMB Fee Guidelines' definition of a Category I, "commercial use" request:

> Commercial use request refers to a request from or on behalf of a person 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.[13]

Case law defining "commercial use" is sparse.[14] The OMB Fee Guidelines instruct that whether a requester properly belongs in the commercial use category depends on the use to which the requester will put the requested documents.[15] Thus, while other fee categories are determined by use and the requester's identity, the commercial use category is determined exclusively by the use for which the requester has requested the information.[16] Because "use" and not identity controls, Agency FOIA processors should be aware that more

[11] 40 Fed. Reg. 28,948, 28,968 (July 9, 1975).
[12] 29 C.F.R. § 102.119(c).
[13] *Id.* at § 102.117(d)(1)(v).
[14] *See Avondale Indus., Inc. v. NLRB*, 1998 WL 34064938, at *5 n.4 (E.D. La. Mar. 20, 1998).
[15] OMB Fee Guidelines, 52 Fed. Reg. at 10,018. *See also VoteHemp, Inc. v. DEA*, 237 F. Supp. 2d 55, 65-66 (D.D.C. 2002) (nonprofit organization, as advocate for free market in controlled substance, had commercial interest in requested records); *S.A. Ludsin & Co. v. U.S. Small Bus. Admin.*, 1998 WL 355394, at *2 (E.D.N.Y. Apr. 2, 1998) (requester who sought documents to enhance prospect of securing government contract found to be commercial requester).
[16] OMB Fee Guidelines, 52 Fed. Reg. at 10,013. For example, a request by a direct mail marketing company for a list of names and home addresses in order to put certain employees on an industry mailing list would clearly be commercial in nature. Because "use" is the exclusive determining factor, however, it is possible that a commercial enterprise will make a request that is not commercial in nature. Similarly, it is also possible that a non-profit organization could make a request that is for "commercial use."

time may need to be spent in determining what the requester intends to do with the documents sought.[17]

A request for information to be used in litigation should be considered a commercial request.[18] This involves requests by charging parties for information in furtherance of their appeal. This applies to individual requesters as well as legal counsel. Case law supports the position that a request for information to be used in litigation should be considered a commercial use request, as it is a "use that furthers . . . [the requester's] business interests as opposed to a use that in some way benefit[s] the public."[19] Information sought in furtherance of a tort claim for compensation or other relief for the requester may not be considered to involve a "commercial interest."[20]

2. Educational, Noncommercial Scientific Institutions, and Representatives of the News Media

Similar to Category I, the Board has adopted the OMB Fee Guidelines' definition of a Category II request by educational or noncommercial scientific institutions and representatives of the news media.[21]

a. Educational Institutions

The Board defines an "educational institution" as follows:

[17] *Id.*

[18] 29 C.F.R. § 102.117(d)(1)(v). *See also Avondale*, 1998 WL 34064938, at *5 (company's intent to use requested documents to contest union election results and to defend itself in unfair labor practice proceeding found to be commercial use); *Rozet v. HUD*, 59 F. Supp. 2d 55, 57 (D.D.C. 1999) (finding commercial use where requester sought documents to defend corporation in civil action).

[19] OMB Fee Guidelines, 52 Fed. Reg. at 10,013.

[20] *But see McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

[21] *See* OMB Fee Guidelines, 52 Fed. Reg. at 10,018. Be aware that "noncommercial scientific institution" is not defined in the Board's Rules and Regulations. Accordingly, when a request is made by a noncommercial scientific institution, the OMB Fee Guidelines' definition "institution that is not operated on a 'commercial' basis . . . and which is operated solely for the purpose of conducting scientific research" should be applied. *Id.*

> 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, or an institution of vocational education, that operates a program of scholarly research.[22]

Consistent with the OMB Fee Guidelines, the definition of "educational institution" is limited by the requirement that the "educational institution" must be one "which operates a program or programs of scholarly research."[23] To fall within this category, the Board requires the requester to show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.[24] Researchers working pursuant to educational institution grants or professors who are conducting research are properly placed in this category. Under this definition, however, there may be individuals not connected with an educational institution, who are performing worthy academic research, but nonetheless are not included in this category.[25]

Agency FOIA processors should always evaluate requests on an individual basis to see: (1) whether a requester can demonstrate that the request is from an institution that is within this category; (2) that the institution has a program of scholarly research; and (3) that the documents sought are in furtherance of the institution's program of scholarly research and not for commercial use.[26]

[22] 29 C.F.R. § 102.117(d)(1)(vi).
[23] *Id. See also* OMB Fee Guidelines, 52 Fed. Reg. at 10,014.
[24] 29 C.F.R. § 102.117(d)(1)(vi).
[25] The OMB notes that student researchers will generally be excluded from this category because the research serves an individual, rather than an institutional, goal. A student who makes a request in furtherance of the completion of a course is carrying out an individual research goal and the request would not qualify. Nevertheless, such individuals may apply and be considered for fee waiver or fee reduction. OMB Fee Guidelines, 52 Fed. Reg. at 10,014.
[26] *Id.*

b. Representatives of the News Media

The Board defines a "representative of the news media" as follows:

> 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. . . . To be in this category, a requester must not be seeking the requested records for commercial use. However, a request for records supporting the news dissemination function of the requester shall not be considered to be for a commercial use.[27]

Section 3 of the OPEN Government Act of 2007[28] amends the FOIA such that "a representative of the news media" is now defined directly in the statute. The provision also: (1) defines the term "news"; (2) gives examples of news-media entities such as "television or radio stations broadcasting to the public at large"; (3) recognizes the evolution of "methods of news delivery" through electronic dissemination and notes that news-media entities might make their products available by "free distribution to the general public"; and (4) includes a provision for a "freelance journalist."[29]

The term "news" means "information that is about current events or that would be of current interest to the public."[30] 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 when they can qualify as disseminators of "news") "who make their products

[27] 29 C.F.R. § 102.117(d)(1)(vii).

[28] Pub. L. No. 110-175, § 2488, 121 Stat. 2524, 2525 (2007) (to be codified at 5 U.S.C. § 552(a)(4)(A)(ii)(III)).

[29] *Id.* This definition codifies the definition set forth by the U.S. Court of Appeals for the District of Columbia and the OMB Guidelines. *See* nn. 31 and 33, *infra*.

[30] *Id.* The U.S. Court of Appeals for the District of Columbia held 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." *Nat'l Sec. Archive*, 880 F.2d at 1387. *See also Elec. Privacy Info. Ctr. v. U.S. Dep't of Def.*, 241 F. Supp. 2d 5, 14 (D.D.C. 2003) (fact that an entity distributes its publication "via the Internet to subscribers' e-mail addresses does not change the [news media] analysis"). *Cf. Hall v. CIA*, 2005 WL 850379, at *6 (D.D.C. Apr. 13, 2005) (organization's statement that "news media status is pled," without mentioning the specific activities in which it is engaged, "misstates the burden that a party seeking a fee limitation . . . must carry . . . [o]therwise, every conceivable FOIA requester could simply declare itself a 'representative of the news media' to circumvent applicable fees").

available for purchase by or subscription by or free distribution to the general public."[31] These examples, however, are not intended to be all-inclusive.[32] This fee category also includes freelance journalists, when they can demonstrate a solid basis for expecting the information disclosed to be published by a news organization. For freelance journalists, a publication contract with a news organization is "a solid basis" for inclusion in the news media category, but a "past publication record" will also be considered.[33]

With changes in technology, new issues have arisen concerning what constitutes a "representative of the news media."[34] Some of these issues include bloggers and maintaining websites. That is, bloggers and individuals and organizations that maintain websites may now be considered as members of the news media under the new definition, but they must still show that the information they seek pursuant to a FOIA request fits the definition of "news." Since 2000, numerous district courts have issued decisions addressing the "news media" question. In the majority of those cases, the courts found that the organization at issue before it was not a "representative of the news media."[35] Despite the direction taken by

[31] 29 C.F.R. § 102.117(d)(1)(vii). *See also* Section 3 of the OPEN Government Act of 2007, Pub. L. No. 110-175, § 2488, 121 Stat. 2524, 2525 (2007) (to be codified at 5 U.S.C. § 552(a)(4)(A)(ii)(III)).

[32] OMB Fee Guidelines, 52 Fed Reg. at 10,018.

[33] 29 C.F.R. § 102.117(d)(1)(vii). *See also* Section 3 of the OPEN Government Act of 2007, Pub. L. No. 110-175, § 2488, 121 Stat. 2524, 2525 (2007) (to be codified at 5 U.S.C. § 552(a)(4)(A)(ii)(III)).

[34] *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 14 n.7 (while finding plaintiff qualified as news media entity, "the Court is not convinced that a website is, by itself, sufficient to qualify a FOIA requester as a 'representative of the news media,'" and reasoning that virtually all organizations and many individuals in the metropolitan area have websites, "but certainly all are not entitled to news media status for fee determinations").

[35] *See, e.g.*, *Ctr. for Pub. Integrity v. HHS*, 2007 WL 2248071, at *6 (D.D.C. Aug. 3, 2007) (requester entitled to treatment as a representative of the news media where it provided agency with information detailing its relatively established history of publication activities, as well as its intent to use information sought in requests as basis for future press releases and articles); *Hall*, 2005 WL 850379, at *6 (plaintiff's endeavors, including "'research contributions . . . email newsletters' . . . and a single magazine or newspaper article" were more akin to those of a middleman or information vendor; second plaintiff offered only conclusory assertion that it was representative of news media and "mentioned no specific activities" that it conducted); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 59 (D.D.C. 2002) (organization did not qualify for news media status as it was not organized to broadcast or publish news and was "at best a type of middleman or vendor of information that representatives of the news media can utilize when appropriate").

the district courts on this issue, it is likely to remain a somewhat unsettled area of law until it can be addressed by the D.C. Circuit and other circuit courts.

Based on the D.C. Circuit's decision in *National Security Archive*, it is clear that the term "representative of the news media" excludes "'private librar[ies]' or 'private repositories'" of government records, or middlemen such as "'intermediar[ies]' or 'information vendors [or] data brokers,'" who request records for use by others.[36]

The OMB Fee Guidelines instruct that a request from a representative of the news media that supports a news-dissemination function "shall not be considered a request that is for a commercial use."[37] A request from a representative of the news media that does not support its news-dissemination function, however, should not be accorded the favored fee treatment of this subcategory.[38] Publication services, when they are seeking information for publication that is of general interest to the labor bar, should be treated as representatives of the news media. On the other hand, a research service seeking information for an individual client's use generally should be treated as a commercial user.

Contact the General Counsel's FOIA officer in Washington if questions arise.

[36] *Nat'l Sec. Archive*, 880 F.2d at 1387.

[37] OMB Fee Guidelines, 52 Fed. Reg. at 10,019. *See also Nat'l Sec. Archive*, 880 F.2d at 1387-1388.

[38] *See Nat'l Sec. Archive*, 880 F.2d at 1387 (stating that "there is no reason to treat an entity with news media activities in its portfolio . . . as a 'representative of the news media' when it requests documents . . . in aid of its nonjournalistic activities). *Cf. Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 14 n.6 (stating that "not every organization with its own newsletter will necessarily qualify for news media status" and that, to qualify, a newsletter "must disseminate actual 'news' to the public, rather than solely self promoting articles about that organization").

3. All Other Requesters

The third statutory category, which is not specifically defined in the Board's Rules and Regulations or the OMB Fee Guidelines, applies only to those requesters who do not fall within the first two user categories.[39]

B. Imposition of Fees

Federal agencies are obligated to conform their fee schedules to the OMB's fee schedule and guidelines[40] and they must promulgate specific "procedures and guidelines for determining when such fees should be waived or reduced."[41] The Board adopted its own FOIA fee rules, which can be found at Section 102.117(d) of the Board's Rules and Regulations.

1. Limitations on the Imposition of Fees

The Freedom of Information Reform Act of 1986 provides that no fee may be charged "if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee."[42] In addition, the categories of "News Media and Educational Institution Requesters" and "All Other Requesters" are entitled to a certain amount of free services prior to the calculation of the minimal fee threshold.[43]

Thus, a threshold fee consideration for every FOIA request is whether the charges involved will exceed the expense of processing the fee. This figure is any amount less than $5.00.[44] For example, for a commercial use category request involving little or no search or review time, a requester would be entitled to a total of 41 pages for a cost of $4.92 (at $.12

[39] OMB Fee Guidelines, 52 Fed. Reg. at 10,019.
[40] *Id.* at 10,012-10,020.
[41] 5 U.S.C. § 552(a)(4)(A)(i). *See also Media Access Project v. FCC*, 883 F.2d 1063, 1064-1065 (D.C. Cir. 1989); *Nat'l Sec. Archive*, 880 F.2d at 1382; *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 6.
[42] 5 U.S.C. § 552(a)(4)(A)(iv)(I). *See also* OMB Fee Guidelines, 52 Fed. Reg. at 10,018.
[43] 5 U.S.C. § 552(a)(4)(A)(iv)(II).
[44] 29 C.F.R. § 102.117(d)(2)(iii)(A).

per page), but at no charge. However, for a request requiring 42 pages of duplication, once the charge exceeds $5.00, the requester will be billed for the entire $5.04 amount of duplication charges.

2. Chargeable Fees by the Board

a. Commercial Requesters (Assessed Full Costs of Search, Review and Duplication)

The commercial user category is the only category that allows charges for "review" time.[45] The costs of "review" chargeable to commercial use requesters 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]."[46] The Board defines "review" as follows:

> the process of examining documents located in response to a request that is for commercial use to determine whether any portion of it is exempt from disclosure. It includes processing any documents for disclosure, *e.g.*, doing all that is necessary to redact and prepare them for disclosure. Review time includes time spent considering any formal objection to disclosure made by a business submitter under paragraph (c)(2)(iv) of this section, but does not include time spent resolving legal or policy issues regarding the application of exemptions.[47]

It should be noted that charges for review may be assessed only for the initial review, *i.e.*, the review undertaken the first time the Agency analyzes the applicability of a specific exemption to a particular document or portion of a document.[48] The Agency may not charge for review at the administrative appeal level of an exemption already applied.[49] However, a document withheld in full under a particular exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not

[45] 5 U.S.C. § 552(a)(4)(A)(ii)(I).
[46] 5 U.S.C. § 552(a)(4)(A)(iv). *See also Carney*, 19 F.3d at 814 n.2.
[47] 29 C.F.R. § 102.117(d)(1)(iv).
[48] OMB Fee Guidelines, 52 Fed. Reg. at 10,018.
[49] *Id.*

previously considered, and the costs for that subsequent review would be properly assessable.[50]

Commercial use requesters are charged in full for search time.[51] Fees for document "search" include all time spent looking for responsive material, including page-by-page or line-by-line identification of material within documents.[52] The Agency may charge for search time even if it fails to locate any responsive records or even if the records located are determined to be exempt from disclosure.[53] Searches for responsive materials should be done in the "most efficient and least expensive manner reasonably possible."[54] Under the FOIA, "search" is defined as locating records or information either "manually or by automatic means" and can require agencies to expend "reasonable efforts" in electronic searches, if requested to do so by requesters willing to pay for such search activity.[55] Electronic searches at the Board may be conducted through several electronic case tracking systems.[56]

Commercial use requesters are also charged for duplication.[57] "Duplication" charges represent the reasonable "direct costs" of making copies of documents.[58] Under the Board's Rules and Regulations, copies can take various forms, including, but not limited to, paper

[50] *Id.*

[51] 29 C.F.R. § 102.117(d)(2)(ii)(A). "Search" is defined by the Board's Rules and Regulations at 29 C.F.R. § 102.117(d)(1)(ii).

[52] *See* 29 C.F.R. § 102.117(d)(1)(ii); *see also* OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

[53] OMB Fee Guidelines, 52 Fed. Reg. at 10,019. *See, e.g., Linn v. U.S. Dep't of Justice*, 1995 WL 417810, at *13 (D.D.C. June 6, 1995) (no entitlement to refund of search fees when search unproductive).

[54] 29 C.F.R. § 102.117(d)(1)(ii). *See also* OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

[55] 5 U.S.C. § 552(a)(3)(C) and (D). *See also* OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (providing that agencies should charge "the actual direct cost of providing [computer searches]," but that for certain requester categories, the cost equivalent of two hours of manual search is provided without charge).

[56] A list of the Agency's case tracking systems is located in Chapter III. Related Statutes, Section A.

[57] 29 C.F.R. § 102.117(d)(2)(ii)(A). "Duplication" is defined by the Board's Rules and Regulations at 29 C.F.R. § 102.117(d)(1)(iii). *See also* OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

[58] 5 U.S.C. § 552(a)(4)(A)(iv).

copies, microfilm, or machine-readable documentation.[59] As required by the FOIA, the Board must honor a requester's choice of form or format if the record is "readily reproducible" in that form or format with "reasonable efforts."[60] For copies prepared by computer, such as disks or printouts, the OMB Fee Guidelines instruct that agencies should charge for the actual costs, including operator time, of the production of such copies.[61] The Board does not charge a requester for the cost of disks or for the number of pages on the disk—only the time it takes to copy information onto the disks.

b. News Media and Educational Institution Requesters (Free Search and Review; 100 free pages)

Representatives of the news media or educational institution requesters are not charged for search or review time. Only duplication costs are properly charged and this charge is limited to pages in excess of the 100 pages of free duplication.[62] After crediting the requester with the appropriate free services, the $5.00 minimum must be met before any charges are properly assessable.[63]

c. All Other Requesters (Two Free Hours of Search; Free Review; 100 Free Pages)

All other requesters are properly billed for duplication and search charges, but not for review time. Such a requester is entitled to 100 pages of free duplication and two hours of

[59] 29 C.F.R. § 102.117(d)(1)(iii). *See also* OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

[60] 5 U.S.C. § 552(a)(3)(B). *See, e.g.*, *TPS, Inc. v. U.S. Dep't of Def.*, 330 F.3d 1191, 1195 (9th Cir. 2003) (interpreting "readily reproducible" as referring to technical capability). Under 5 U.S.C. § 552(a)(4)(B), if an agency's determination as to "reproducibility" is challenged, it is accorded "substantial weight" by the courts. *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C. Cir. 2006).

[61] OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

[62] 29 C.F.R.§ 102.117(d)(2)(ii)(B) and (C) and (d)(2)(iii)(A).

[63] *Id.* at § 102.117(d)(2)(iii).

free search time.[64] After crediting the requester with the appropriate free services, the $5.00 minimum must be met before any charges are properly assessable.[65]

3. Schedule of Charges

Charges[66] for responding to FOIA requests include:

- $3.10 per quarter-hour of clerical time;
- $9.25 per quarter-hour of professional time;[67] and
- $.12 per page of photoduplication.[68]

Further, the Board's Rules and Regulations provide for the imposition of charges based on "[a]ll other direct costs of preparing a response to a request."[69] Specific examples of the additional charges that may be imposed include certifying records as true copies, providing for special means (such as overnight mail delivery) of transmitting records to the requester or from the Federal Records Storage Center, programming time to retrieve materials from the Board's data processing equipment, and the cost of replicating video, computer, or audio tapes.

Pursuant to the OPEN Government Act of 2007,[70] 5 U.S.C. § 552(a)(4)(A)(viii) is amended to provide that "[a]n agency shall not assess search fees [in the case of a commercial requester] (or in the case of a [favored] requester [*i.e.*, one who qualifies as an educational or non-commercial scientific institution, or as a representative of the news

[64] *Id.* at § 102.117(d)(2)(ii)(D).
[65] *Id.* at § 102.117(d)(2)(iii).
[66] *Id.* at § 102.117(d)(2)(i)(A)-(C).
[67] Paralegal time is charged at the professional rate.
[68] The $.12 per-page charge for photoduplication includes the Board's expenses of machine rental and materials. Clerical time spent making copies also is included in the $.12 per page.
[69] 29 C.F.R. § 102.117(d)(2)(i)(D). *See also* OMB Fee Guidelines, 52 Fed Reg. at 10,018.
[70] Pub. L. No. 110-175, § 2488, 121 Stat. 2524, 2526 (2007) (to be codified at 5 U.S.C. § 552(a)(4)(A)(viii)).

media] duplication fees) . . . if the agency fails to comply with any time limit under [5 U.S.C. § 552(a)(6)], if no unusual or exceptional circumstances (as those terms are defined for purposes of [5 U.S.C. § 552(a)(6)(B) and (C)], respectively) apply to the processing of the request." Thus, 5 U.S.C. § 552(a)(4)(A)(viii) precludes an agency from assessing search fees (or in the case of "favored" requesters, duplication fees), if the agency fails to comply with the FOIA's time limits, unless "unusual" or "exceptional" circumstances "apply to the processing of the request." This section takes effect on December 31, 2008.

For guidance on charging requesters for "special services," Agency FOIA processors should contact the General Counsel's FOIA officer in Washington.

C. Principles of General Applicability

The FOIA requires that requesters follow an agency's published rules for making FOIA requests, including those pertaining to the payment of authorized fees.[71] Requesters have been found not to have exhausted their administrative remedies when fee requirements have not been met,[72] or when no appeal has been taken from the refusal to waive fees.[73] A requester's obligation to comply with an agency's fee requirements does not cease after litigation has been initiated under the FOIA.[74]

[71] 5 U.S.C. § 552(a)(3)(A). *See also Hinojosa v. U.S. Dep't of Treasury*, 2006 WL 2927095, at *4 (D.D.C. Oct. 11, 2006) (request must comply with the FOIA and with agency's requirements, "including a firm promise to pay applicable processing fees"); *Dinsio v. FBI*, 445 F. Supp. 2d 305, 311 (W.D.N.Y. 2006) (requester is required to follow agency rules "for requesting, reviewing and paying for documents").

[72] *See, e.g.*, *Trenerry v. IRS*, 1996 WL 88459, at *1 (10th Cir. Mar. 1, 1996) (exhaustion includes payment of FOIA fees), *aff'd*, 78 F.3d 598 (10th Cir. 1996).

[73] *See, e.g.*, *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 66 (D.C. Cir. 1990) ("Exhaustion does not occur until the required fees are paid or an appeal is taken from the refusal to waive fees."); *Gonzalez v. Bureau of Alcohol, Tobacco and Firearms*, 2005 WL 3201009, at *6 (D.D.C. Nov. 9, 2005) (requester's inaction—*i.e.*, that he never paid assessed fee nor appealed agency's refusal of fee waiver denial—precludes judicial review of request).

[74] *See Pollack v. U.S. Dep't of Justice*, 49 F.3d 115, 119-20 (4th Cir. 1995) (commencement of FOIA action does not relieve requester of obligation to pay for documents); *Kemmerly v. U.S. Dep't of Interior*, 2006 WL 2990122, at *2 (E.D. La. Oct. 17, 2006) (whether request for payment is made by agency pre- or post-

1. Assumption of Liability for Fees

Before undertaking a search, the FOIA processor must determine whether the requester has agreed to assume the costs of processing the request, and if so, whether the requester has placed any restrictions on the amount the requester will pay. Assumption of financial liability is required in all requests.[75] In the event that a requester fails to assume full liability or assumes liability in a specific amount insufficient to cover the anticipated charges, the requester is to be notified and given an opportunity to assume full liability.[76] A request is deemed not to be received by the Board, and the 20 working days for response does not begin to run, until there has been a full assumption of liability for fees in writing.[77]

The FOIA processor must still give separate notice to the requester if, during processing of the request, the processor becomes aware, for the first time, that the costs are expected to exceed $250.00, unless this has been made clear to the requester from the outset and the requester has agreed to accept such costs in writing.[78]

2. Interest

The Agency may begin to assess interest on unpaid charges on the thirty-first day after the notification of charges was sent.[79] Interest will accrue from the billing date at a rate prescribed in 31 U.S.C. § 3717.[80] Agency FOIA processors should contact the General Counsel's FOIA officer in Washington before assessing interest.

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litigation, "'the plaintiff has an obligation to pay'" (quoting *Trueblood v. U.S. Dep't of the Treasury*, 943 F. Supp. 64, 68 (D.D.C. 1996)).

[75] 29 C.F.R. § 102.117(d)(2)(vi).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at § 102.117(d)(2)(v).

[80] The rate changes annually, and the new rate is published in the *Federal Register*.

3. Advance Payments

Prepayment of charges prior to beginning the search generally is not required unless the requester has previously been delinquent.[81] However, a requester who previously has not made a request is required to make an advance payment if the cost of processing the request is anticipated to exceed $250.00.[82] For requesters with a history of prompt payment, a written assurance of payment is sufficient before beginning the search.[83] In addition, before a new request from a requester who is overdue in paying charges for a prior request can be processed, that requester will be required to pay the entire amount of fees that are owed.[84] No FOIA requests from delinquent requesters should be processed. The Agency may also require advance payment of fees that it estimates will be incurred in processing the new request before it commences processing that request.[85] When prepayment is required in either of these circumstances, the requester should be advised that applicable administrative FOIA time limits for response and appeal begin to run only after such prepayment amounts are received.[86] As noted above, a requester becomes delinquent for purposes of payment of fees on the thirty-first day after fees are assessed, despite the filing of an appeal.[87] Requesters should be advised that timely payment of fees must be made, under protest if

[81] The statutory restriction prohibiting a demand for advance payments does not, of course, prevent agencies from requiring payment before records that have been processed are released. *See Farrugia v. Executive Office for U.S. Attorneys*, 366 F. Supp. 2d 56, 57 (D.D.C. 2005) (where requested records are already processed, payment may be required by agency before sending them).

[82] 5 U.S.C. § 552(a)(4)(v). *See also* OMB Fee Guidelines, 52 Fed. Reg. at 10,020; *O'Meara v. IRS*, 1998 WL 123984, at *1-2 (7th Cir. Mar. 17, 1998) (upholding agency's demand for advance payment when fees exceeded $800).

[83] 29 C.F.R. § 102.117(d)(2)(vi)(A).

[84] *Id.* at § 102.117(d)(2)(vi)(B).

[85] *Id.*

[86] *Id.*

[87] *Id.* at § 102.117(d)(2)(v). Processing offices should check the "Past Due Invoice Report" to see if the requester is more than 30 days past due on any invoices.

necessary, to avoid being deemed a delinquent requester required to make advance payment for subsequent requests.[88]

In addition to the Division of Operations Management, the General Counsel's FOIA officer in Washington should be advised as to all delinquent requesters.

4. Estimating Costs

For delinquent requesters (those who have failed to pay FOIA fees within thirty-one days of assessment),[89] processing offices shall estimate the fees that will be associated with processing subsequent requests by those requesters. This estimate is calculated by estimating the amount of professional and clerical time and duplication charges, at the rates set forth in the Board's Rules and Regulations,[90] which will be required to process the request.[91] The processing office will then transmit this estimate to the requester together with an explanation of the estimate and the requester's delinquent status under the Board's Rules and Regulations and an assertion that the request will not be processed and the 20-day time limit for response will not begin to run until the estimated costs, including delinquent costs, are paid in full.[92]

5. Aggregation of Requests

Whenever the Agency "reasonably believes" that a requester, or a group of requesters acting together, is attempting to escape fees by submitting a series of individual requests, it

[88] *Id.* at § 102.117(d)(2)(vi)(B). FOIA processors should first contact the requester by telephone about delinquent fees and then follow up with a letter.

[89] As stated, *supra*, processing offices are to review the "Past Due FOIA Invoice Report" to determine whether the requester is a delinquent payer.

[90] 29 C.F.R. § 102.117(d)(2)(i). Requesters are not charged for postage.

[91] This method of calculation also should be used to determine whether the costs of complying with a first-time request are anticipated to exceed $250.00, as well as to keep track of costs generally.

[92] Any further collection efforts, including litigation, will be considered by the General Counsel's FOIA officer in Washington.

may, after notification, aggregate such requests and charge accordingly.[93] The OMB Fee Guidelines instruct that one factor to consider in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30-day period had been made to avoid fees. For requests, however, made over a longer period, such a presumption becomes harder to sustain, and agencies should have a solid basis for determining that aggregation is warranted in such cases.[94] The OMB Fee Guidelines caution that before aggregating requests from more than one requester, an agency should have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. Under no circumstances may an agency aggregate multiple requests on unrelated subjects from one requester.[95]

The OMB Fee Guidelines should be consulted for additional guidance on aggregating requests as should the General Counsel's FOIA officer in Washington.

D. Fee Waiver and Fee Reduction

Fee waiver or reduction is a determination separate and apart from placement in a user category. The fee waiver standard provides 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."[96] The Board has incorporated the statutory fee waiver test into its regulations.[97] Such a determination requires balancing

[93] 29 C.F.R. § 102.117(d)(2)(iii)(B).
[94] OMB Fee Guidelines, 52 Fed. Reg. at 10,019-20.
[95] *Id.*
[96] Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-50 (codified as amended at 5 U.S.C. § 552(a)(4)(A)(iii) (2000) and Supp. IV (2004)).
[97] 29 C.F.R. § 102.117(d)(2)(iv).

whether the public interest in the disclosure outweighs the requester's commercial or personal interest in the disclosure.[98]

In all cases where fee waiver situations raise questions about application of this test, Agency FOIA processors should contact the General Counsel's FOIA officer in Washington.

1. Fee Waiver Standard

The statutory fee waiver standard contains two basic requirements—the public interest requirement and the requirement that the requester's commercial interest in the disclosure, if any, must be less than the public interest in it.[99] These two requirements must be satisfied by the requester before properly assessable fees are waived or reduced under the statutory standard.[100] In this regard, it is the status of the requester, not the requester's representative or counsel, who must demonstrate his entitlement to a fee waiver.[101]

The Department of Justice has advised Federal agencies to employ the following six factors when determining whether fees should be waived or reduced.[102]

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."

1. **The subject of the request:** Whether the subject of the requested records concerns "the operations or activities of the government";

[98] *Id.*

[99] *See, e.g., Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, 290 F. Supp. 2d 1226, 1228 (D. Or. 2003) (recognizing that statute establishes two-part test for fee waiver); *VoteHemp*, 237 F. Supp. 2d at 58 (reiterating "two-prong analysis" required for fee waiver requests); *Jarvik v. CIA*, 495 F. Supp. 2d 67, 72-73 (D.D.C. 2007) (agency properly denied request for fee waiver by requester who identified himself as journalist working on book and maintaining personal blog where requester failed to prove that request would likely contribute significantly to public understanding of government operations).

[100] *See Brown v. U.S. Patent and Trademark Office*, 445 F. Supp. 2d 1347, 1354 (M.D. Fla. 2006) (requester "bears the burden of providing information that supports his fee waiver request with the initial FOIA request," and noting that plaintiff provided no authority for the "proposition that an agency must conduct independent research in making a fee waiver determination"); *S. Utah Wilderness Alliance v. U.S. Bureau of Land Mgmt.*, 402 F. Supp. 2d 82, 87 (D.D.C. 2005) (reiterating that requester bears the burden of showing entitlement to fee waiver).

[101] *See, e.g., Dale*, 238 F. Supp. 2d at 107.

[102] *See U.S. Dep't of Justice FOIA Update*, Vol. VIII, No.1 (Winter/Spring 1987), at 3-10.

2. **The informative value of the information to be disclosed:** Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

3. **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to "public understanding"; and

4. **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Disclosure of the Information "is Not Primarily in the Commercial Interest of the Requester."

5. **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

6. **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."[103]

All categories of requesters may qualify for waiver or reduction of fees, although the likelihood of a commercial user qualifying for such a waiver or reduction is less than that of the other categories.[104] Legislative history shows that the FOIA fee waiver provision "'is to be liberally construed in favor of waivers for noncommercial requesters.'"[105] Despite this "liberal construction," noncommercial public interest groups must still satisfy the statutory standard to obtain a fee waiver.[106] Each request for fee waiver or reduction must be analyzed

[103] These six factors were applied and implicitly approved in *McClellan*, 835 F.2d at 1284-1297. *See also Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003).

[104] As discussed above, it is the status of the requester, not the requester's representative or counsel, who must demonstrate his entitlement to a fee waiver. *See Dale*, 238 F. Supp. 2d at 107.

[105] *See McClellan,* 835 F.2d at 1284 (quoting 132 Cong. Rec. S14,298 (Sept. 30, 1986) (statement of Sen. Leahy)). *See also Rossotti,* 326 F.3d at 1312 (agreeing with liberal construction).

[106] *McClellan,* 835 F.2d at 1284.

on a case-by-case basis.[107] As a result, when analyzing fee waiver questions, the Agency is not strictly bound by a previous administrative decision—even if it involves a similar request from the same requester.[108] Additionally, when a requester fails to provide sufficient information for the Agency to make an informed decision as to whether it can appropriately waive or reduce the fees in question, consideration of a fee waiver request may be deferred in order to ask the requester for all necessary supplemental or clarifying information.[109] Thus, the Agency may toll the 20-day period if necessary to clarify with the requester issues regarding fee assessment.[110]

a. Whether disclosure of the information is in the public interest

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—Agency FOIA processors must consider the following four factors in sequence:[111]

(1) The subject matter of the request

The subject matter of the requested records must specifically concern identifiable "operations or activities of the government." As the D.C. Circuit indicated in applying the predecessor fee waiver standard, "the links between furnishing the requested information and

[107] *See Media Access Project*, 883 F.2d at 1065 (any requester may seek waiver of assessed fees on "case-by-case" basis).

[108] *See Dollinger v. U.S. Postal Serv.*, No. 95-CV-6174T, slip op. at 7-8 (W.D.N.Y. Aug. 24, 1995) (agency is not bound by previous decision on fee waiver for similar request from same requester).

[109] *See McClellan*, 835 F.2d at 1287 ("[t]he fee waiver statute nowhere suggests that an agency may not ask for more information if the requester fails to provide enough").

[110] Pub. L. No. 110-175, § 2488, 121 Stat. 2524, 2526 (2007) (to be codified at 5 U.S.C. § 552(a)(6)(A)(ii)(II)).

[111] *See Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (invoking agency's four-factor fee waiver test, and stating that "[the] four criteria must be satisfied" in order "for a request to be in the 'public interest'").

benefiting the general public" should not be "tenuous."[112] Although it is true that in most cases the records possessed by a Federal agency will meet this threshold, the records must be sought for their informative value with respect to specifically identified government operations or activities;[113] a request for access to records for their intrinsic informational content alone would not satisfy this threshold consideration.

(2) The informative value of the information to be disclosed

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 material must be meaningfully informative in relation to the subject matter of the request.[114] 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 because the disclosure would not be likely to contribute to an understanding of government operations or activities when nothing new would be added to the public's understanding.[115] There is, however, no clear consensus yet

[112] *See NTEU v. Griffin*, 811 F.2d 644, 648 (D.C. Cir. 1987). *But see Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (accepting requester's assertion that the requested records would indirectly pertain to agency policy by "shedding light on the potential influence private groups have over agency policy," and stating that requiring requester "to provide more concrete factual support for its assertions would be setting the bar too high").

[113] *See, e.g.*, *Brown*, 445 F. Supp. 2d at 1358-1359 (allegations made in lawsuits brought against agency did not concern operations or activities of agency); *Judicial Watch, Inc. v. Reno*, 2001 WL 1902811, at *10 (D.D.C. Mar. 30, 2001) (upholding agency's assessment of fees, reasoning that while agency's response to citizen letters regarding Cuban émigré Elian Gonzales would likely contribute to understanding of agency actions, citizen letters to agency on that topic do not).

[114] *See Carney*, 19 F.3d at 814 (finding it is relevant to consider subject matter of fee waiver request).

[115] *See, e.g.*, *Judicial Watch, Inc.*, 365 F.3d at 1126-1128 (emphasizing that plaintiff received "thousands of pages of requested documents" but "has made no showing" to counter the government's representations that requested information "was already in the public domain and thus not likely to contribute significantly to the public's understanding" of a governmental activity; further finding "no basis to conclude that [plaintiff] is entitled to a blanket fee waiver" where plaintiff did not take issue with the reasonableness of the district court's finding of the public availability of documents already released); *Lappin*, 436 F. Supp. 2d at 24 (publicly available court documents were "likely dispersed throughout the . . . federal courthouses in this country," thus compelling the conclusion that such records are not "readily available" to the public; further noting that electronic access to requested records on court electronic case filing system was not yet fully implemented nationally).

as to what "is and what is not" considered information in the public domain.[116] It should be noted that a denial of a fee waiver for records that are said to be already in the public domain is not a denial of access to them under the FOIA, such records merely must be paid for by the requester.

(3) The contribution to an understanding of the subject by the general public likely to result from the disclosure

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.[117]

As the proper focus must be on the benefit to be derived by the public, any personal benefit to be derived by the requester, or the requester's particular financial situation, are not factors entitling him to a fee waiver.[118] Indeed, it is well settled that indigence alone, without a showing of a public benefit, is insufficient to warrant a fee waiver.[119]

[116] Compare *Forest Guardians*, 416 F.3d at 1181 (public availability of information generally weighs against fee waiver) and *Blakey v. U.S. Dep't of Justice*, 549 F. Supp. 362, 364-65 (D.D.C. 1982) (applying same principle under previous statutory fee waiver standard), *aff'd*, 720 F.2d 215 (D.C. Cir. 1983), with *Friends of the Coast Fork v. U.S. Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997) (availability in agency's public reading room alone does not justify denial of fee waiver). *See also Carney*, 19 F.3d at 815 (mere fact records released to others does not mean same information is readily available to public).

[117] *See Forest Guardians*, 416 F.3d at 1179 ("FOIA fee waivers are limited to disclosures that enlighten more than just the individual requester"); *Carney*, 19 F.3d at 814 (observing that relevant inquiry is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject"); *Crooker v. U.S. Dep't 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"); *see also NTEU*, 811 F.2d at 648 (rejecting "union's suggestion that its size insures that any benefit to it amounts to a public benefit"); *Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs*, 241 F. Supp. 2d 1342, 1367 (D.N.M. 2002) (requester's intent to release the information obtained "to the media is not sufficient to demonstrate that disclosure would contribute significantly to public understanding").

[118] *See, e.g.*, *McClain v. U.S. Dep't of Justice*, 13 F.3d 220, 220-21 (7th Cir. 1993) (fee waiver was inappropriate when requester sought to serve a private interest rather than "public understanding of operations or activities of the government"); *Carney*, 19 F.3d at 816 (fee waiver inappropriate for portion of responsive records that concerned processing of plaintiff's own FOIA requests); *McQueen v. United States*, 264 F. Supp. 2d 502, 525 (S.D. Tex. 2003) (acknowledging that plaintiff asserted more than one basis in support of fee waiver, but concluding that his "primary purposes" served private interests and thus disqualified him on that basis alone), *aff'd*, 100 F. App'x 964 (5th Cir. 2004).

[119] *See, e.g.*, *DeCato v. Executive Office for the U.S. Attorneys*, 2003 WL 22433759, at *1 (D.C. Cir. Oct. 24, 2003) (reiterating that "this court has held that indigence is not a justification for waiving fees"); *Ely v.*

To determine whether the public would benefit from disclosure to that requester, Agency FOIA processors 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 public.[120] Specialized knowledge may be required to extract, synthesize, and effectively convey the information to the public, and requesters certainly vary in their ability to do so.[121]

While established representatives of the news media should be readily able to meet this aspect of the statutory requirement by showing their connection to a ready means of effective dissemination, other requesters should be required to describe with greater substantiation their expertise in the subject area and their ability and intention to disseminate the information.[122] The Agency often receives FOIA requests from non-profit organizations and public interest groups. Although such organizations may be capable of disseminating

U.S. Postal Serv., 753 F.2d 163, 165 (D.C. Cir. 1985) ("Congress rejected a fee waiver provision for indigents.").

[120] Compare *Brown*, 445 F. Supp. 2d at 1360 ("Simply maintaining a website is not disseminating information to a broad audience of interested persons."), *Hall*, 2005 WL 850379, at *7 (the "'ability to convey information' to others is insufficient without some details of how the requester will actually do so" (citations omitted), and viewing the requester's statement that he "'makes pertinent information available to newspapers and magazines' . . . [as] exactly the kind of vague statement that will preclude a fee waiver"), with *Forest Guardians*, 416 F.3d at 1180 (requester's publication of online newsletter and its intent to create interactive website using requested records, "[a]mong other things," to be sufficient for dissemination purposes), *Carney*, 19 F.3d at 814-815 (characterizing dissemination requirement as the ability to reach "a reasonably broad audience of persons interested in the subject" and not the need to "reach a broad cross-section of the public"), *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040-1041 (D. Idaho 2004) (requester had adequately demonstrated its intent and ability "to reach a large audience" through multiple means including its regular newsletter, radio and newspapers, website, presentations to diverse groups, and participation in conferences and nationwide public events; stating that the agency's position on dissemination "would set the bar for fee waivers impermissibly high"), and *Judicial Watch v. U.S. Dep't of Energy*, 310 F. Supp. 2d 271, 292 (D.D.C. 2004) (requester's "litany of means by which it [could] publicize[] information" without any specific representation that it intended to do so in instant case satisfied dissemination requirement).

[121] *See McClellan*, 835 F.2d at 1286 (observing that fee waiver request gave no indication of requesters' ability to understand and process information nor whether they intended to actually disseminate it); *Eagle v. U.S. Dep't of Commerce*, 2003 WL 21402534, at *5 (N.D. Cal. Apr. 28, 2003) (granting fee waiver and emphasizing that agency ignored educational institution requester's intent to review, evaluate, synthesize, and present "the otherwise raw information into a more usable form").

[122] *McClellan*, 835 F.2d at 1286-1287 (stating agency may request additional information, finding that twenty-three questions not burdensome).

information, they do not by virtue of their status presumptively qualify for fee waivers.[123] Such organizations must, like any requester, meet the statutory requirements for a full waiver of all fees.

Further, 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. Requests that make no showing of how the information would be disseminated, other than through passively making it available to anyone who might seek access to it, do not meet the burden of demonstrating with particularity that the information will be communicated to the public. These requests, like those of other requesters, should be analyzed to identify a particular person or persons who actually will use the requested information in scholarly or other analytic work and then disseminate it to the general public.

(4) The significance of the contribution to public understanding

The disclosure must contribute "significantly" to public understanding of government operations or activities.[124] 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

[123] 5 U.S.C. § 552(a)(4)(A)(iii). *See also* OMB Fee Guidelines, 52 Fed. Reg. at 10, 018 (specifying where "use is not clear from the request . . . agencies should seek additional clarification before assigning the request to a specific category"); *Forest Guardians*, 416 F.3d at 1178 (public interest groups "must still satisfy the statutory standard to obtain a fee waiver").

[124] 5 U.S.C. § 552(a)(4)(A)(iii). *See also Cmty. Legal Servs., Inc. v. HUD*, 405 F. Supp. 2d 553, 558 (E.D. Pa. 2005) (statute provides no guidance "as to what constitutes a 'significant' contribution"); *Tomscha v. Gen. Servs. Admin.*, 2005 WL 3406575, at *2 (2d Cir. Dec. 12, 2005) (determining, in an Exemption 6 context, that where requester sought justifications for a Federal employee's performance awards but provided no evidence of wrongdoing by agency in granting such awards, disclosure would not "contribut[e] significantly to the public understanding of the operations or activities of the government") (citations omitted)).

disclosure to a significant extent.[125] Such a determination must be an objective one. Agency FOIA processors 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.[126]

Once an agency determines that the "public interest" requirement for a fee waiver has been met—through its consideration of fee waiver factors one through four—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."[127]

b. Whether disclosure of information is "not primarily in the commercial interest of the requester"

In order to decide whether this requirement has been satisfied, Agency FOIA processors should consider the final two of the six fee waiver factors—factors five and six—in sequence.

(5) The existence and magnitude of a commercial interest

To apply this factor, Agency FOIA processors must next determine as a threshold matter whether the request involves any commercial interest of the requester which would be furthered by the disclosure.[128] A "commercial interest" is one that furthers a commercial,

[125] *See, e.g., Brown v. U.S. Patent & Trademark Office*, 2007 WL 446601, at *2 (11th Cir. Feb. 13, 2007) (requester failed to adequately explain how requested records were "related to the activities or operations" of agency or how they "would contribute to the public's understanding of that agency"); *Forest Guardians*, 416 F.3d at 1181-1182 (acknowledging that the significance of the contribution to be made by the "release of the records" at issue "is concededly a close question," and finding that requester "should get the benefit of the doubt" and therefore is entitled to a fee waiver).

[126] *See Cmty. Legal Servs.*, 405 F. Supp. 2d at 560 (agency's inferences that request was a pretext for discovery and requester's use of "information in advising clients suggests a litigious motive" were speculative where there was no evidence of any pending lawsuits).

[127] 5 U.S.C. § 552(a)(4)(A)(iii).

[128] *See, e.g., Vote-Hemp*, 237 F. Supp. 2d at 64 (citing to agency's regulation and noting that "agencies are instructed to consider 'the existence and magnitude' of a commercial interest").

trade, or profit interest as those terms are commonly understood.[129] 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.[130] Agency FOIA processors may consider the requester's identity and the circumstances surrounding the request and draw reasonable inferences regarding the existence of a commercial interest.[131]

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, Agency FOIA processors must assess the magnitude of such interest in order subsequently to compare it to the "public interest" in disclosure. In assessing the magnitude of the commercial interest, the FOIA processor should reasonably consider the extent to which the FOIA disclosure will serve the requester's identified commercial interest.

It would be a rare circumstance where a request of a party litigant or its representative in a case pending before the Board, for information to be used in the litigation of the case, could qualify for a fee waiver, since it is the Agency's position that a request for records for such a use would be primarily for the commercial interest of the requester, as opposed to the public interest. Nevertheless, each fee waiver or fee reduction request should be evaluated on its individual merits.

[129] OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18. *Cf. Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978) (defining term "commercial" in Exemption 4 as meaning anything "pertaining or relating to or dealing with commerce").

[130] OMB Fee Guidelines, 52 Fed. Reg. at 10,013. *See also VoteHemp*, 237 F. Supp. 2d at 65 (non-profit organization, as advocate for free market in controlled substance, had commercial interest in requested records). *Cf. Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 281 (D.C. Cir. 1987) (entity's "non-profit status is not determinative" of commercial status) (Exemption 4 case).

[131] *See Vote-Hemp*, 237 F. Supp. 2d at 65 ("a review of plaintiff's website pages demonstrates that indeed it has a commercial interest in the information it is seeking to obtain.")

(6) The primary interest in disclosure

Finally, Agency FOIA processors 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 when the public interest in disclosure is greater in magnitude than the requester's commercial interest.

Although news gathering organizations ordinarily have a commercial interest in obtaining information, FOIA processors may generally presume that when a news media requester has satisfied the "public interest" standard, that will be the primary interest served.[132] On the other hand, disclosure to private repositories 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.[133]

When the FOIA processors analyze fee waiver requests by considering the aforementioned six factors, the Agency will have carried out its statutory obligation to determine whether a waiver is in the public interest.[134] When an agency relies on factors unrelated to the public benefit standard to deny a fee waiver request, courts have found an abuse of discretion.[135]

[132] *See Nat'l Sec. Archive*, 880 F.2d at 1388 (requests from news media entities, in furtherance of their newsgathering function, are not for "commercial use").

[133] *Id.*

[134] *Friends of the Coast Fork*, 110 F.3d at 55 (where agency's regulations provide for multifactor test, it is inappropriate to rely on single factor); *Or. Natural Desert Ass'n v. U.S. Dep't of the Interior*, 24 F. Supp. 2d 1088, 1095 (D. Or. 1998) (fee waiver denial must fail when agency did not fully follow its multifactor regulation).

[135] *See, e.g.*, *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); *Eudey v. CIA*, 478 F. Supp. 1175, 1177 (D.D.C. 1979) (agency may not consider quantity of documents to be released).

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 a request, because the statutory standard speaks to whether "disclosure" of the responsive information will significantly contribute to public understanding.[136] This assessment necessarily focuses on the information that would be disclosed,[137] which in turn logically requires an estimation of the applicability of any relevant FOIA exemption(s).

Additionally, fee waiver is not an all or nothing proposition. When only some of the requested records satisfy the fee waiver test, a partial waiver may be granted. For example, if sixty percent of the documents satisfy the test, a sixty percent waiver is warranted. When only some of the requested records satisfy the statutory test, a waiver should be granted for those records.[138]

The FOIA does not explicitly reference any time period within which an agency must resolve a fee waiver issue.[139] The extension of the statutory 20-working day compliance requirement to include the resolution of fee waiver (and fee) issues, however, is a logical application of the statutory 20-day provision. Indeed, several courts, including the D.C. Circuit, have implicitly approved such application.[140] Moreover, the OPEN Government Act

[136] 5 U.S.C. § 552(a)(4)(A)(iii).

[137] *See Hall*, 2005 WL 850379, at *7 (FOIA fee waiver provision is applicable to "properly disclosed documents"); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 2000 WL 33724693, at *5 (D.D.C. Aug. 17, 2000) (explaining "[u]nder the FOIA, the [fee waiver] analysis focuses on the subject and impact of the particular disclosure").

[138] 29 C.F.R. § 102.117(d)(2)(iv). *See also Samuel Gruber Educ. Project v. U.S. Dep't of Justice*, 24 F. Supp. 2d 1, 2 (D.D.C. 1998) (upholding, without discussion, seventy percent fee waiver granted by agency). *But see Schrecker v. U.S. Dep't of Justice*, 970 F. Supp. 49, 50-51 (D.D.C. 1997) (granting full fee waiver despite agency's determination that portion of requested information already was in public domain); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 35 (D.C. Cir. 1998) (finding fault with analysis used by agency to award partial fee waiver; remanding case for reconsideration but declining to hold that agency may not charge any fee).

[139] 5 U.S.C. § 552(a)(4)(A)(iii).

[140] *See Rossotti*, 326 F.3d at 1311 ("A requester is considered to have constructively exhausted administrative remedies and may seek judicial review immediately if . . . the agency fails to answer the [fee waiver] request within twenty days."); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*,

of 2007 expressly provides that the 20-day period may be tolled by the Agency if necessary to clarify with a requester issues regarding fee assessment.[141] With regard to fee waiver matters, agencies should retain the general discretion, though, to consider the cost-effectiveness of their investment of administrative resources in their fee waiver determinations.[142]

E. Appeals of Fee-Related Issues

In order to ensure uniformity of treatment of requesters and administrative exhaustion prior to court litigation, Agency FOIA processors should inform requesters of their right to appeal fee waiver or reduction decisions and the determinations concerning placement of requesters in a particular FOIA use category. The appeals process will be handled in the same manner in which appeals from the denial of requests for documents are handled.

1. Review of fee category determination

The 1986 Reform Act is silent with respect to the standard and scope of judicial review for an agency determination of fee category. The standard therefore appears to be the same as that under the predecessor statutory fee provision. That is, agency action should be upheld unless it is found to be "arbitrary and capricious," in accordance with the Administrative Procedure Act.[143] Due to this lack of clarity, the appropriate standard of

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2006 WL 1518964, at *3, *5-*6 (D.D.C. June 1, 2006) (criticizing agency for time taken in adjudicating fee waiver appeal).

[141] Pub. L. No. 110-175, § 2488, 121 Stat. 2524, 2526 (2007) (to be codified at 5 U.S.C. § 552(a)(6)(A)(ii)(II)).

[142] *See Rodriguez v. U.S. Postal Serv.*, No. 90-1886, slip op. at 3 n.1 (D.D.C. Oct. 2, 1991) (suggesting agency "consider" waiving de minimis fee despite requester's failure to comply with exhaustion requirement); *see also* OMB Fee Guidelines, 52 Fed. Reg. at 10,018 (encouraging agencies, with regard to fee matters, to use "most efficient and least costly methods" to comply with FOIA requests).

[143] 5 U.S.C. §§ 701-706 (2000); *see Judicial Watch, Inc. v. U.S. Dep't of Justice*, 122 F. Supp. 2d 13, 20 (D.D.C. 2000) (applying arbitrary and capricious standard of review based on court's "prior analysis" in *Judicial Watch v. U.S. Dep't of Justice*, 122 F. Supp. 2d 5, 8 (D.D.C. 2000); *Judicial Watch*, 122 F. Supp. 2d at 8, 11 (acknowledging that standard of review for fee issue is not "as well settled" as other areas of the FOIA but

review has yet to be clearly established in the decisions that have considered this issue.[144] Despite statutory language that seems to suggest to the contrary,[145] the majority of courts that have reviewed fee issues under FOIA have applied a single review standard (*i.e.*, de novo review) to both fee and fee waiver matters, and they have done so with little or no discussion.[146] As for the scope of review, it should be limited to the administrative record before the agency at the time of its decision, not some new record made before the reviewing court.[147]

2. Review of fee waiver determination

The FOIA does not explicitly provide for administrative appeals of denials of requests for fee waivers.[148] Nevertheless, many agencies, including the Board, either by regulation or by practice, have appropriately considered appeals of such actions.[149] The Courts of Appeals for the D.C. and Fifth Circuits have made it clear, moreover, that appellate administrative exhaustion is required for any adverse determination, including fee waiver denials.[150] However, a requester wishing to challenge an agency's denial of a fee waiver may seek

that this issue is "not difficult" under well-established principle of statutory construction; reasoning that because 1986 Reform Act "only changed the standard of review for fee-waiver decisions, this court presumes that Congress retained the arbitrary and capricious standard of review for fee-category decisions").

[144] Compare *Hall*, 2005 WL 850379, at *6 n.10 (acknowledging that there is "some dispute" as to review standard for fee limitation based on news media status (citing *Judicial Watch*, 122 F. Supp. 2d at 11-12 (applying arbitrary and capricious standard), with *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53 (D.D.C. 2000) (applying de novo standard))).

[145] 5 U.S.C. § 552(a)(4)(A)(vii) ("[I]n any action by a requester regarding the *waiver of fees* . . . the court shall determine the matter de novo.") (emphasis added).

[146] *Judicial Watch*, 133 F. Supp. 2d at 53 (rejecting government's argument that arbitrary and capricious standard applied to matter of fee category; undertaking de novo review on both fee and fee waiver issues); *Judicial Watch*, 2000 WL 33724693, at *3-*4 (applying de novo standard to fee category and fee waiver issues).

[147] *See, e.g.*, *Judicial Watch*, 122 F. Supp. 2d at 12 (scope of court's review is limited to administrative record); *NTEU*, 811 F.2d at 648 (reasonableness of agency's position "depends on the information before it at the time of its decision").

[148] 5 U.S.C. § 552(a)(4)(A)(iii).

[149] 29 C.F.R. § 102.117(c)(2)(v).

[150] *See Pruitt v. Executive Office for the U.S. Attorneys*, 2002 WL 1364365, at *1 (D.C. Cir. Apr. 19, 2002) (judicial review is not appropriate until requester either appeals fee waiver denial or pays assessed fee); *Voinche v. U.S. Dep't of Air Force*, 983 F.2d 667 (5th Cir. 1993) (holding that claimants seeking a fee waiver under FOIA must exhaust their administrative remedies prior to seeking judicial relief).

judicial review of the agency's decision.[151] An agency denial of a fee waiver request is reviewed by courts under a de novo standard. [152] The scope of judicial review is expressly limited to the administrative record established before the agency,[153] and thus it is crucial that the Board's fee waiver denial letter create a comprehensive administrative record of all of the reasons for the denial.[154] In this regard, agencies should also be aware that a challenge to an agency's fee waiver policy is not automatically rendered moot when the agency reverses itself and grants the specific fee waiver request; courts may still entertain challenges when they concern the legality of the standards used.[155] An agency's belated grant of a fee waiver, however, can render moot a requester's challenge to its fee waiver denial when it is the agency's specific denial that is at issue,[156] not the underlying fee waiver policy used by the agency to make that administrative determination.[157]

Key Points to Remember

- Based on the user category, requesters can be charged for one or more of three services: search, review, and duplication.

[151] 5 U.S.C. § 552(a)(4)(B). *Cf. Kansi v. U.S. Dep't of Justice*, 11 F. Supp. 2d 42, 43 (D.D.C. 1998) (refusing to consider fee waiver request when it was not raised in complaint or adequately justified before agency).

[152] 5 U.S.C. § 552(a)(4)(A)(vii).

[153] *Id. See also Rossotti*, 326 F.3d at 1311 (review is "limited to the record before the agency").

[154] *See, e.g.*, *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005); *Friends of the Coast Fork*, 110 F.3d at 55 (agency's letter "must be reasonably calculated to put the requester on notice" as to reasons for the fee waiver denial); *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (information not part of administrative record may not be considered by district court when reviewing agency fee waiver denial).

[155] *See Better Gov't Ass'n v. U.S. Dep't of State*, 780 F.2d 86, 91 (D.C. Cir. 1986) (arguments concerning facial validity of fee waiver guidelines not moot when agency intends to apply same standards to future requests).

[156] *See Hall v. CIA*, 437 F.3d 94, 97-100 (D.C. Cir. 2006) (in this "disconcertingly complex" case, agency's decision to release documents without payment of fees moots requester's appeal of the fee waiver denial; vacating "each of the district court's decisions to the extent that they relate to the payment of fees"); *Judicial Watch, Inc. v. U.S. Dep't of Transp.*, 2005 WL 1606915, at *5 n.2 (D.D.C. July 7, 2005) (where requester was entitled to fee waiver "there is no need to address . . . news media" status). *Cf. Tooley v. Bush*, 2006 WL 3783142, at *11 n.2 (D.D.C. Dec. 21, 2006) (request for fee waiver moot where agencies charged no fees).

[157] *See Payne Enters. v. United States*, 837 F.2d 486, 491-92 (D.C. Cir. 1988) (when party's lawsuit is "challenge to the policy or practice" of agency, such that agency action reasonably would be expected to "recur" absent judicial review, and not to the specific action taken by agency in a particular instance, it "cannot be mooted by the release of the specific documents that prompted the suit") (non-fee context).

- Agencies may charge for search time even if they fail to locate any responsive records or even if the records located are determined to be exempt from disclosure.[158]

- Search for material should be done in the most efficient and least expensive manner.[159]

- A request for information to be used in litigation before the Board ordinarily should be considered a commercial use request as it is a "use that further[s]…[the requester's] business interests as opposed to a use that in some way benefits the public."[160] Commercial use requesters are assessed full costs of search, review and duplication.[161]

- Fees are waived for responses to FOIA requests that do not exceed $5.00.[162]

- Current charges for responding to FOIA requests are: $3.10 per quarter-hour of clerical time; $9.25 per quarter-hour of professional time; and $.12 per page of photoduplication.[163]

[158] OMB Fee Guidelines, 52 Fed. Reg. 10,019 (1987). *See also Linn*, 1995 WL 417810, at *13; *Stabasefski v. United States*, 919 F. Supp. 1570, 1573 (M.D. Ga. 1996).
[159] *Id.* at 10,017. *See also* Exec. Order No. 13,392, Sec.2(b)(i), 70 Fed. Reg. 75,373 (Dec. 14, 2005).
[160] 52 Fed. Reg. at 10,013. *See also Avondale*, 1998 WL 34064938, at *4-5.
[161] 29 C.F.R. § 102.117(d)(2)(ii)(A).
[162] *Id.* at § 102.117(d)(2)(iii)(A).
[163] *Id.* at § 102.117(a)(2)(i)(A),(B), and (C).

XVI. Processing FOIA Requests

Introduction

This chapter will provide guidance on the "nuts and bolts" of processing an initial FOIA request or a FOIA appeal. It will address threshold procedural and operational aspects, including but not limited to how to identify a proper request, search for responsive documents, review and duplicate appropriate documents, and create a FOIA file. Issues surrounding assessment of charges are discussed in Chapter XV. Fees and Fees Waivers and are not explored in this chapter.

A. Beginning the Procedural Process

The level of compliance with the procedures set forth in this Chapter will depend on the circumstances surrounding each FOIA request.[1] Where the requester asks for routine material[2] or where there is full disclosure, the processing office need only fill in the necessary electronic FOIA Tracking System (FTS)[3] data and keep a copy of the request and its reply, which sets forth in detail what has been disclosed. The documents that are disclosed should be duplicated and kept in a FOIA file. Where there is a partial disclosure and the processing office is confident that the case will not be appealed,[4] the processing office need only fill out the FTS and keep a copy of the request and the processing office's detailed response, explaining what

[1] Of course, all responses to FOIA requesters should comport with the Agency's FOIA regulations, 29 C.F.R. § 102.117.

[2] Routine requests include, but are not limited to, election results and/or election logs, petitions, unfair labor practice charges, certifications, dismissal letters, and tallies of ballots.

[3] Located at: http://web-hq-intra2.nlrb.gov/foia2

[4] In assessing whether the processing office's response will be appealed, the processing office should consider the scope of the request, the complexity of the FOIA case, whether similar FOIA requests have been appealed and/or litigated, and the identity of the requester.

has been disclosed and what has not been disclosed. The processing office also should always keep copies of materials that have been furnished in their redacted form. There is no need to keep the copies of the original documents in a FOIA file if the processing office can later reconstruct what was or was not produced. **The critical point is that the Regional Office must have a system in place that permits it to exactly reconstruct what documents were considered responsive and what documents were or were not produced and in what form, should there be an appeal to a FOIA response.**

Any questions regarding compliance with these procedures should be addressed to the General Counsel's FOIA officer in Washington.

B. Intake Issues

1. Is it a Proper FOIA Request?

Under Section 102.117(c)(1) of the NLRB Rules and Regulations, a proper FOIA request must (1) be in writing;[5] (2) reasonably describe the records sought in a manner that permits their identification and location;[6] (3) be clearly marked on the face of the letter and the envelope as a FOIA request;[7] (4) contain a specific statement assuming financial responsibility

[5] Facsimile transmissions of initial FOIA requests are permitted. The cover sheet should be clearly marked to indicate that it contains a request for records under the FOIA. However, facsimile transmissions of FOIA appeals are not permitted. If an appeal is sent by fax, an extension of time will be granted to allow appropriate filing of an appeal by mail.

[6] 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." H.R. Rep. No. 876, 93 Cong., 2d Sess. 6 (1974); *see, e.g., Truitt v. U.S. Dep't of State*, 879 F.2d 540, 544-45 (D.C. Cir. 1990); *see also* 5 U.S.C. § 552(a)(3)(A). *Brumley v. U.S. Dep't of Labor*, 767 F.2d 444, 445 (8th Cir. 1985).

[7] If a written request is made for Board records without the explicit invocation of the FOIA, or 29 C.F.R. § 102.118, or any other statute, rule, or regulation, it ordinarily should be handled as a FOIA request, even if not labeled as such. However, the requester should be notified of the requirement of an assumption of costs. Further, most FOIA requests, even those that are technically not in compliance with the requirements of 29 C.F.R. § 102.117(c)(1) as to form, are immediately identifiable as FOIA requests and should be processed within the appropriate time limits. If necessary, a processing office may rely upon the requirements of § 102.117(c)(1) to

for the costs of responding to the request or setting forth the amount of costs a requester will pay;[8] and (5) be addressed to the office where the records are located.[9]

2. How are Requests for Reading Room Documents Treated?

There are categories of documents under the FOIA that are treated differently from routine FOIA requests. Reading Room documents are documents that the FOIA[10] requires an agency to make available for public inspection and copying in its electronic and public reading room and, therefore, are not included within those documents that the Agency is required to disclose pursuant to a FOIA request made under 5 U.S.C. § 552(a)(3).[11] These Reading Room documents include the following categories[12]:

(1) final opinions rendered in the adjudication of cases;

(2) Agency policy statements;

(3) administrative staff manuals and instructions to staff that affect the public;

(4) frequently requested documents;

justify a delayed response in the event a request is buried in a document that also has some other purpose, such as in a position statement or an appeal.

[8] If a request does not reference payment of fees, it is necessary to first contact the requester to advise him or her that the time limits for processing do not begin to run until an assurance of payment is made. *See* full discussion of time limits, *infra*.

[9] Requests for records in Regional or Subregional Offices should be addressed to those offices. Requests for records maintained by the General Counsel's Office in Washington should be addressed to the General Counsel's FOIA officer in Washington. Requests for records maintained by the Board or the Inspector General in Washington, D.C., should be made to the Executive Secretary of the Board. If the records were generated by the Inspector General and in possession of another office, or in the possession of the Inspector General but generated by another office of the Agency, the request may be referred to the generating office for decision. Until December 31, 2008, requests made to the wrong office should be forwarded to the appropriate office and the time for processing the request does not commence until it is received by that office. 29 C.F.R. § 102.117(c)(1). *Blackwell v. EEOC*, 1999 WL 1940005, at 2-3 (E.D.N.C. Feb. 12, 1999). On that date, based on the 2007 OPEN Government Act, the 20-day period starts to run no later than 10 days after the request is first received by any component of the Agency that is designated to receive FOIA requests. OPEN Government Act of 2007, P.L. No. 110-175, 121 Stat. 2524, 2526 (2007) (to be codified at 5 U.S.C. § 552 (a)(6)(A)(ii)).

[10] 5 U.S.C. § 552(a)(2).

[11] *See* Chapter IV. Agency Records and Electronic FOIA, Section D.

[12] 5 U.S.C. § 552(a)(2) (A) – (E).

(5) a general index of frequently requested documents.

Accordingly, with the exception of frequently requested documents, which are treated differently from other Reading Room documents, as discussed below, a response to a request for documents that are in the Reading Room need only direct the requester to the availability of the documents in the Reading Room.

If a person requests a "true" Reading Room document from the Region,[13] the person should be directed either to the Agency's home page,[14] or to the Reading Room in Washington, D.C., or to request, in writing, such Reading Room material from the General Counsel's FOIA officer in Washington. Access to a computer and the web site does not have to be provided by the processing office,[15] but access to the Internet is available in most public libraries and in the Headquarters' library. The Agency is under no legal obligation to supply documents that are available in the Reading Room, unless they are "frequently requested" Reading Room documents.

"Frequently requested" documents, the fourth category of documents, are records that have been disclosed in response to a FOIA request and that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D).[16] As a general guideline, the Department of Justice

[13] 5 U.S.C. § 552(a)(2)(A)(B)(C) & (E).

[14] National Labor Relations Board (http://www.nlrb.gov/foia)

[15] As a customer service and to ease the Region's burden with respect to frequently requested documents, the Region could place copies of the public documents most frequently requested, such as charges, petitions, complaints, dismissal letters, and certifications (filed, by date, in separate binders) in a designated area in the Regional office for the public's use. In addition, Regions may contact the Division of Operations Management to request that documents be added to the NLRB's FOIA webpage.

[16] The Agency may determine that some such records no longer fall within this Reading Room category and remove the documents.

considers any document requested three or more additional times to be frequently requested.[17] Current examples of frequently requested documents available in the Reading Room include briefs filed by the General Counsel and by parties in significant Board and court cases. When a request is made for a frequently requested document, the document must be provided to a requester despite its placement in the Reading Room, if the requester so insists.[18]

3. What are the Time Limits for Our Response?

Except in unusual cases of "expedited processing" that require shorter response times, discussed below, the processing office[19] must respond to a FOIA request within 20 working days of its receipt by issuing a Determination Letter granting or denying the request and including notification of any charges.[20] Thereafter, the processing office must "promptly" make the documents encompassed by its response available to the requester.[21] Typically, the responsive documents will be sent with the Determination Letter.

The processing office may take additional time (up to 10 working days), to issue the Determination Letter based upon certain prescribed "unusual circumstances" "reasonably necessary to the proper processing" of a particular request if it tells the requester in writing why it needs the extension and when it will make a determination on the request. These "unusual

[17] *See* FOIA Post, "FOIA Counselor Q &A: 'Frequently Requested' Records (posted 7/23/03) explaining that it is the receipt or anticipation of the third FOIA request that triggers "frequently requested" status). Contact the General Counsel's FOIA officer in Washington with any questions.

[18] H.R. Rep. No. 104-795, at 21 (1996). To properly implement the Reading Room requirements, if the processing offices have consistent requests for items that would be of national interest, those documents, properly sanitized, should be forwarded to the General Counsel's FOIA officer in Washington for consideration for placement in the Agency Reading Room.

[19] 29 C.F.R. § 102.117(c)(2)(iii). *See* note 9, *supra*, for specifics of time limits both before and after December 31, 2008.

[20] The term "working days" is defined as calendar days, excluding Saturdays, Sundays, and legal public holidays. 5 U.S.C. § 552(a)(6)(A)(i); 29 C.F.R. § 102.117(d)(1)(viii).

[21] 5 U.S.C. § 552(a)(3)(A); 29 C.F.R. § 102.117(c)(2)(iii).

circumstances" are restricted to the need to search for and collect from facilities separate from the processing office (including federal records centers); to search for, collect and review a voluminous number of documents; or, for consultation between components of the Agency or with other agencies that have a substantial interest in the requested records, which is required to be done "with all practicable speed."[22] If the extension exceeds 10 working days, the processing office shall notify and provide the requester the opportunity to modify the request or to arrange for an alternative timeframe for processing the request or the modified request.[23]

All offices processing FOIA requests should strictly observe the FOIA's time limitations. The failure to comply with the FOIA's time provisions automatically constitutes exhaustion of administrative remedies by the requester,[24] and confers immediate de novo jurisdiction to the federal district court over the request.[25] This allows the requester to circumvent the administrative appeals process, if the requester elects to file a lawsuit.[26] However, if the processing office responds to the request after the expiration of the FOIA's time limits but prior to the time the requester actually files a lawsuit the suit may be dismissed for failure to exhaust administrative remedies.[27] The 20-day period may be tolled only one

[22] 5 U.S.C. § 552(a)(6)(B)(iii)(I)-(III); 29 C.F.R. § 102.117(c)(2)(vi)(A)-(C). Processing offices may aggregate requests if the office "reasonably believes" they are actually a single request, which would "otherwise satisfy the unusual circumstances" standards, just mentioned, and involve "clearly related matters." 5 U.S.C. § 552(a)(6)(B)(iv); 29 C.F.R. § 102.117(d)(2)(iii)(B). For additional reasons to aggregate requests, *see infra*.

[23] 5 U.S.C. 552(a)(6)(B); 29 C.F.R. 102.117(c)(2)(vi). Any such agreement should be documented and a letter sent to the requester memorializing such agreement.

[24] 5 U.S.C. § 552(a)(6)(C)(i). *See, e.g.*, *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987).

[25] 5 U.S.C. § 552(a)(4)(B).

[26] Failure to meet the appeals time limits also allows requesters to go directly to the courts based upon the existing administrative record. 5 U.S.C. § 552(a)(6)(C)(i).

[27] *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 61-65 (D.C. Cir. 1990). In order to take advantage of this judicially created exception to the constructive exhaustion provision of § 552(a)(6)(C)(i), the response must

time to seek clarification or modification from the requester regarding the request. However, the 20-day time period may be tolled more than once for communications with the requester regarding fee questions.[28] Also, the OPEN Government Act of 2007 prohibits the Agency from assessing search fees or, if applicable, duplication fees if the Agency fails to comply with any statutory time limits, absent the above-mentioned "unusual" or "exceptional" circumstances.[29]

Adverse initial FOIA determinations by the Region, the General Counsel's FOIA officer, or by the Executive Secretary that may be appealed usually consist of denials of requests for documents, in whole or in part, and fee category, waiver, reduction, and assessment decisions.[30] However, requesters may also appeal determinations that a requested record does not exist or cannot be found; that what has been requested is not a record under the FOIA; that there has been an inadequate search; or that expedited treatment is not warranted.[31]

Once an appeal is received,[32] the Office of Appeals or the Solicitor's Office, as the case may be, has 20 working days to make a determination whether to comply with the request on appeal and to notify the requester of the decision.[33] These offices may take additional time to answer the appeal (up to 10 working days) based upon the "unusual circumstances"

give notice of the requester's administrative and/or judicial appeal rights. *See, e.g. Ruotolo v. U.S. Dep't of Justice*, 53 F.3d 4, 9 (2d Cir. 1995).

[28] 5 U.S.C. § 552(a)(6)(A)(ii)(I) and (II). This change becomes effective December 31, 2008.

[29] 5 U.S.C. § 552(a)(4)(A)(viii). This prohibition also takes effect December 31, 2008.

[30] 29 C.F.R. § 102.117(c)(2)(iii),(iv).

[31] *Id.*

[32] Appeals "must be filed within 28 calendar days of the service of the letter containing the adverse determination, in whole or in part." Revisions of Regulations Concerning Procedures for Filing Appeals to Denial in Whole or Part of Initial FOIA Requests, 72 Fed. Reg. 68502 (Dec. 5, 2007) (to be codified at 29 C.F.R. § 102.117(c)(2)(v). This new timeframe must be included in the letters addressing appeal rights from initial requests.

[33] 5 U.S.C. § 552 (a)(6)(A(ii); 29 C.F.R. § 102.117(c)(2)(v).

"reasonably necessary to the proper processing" of a particular request, described above, if it tells the requester in writing why it needs the extension and when it will make a determination on the request.[34] As with an initial request, if the extension is expected to exceed 10 working days, the processing office must seek agreement from the requester and if an agreement is reached, memorialize such agreement in writing. If the appeal is denied, in whole or in part, the requester may file a lawsuit in federal district court.[35]

Once a lawsuit is filed, if the agency can show that "exceptional circumstances" exist and that it is exercising "due diligence" in responding to the request, the court may retain jurisdiction but allow the agency additional time to review the records.[36] A requester's "refusal to arrange an alternative time frame for processing the request (or modified request)" is a factor in determining whether or not "exceptional circumstances" exist so that a court may extend the applicable time limits for the agency's response to the request.[37] "Predictable agency workload" does not constitute "exceptional circumstances. . . unless the Agency demonstrates reasonable progress in reducing its backlog of pending requests.[38]

4. Expedited Processing

The Agency has promulgated regulations for "expedited processing" of requests in cases of "compelling need" and "as determined by the Agency."[39] Pursuant to those regulations, the Agency will give expedited treatment to requests for records and appeals when

[34] 5 U.S.C. § 552 (a)(6)(B)(i).
[35] 5 U.S.C. § 552(a)(4)(B); 29 C.F.R. § 102.117(c)(2)(v).
[36] 5 U.S.C. § 552(a)(6)(C)(i).
[37] 5 U.S.C. § 552(a)(6)(B)(ii) and (C)(iii).
[38] 5 U.S.C. § 552(a)(6)(C)(ii). Some agencies, but not the NLRB, have had huge FOIA backlogs. Because it does not have a backlog, the NLRB has decided not to institute a multi-track processing system. 29 C.F.R. § 102.117(c)(2)(i).
[39] 5 U.S.C. § 552(a)(6)(E)(i); 29 C.F.R. § 102.117(c)(2)(ii).

it is determined that they involve: "[c]ircumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;" an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information [*e.g.*, a journalist]; the loss of substantial due process rights; or a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."[40]

A FOIA requester may request expedited processing at any time, but must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining the basis for the request. The formality of the certification may be waived as a matter of administrative discretion. Merely alleging that the public has a right to know is insufficient to meet this standard.[41] The Agency must notify the requester within 10 calendar days of receipt of the request whether or not the request for expedited processing is granted.[42] If the request is granted, the request shall be given priority and processed "as soon as practicable."[43] If the request is denied, the Agency shall act "expeditiously" on any appeal of that decision."[44]

[40] 5 U.S.C. § 552(a)(6)(E)(v); 29 C.F.R. § 102.117(c)(2)(ii).

[41] *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001) ("the public's right to know, although a significant and important value, would not by itself be sufficient to satisfy [the]standard" for expedited processing) (quoting H.R.Rep. No. 104-795, at 26 (1996). Accord: *Elec. Privacy Info. Ctr. v. U.S. Dep't of Def.*, 355 F. Supp. 2d 98 (D.D.C. 2004).

[42] 5 U.S.C. § 552(a)(6)(E)(ii)(I); 29 C.F.R. § 102.117(c)(2)(ii).

[43] 5 U.S.C. § 552(a)(6)(E)(iii); 29 C.F.R. § 102.117(c)(2)(ii).

[44] 5 U.S.C. § 552(a)(6)(E)(ii)(I)-(II); 29 C.F.R. § 102.117(c)(2)(ii). Agency action denying or affirming a denial of a request for expedited processing and Agency failure to timely respond to such a request shall be subject to judicial review based solely on the administrative record (of correspondence). 5 U.S.C. § 552(a)(6)(E)(iii). Once the Agency provides a complete response to the request, the district courts have no jurisdiction to review a denial of expedited processing. 5 U.S.C. § 552(a)(6)(E)(iv).

C. Processing the FOIA Request

1. What do I put in the FOIA File?

It is the FOIA processor's responsibility to maintain a separate Official FOIA file for each FOIA request just as is done for each unfair labor practice or representation case. In the event of an administrative appeal or court litigation, the FOIA file is reviewed by the Office of Appeals, the Solicitor's Office, or the Special Litigation Branch.

The file should contain the following:

1. A copy of the completed Case Progress Sheet from the FTS.

2. Communications log and correspondence.

The FOIA processor should keep a log of all her communications with the FOIA requester, other parties and Agency personnel. Similarly, all correspondence to and from the requester, such as all FOIA request letters and responses thereto, and letters regarding the assumption of costs or letters confirming telephonic agreements, should be maintained in the FOIA file.

3. Time Log

The FOIA processor must enter time spent on the request in the FTS. It should be entered contemporaneously with the time incurred, rather than at the end of the process. The reported time should reflect all time spent on the FOIA case, including time, which may be reimbursable under the FOIA for search and review. The log should be in quarter-hour increments.[45] The necessity of recording accurate information contemporaneously with the

[45] *See* § 102.117(d)(2)(i) (schedule of charges in one-quarter hour increments). The log should accurately reflect the specific hours in a day spent on FOIA work, the total FOIA hours for the day, and a description of activities during the time period. For example: (9:00 am to 10:00 am—searching for responsive documents; 10:00

actual search and review efforts, which constitute chargeable time (depending on the requester's fee category placement), cannot be overstated.[46] The FOIA processor also must keep detailed notes in the FOIA file as to how the processor conducted the search (*i.e.*, whether manually or by computer, and, in the case of multiple requests, whether there were separate searches to respond to each request or whether all requests were dealt with simultaneously in one overall search). The total of the chargeable hours reflected in the time log should be recorded in the FTS, using the designations of time of 0.25, 0.50 and 0.75 for each additional 15 minutes.

The Agency must report to the Congress on FOIA processing. As a result, in addition to the chargeable or reimbursable time, the FOIA processor must keep a log of the total FOIA casehandling time. As with chargeable hours, the total hours recorded in this log should be recorded contemporaneously with the FOIA work and be as accurate as possible. Total casehandling time would include such non-chargeable functions as drafting and proofreading the final letter, researching issues of law, and clarifying certain matters with the requester. As with chargeable hours, the total FOIA casehandling time from the Time Log should be recorded in the FTS.

am to 10:30 am—review of documents; 10:45 am to 11:00 am—redaction of information from responsive documents. Time spent on photocopying is included in the fee for duplication of $.12 per page and is not charged separately.

[46] It is not sufficient to reconstruct a time log of search and review functions after that work has been completed. An accurate contemporaneous account is necessary to enable the FOIA processor to give a detailed affidavit concerning search and review efforts, if subsequent litigation so requires. Agency litigation experience has demonstrated that where the Agency can present accurate, timely records by the FOIA processor to support an affidavit, great deference is lent to the Agency's fee calculation. The calculation of fees is separate and apart from the legal issue of category placement/fee waiver, however, which is set forth in Chapter XV. Fees and Fee Waivers.

The FOIA processor should also keep a running tally from the Time Log of the anticipated fees, based on the fee category placement of the requester, especially if the search and review efforts escalate beyond the original estimates that were anticipated by the requester.[47]

4. The FOIA Inventory

The FOIA Inventory is the index of the responsive documents and is a critical tool in processing a FOIA request. It is the record of the FOIA processor's decision-making process in determining the responsiveness of a document and the application of the FOIA exemptions, if any, to the document, in whole or in part. It therefore furnishes the principal basis for reviewing the processing office's FOIA decisions.

The FOIA Inventory should be tailored to the amount of information requested in the FOIA request. Thus, with an all-encompassing request, all public and non-public documents must be included. All documents listed in the inventory must be clearly identified by, *inter alia*, title, name, and date. For example, affidavits, supplemental affidavits and their attachments must be clearly identified by the name of the affiant and the date of the document and all correspondence by date and the names of the sender and recipient. Similarly, all witness statements and documentary evidence must be identified with a notation as to who provided them to the Agency, or whether they were created by the investigating Board agent. All FIRs, Agenda decisions, and Board agent notes to file also must be identified in the FOIA inventory. However, where a FOIA requester only asks for a particular document or type of

[47] Issues surrounding assessment of charges are discussed in Chapter XV. Fees and Fee Waivers.

document only those responsive documents need be entered on the FOIA Inventory. *See* Sample Updated FOIA Inventory.

5. Copy of all responsive documents within the scope of the request

The FOIA file should contain an exact duplicate of all original documents that were uncovered in the search and are arguably responsive to the request, without any extraneous markings by the FOIA processor.[48] This copy may be used for later reference at the administrative appeal or district court litigation stage to avoid the need for a further duplicative search.

6. Copy of all disclosures (grease pencil/white-out copy)[49]

A copy of all released documents, in the exact condition in which they were released and showing the redactions and non-responsive portions, must be placed in the processing office's FOIA file. As a practical matter, this is the actual copy that was redacted by the FOIA processor and later photocopied for release to the requester. The importance of keeping an exact copy of all disclosures in the FOIA file cannot be overstated. It is absolutely necessary, in the event of an appeal or lawsuit, that the reviewing office know the precise extent of all disclosures. Also, in the event of future requests for the same documents, some amount of work will not need to be repeated.

7. Copy of Determination Letter signed by the head of the processing office

[48] The cost of duplicating only one copy may be charged to the requester. However, the total cost of duplication in the process of responding to the FOIA request should be noted in the FTS for purposes of the Annual Report.

[49] This update deletes a requirement that processing offices create a third "working copy" of the responsive documents. The working copy was intended to show the exemptions and indicate redactions/non-responsive portions of documents with a highlighter, so that the underlying material could be seen for purposes of supervisory approval prior to creation of the "grease pencil" copy. Processing offices may still create this third "working copy," if doing so facilitates the processing office's internal review process.

All processing office letters granting a FOIA request should notify the requester of that determination and the charges due.[50] All notifications of denials of requests, in whole or in part, should:

a) state when the FOIA request was received;

b) notify the requester of the charges due;[51]

c) reasonably inform the requester of the reasons for denial including citations to any exemptions relied upon;

d) notify the requester of the right to appeal.[52] (The right to appeal covers the denial of requests, in whole or in part, fee category determinations, fee assessments, denials of fee waiver requests, and denials of requests for expedited processing.);[53]

e) provide the name and title of the person responsible for the denial;[54]

f) indicate the approximate amount of information withheld from disclosure, if applicable.[55] However, where the Agency is neither confirming nor denying the existence of a requested document under the "Glomar" policy (*see* Chapter X. The "Glomar" Principle), the processor should not include the number of pages of that document in the amount of information withheld from disclosure because to do so would disclose the existence of the document.

g) while there is no requirement that the Determination letter specify each document that will be released or withheld,[56] it should include a sufficient

[50] 29 C.F.R. § 102.117(c)(2)(i), (iii).

[51] Note that there can be charges due even if no responsive documents are found or disclosed. See OMB Fee Guidelines, 52 Fed Reg. at 10,019, attached to Appendix.

[52] 5 U.S.C. § 552(a)(6)(A)(i); 29 C.F.R. § 102.117(c)(2)(iii). Responses stating that there are "no records responsive to the request" also should contain a notification of the administrative appeals procedures. *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 67 (D.C. Cir. 1990). Absent notification of appeal rights in a denial or a "no records" response, a requester can bypass the administrative appeal procedures and file a complaint directly with the district court seeking the requested records. *Id.* at 65. *See* discussion in "Time Limits" section, *supra*.

[53] 29 C.F.R. § 102.117(c)(2)(iii), (v).

[54] 5 U.S.C. § 552(a)(6)(C)(i); 29 C.F.R. § 102.117(c)(2)(iii).

[55] 5 U.S.C. § 552(a)(6)(F); 29 C.F.R. § 102.117(c)(2)(iii). The requirement to estimate the volume of the denied material is not required when to do so would "harm an interest protected by [an applicable] exemption." *Id.*

[56] A "Vaughn Index" of documents withheld is not required until the litigation stage of FOIA processing. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.C.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996). This principle reinforces the necessity for a complete FOIA file, including a FOIA Inventory.

description, including the title and date, so that there is a record of what was released on a particular date. This is particularly important when there is a supplemental disclosure in a case.

In the event that the General Counsel or Chairman authorizes a discretionary release of documents which might otherwise be exempt from disclosure under the FOIA, the Determination Letter must specifically state to the requesting party that the documents are being released as an act of discretion. Prior to any such discretionary disclosure, an analysis of the circumstances surrounding a particular request and the consequences resulting from such a disclosure must be made. FOIA processors should not make discretionary disclosures unless provided for in Chapter XVII. The Agency's Release Policies, Section B. or unless cleared by the General Counsel's FOIA officer in Washington. This is because such a discretionary disclosure may waive the Board's right to protect the identical information in the future.[57] However, similar documents in other cases, or even in the same case could be protected. *See* Chapter XIII. Waiver.

D. What Constitutes a Proper FOIA Search?

1. Generally

For purposes of the FOIA, the term search means "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."[58] **The cut-off date for responsive records is the actual date of the**

[57] *See* Chapter XIII. Waiver.

[58] 5 U.S.C. § 552(a)(3)(D). The Agency's electronic search efforts for documents for a particular FOIA request may result in the creation of another document or documents reflecting the search methodology or program and/or result. This document or documents would not be responsive to the FOIA request for which the search has been undertaken. Such material would only be responsive to a later separate FOIA request for the search methods utilized.

commencement of the search.[59] FOIA requests may require on-line searches for agency documents. FOIA processing in the Regions and throughout the Agency must necessarily be a team effort to assure maximum effectiveness in compliance with the mandates of the FOIA. In responding to a FOIA request, the processing office should do a complete search the first time and locate all documents that are arguably within the scope of the request, including documents that may be on-line or the subject of e-mails.[60] As stated before, the Agency must be able to document what records were searched, by whom, and through what process. Search efforts must, above all, "be reasonably calculated" to locate the requested records,[61] based on the judgment of Agency personnel who are experienced in all aspects of the Agency's casehandling and recordkeeping systems and who are responsible for keeping the records containing the requested information. This may include review of agency systems of records that allow searches by case name, case number, or name of parties.[62]

However, a FOIA processor is not required to look for a needle in a haystack or do research for the requester.[63]

[59] Prior agency policy set the cut-off date at the date of receipt of the FOIA request. However, the weight of authority supports the more liberal, later date, which may result in the disclosure of additional documents. *See McGehee v. CIA*, 697 F.2d 1095, 1104 (D.C. Cir.), *vacated on other grounds on panel reh'g & reh'g en banc denied*, 711 F.2d 1076 (D.C. Cir. 1983); *Pub. Citizen v. U.S. Dep't of State*, 276 F.3d 634, 644 (D.C. Cir. 2002). The date of the commencement of the search must be documented in the FOIA file by the FOIA processor. If there is a compelling reason to use the date of receipt as the cut-off date, the processor should contact the FOIA Officer. Additionally, the individual requester must be notified of the cut-off date applied to the request. *Judicial Watch, Inc. v. U.S. Dep't of Energy*, 310 F. Supp 2d 271 (D.D.C. 2004), *aff'd in rel. part*, 412 F.3d 125 (D.C. Cir. 2005).

[60] If the office routinely includes all e-mails about a case in the case file, the documents will be readily available to the FOIA processor. However, if not, the FOIA processor must contact the staff members who handled the case to obtain copies of e-mails that they created or received concerning the case.

[61] *Nat'l Resources Def. Council v. U.S. Dep't of Def.*, 388 F. Supp. 2d 1086, 1102 (C.D. Cal. 2005); *Kowalczyk v. U.S. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996); *Cf. Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

[62] For example, searches under CATS, ACTS, etc.

[63] *Kowalczyk v. U.S. Dep't of Justice*, 73 F.3d at 389.

2. Identifying the Scope of the Request (Determining What Records are Responsive)

The FOIA processor now must determine the scope of the FOIA request. That is, the processor must determine the records and information that are responsive to a FOIA request. The precise language of the request will direct the search.[64] With simple requests for particular case files or documents within an identified case file, the scope of the FOIA request is easily identified. In complex requests, the FOIA processor must analyze the request and parse it out to fully understand what information is being sought. If there is any doubt as to what the requester seeks, the FOIA processor should contact the requester by telephone to clarify the request. All such contacts must be documented in the FOIA file.[65] Some FOIA requesters who lack knowledge of the Agency's recordkeeping system phrase the scope of their requests so broadly that almost anything technically could be included, with the result that the request is either unwieldy or virtually meaningless. Such requests should be treated in the same manner as ambiguous requests, and the FOIA processor should contact such requesters to aid them in tailoring the scope of their requests to those documents that they truly want (and are willing to pay for).[66] Clearly, the volume of the records within the scope of the request will have a direct impact on the fees charged.

Once there is a true understanding of the request—which may require a team effort and consultation with management—as with any other investigation, the FOIA processor must map

[64] The Agency is obligated to construe a FOIA request liberally. *LaCedra v. Executive Office for U.S. Attorneys*, 317 F.3d 345 (D.C. Cir. 2003); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995).

[65] *Hamilton Sec. Group Inc. v. HUD*, 106 F. Supp. 2d 23, 27 (D.D.C. 2000), *aff'd per curiam*, 2001 WL 238162 (D.C.Cir. Feb. 21, 2001) (scope of request narrowed by subsequent communication). *See* Section B. 3, Time Limits, *supra*, for impact of clarification request on time limits for Agency to act on requests.

[66] Always document contacts with the requester or with other parties in writing.

out a strategy for responding to the request. It can be helpful to consult with other staff members and conduct a "brainstorming" session. This includes determining whether the records sought are agency records[67] and whether a computer search can and should be done, as well as locating all of the possible records that might be responsive to the request, including those in other Agency offices. As stated above, it is the FOIA processor's responsibility to do a complete search *the first time*.

In determining what records are responsive to the FOIA request, the FOIA processor must pay close attention to the requester's precise terminology in phrasing the request.[68] A document may contain multiple subjects, only one of which pertains to the subject of a particular FOIA request. That part of the record that is "outside the scope" of the request should be redacted as non-responsive. For example, arguably a request for "the evidence which formed the basis for a decision" is distinguishable from a request for the "basis for the decision." The former could be said to encompass evidentiary materials, such as witness statements and letters, while the latter (without further clarification from the requester) could be said to refer to the Agency's privileged internal deliberations and legal conclusions. Likewise, a request for correspondence from a party to the office would not include correspondence from the office to a party. Further, such a request would not include correspondence that postdates the date of the commencement of the search for documents that are responsive to the FOIA

[67] *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-145 (1989) (definition of "agency records"). *See* Chapter IV. Agency Records and Electronic FOIA, Section A.

[68] The FOIA processor must keep in mind that the inquiry as to what is responsive is entirely separate and apart from the issue of whether the subject records are disclosable.

request (because FOIA requests are not continuing requests).[69] Where requests are ambiguous, as just shown, the FOIA processor should call the requester for clarification, and document these contacts.

3. The Search for Responsive Records

a. How to Conduct a Search

Once a determination is made as to what records are within the scope of the request, a search for those records must be undertaken. As stated above, in most cases, the search is a relatively simple task, because the requester has identified a particular case file by name and number, so that the FOIA processor knows exactly where the requested information is located and whether it is contained in any processing office files.

In some instances, however, the search task is more difficult, either because it involves multiple case files or categories of files, the case file is voluminous, the case currently may be in active litigation, or because the records sought do not pertain to a particular case or cases that are identified by name and case number. Indeed, the FOIA processor sometimes may not even be aware whether the records exist at all, and must investigate the matter by examining the processing office's filing system and by consulting with other processing office personnel.

The Agency's computer system has vastly increased the amount of information that is available for searching.[70] The FOIA applies a general "reasonable efforts" standard to an

[69] *Mandel, Grunfeld & Herrick v. U.S. Customs Serv.*, 709 F.2d 41, 43 (11th Cir. 1983) (plaintiff not entitled to automatic mailing of materials as they are produced).

[70] If information can be located, it must be retrieved in the most expeditious and cost efficient manner. Thus, if information can be found through CATS in a matter of minutes, a manual search through files that might take many hours would not be justified, and the Region would not be entitled to charge the requester for the manual search.

agency's search obligation in connection with electronic records.[71] It provides that "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system."[72]

Pursuant to the FOIA, government agencies are required to provide FOIA requesters with disclosures in the format desired by the requester if the record is readily reproducible in that new form or format.[73] Further, when processing a FOIA request, the processor should contact all employees in the Region and/or in Headquarters who have worked on, or had any involvement with, the subject of the FOIA inquiry and request that they search for any responsive e-mail messages.[74] If there is any indication that requested documents that are contained in Agency files were created by another agency, such as OSHA or DOL, the processor must consult with the other agency and follow that agency's release restrictions. Contact the General Counsel's FOIA officer in Washington for further guidance if needed

[71] 5 U.S.C. §552(a)(3)(C).

[72] 5 U.S.C. § 552(a)(3)(C); *Sun-Sentinel Co. v. Dep't of Homeland Sec.*, 431 F. Supp. 2d 1258, 1276 (S.D. Fla. 2006).

[73] 5 U.S.C. § 552(a)(3)(B). *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C. Cir. 2006); *TPS, Inc. v. U.S. Dep't of Def.*, 330 F.3d 1191, 1195 (9th Cir. 2003). If a FOIA requester requests the Agency's response on a computer disk, the processor should contact the General Counsel's FOIA officer in Washington who will coordinate with O.C.I.O. to determine whether the requester's demand may be satisfied and the costs for reproduction.

[74] Employees should be reminded that our e-mail system has the capability of searching for messages (under "File," then "File Search"), and that messages can be stored in "folders," which can make it easier to retrieve responsive documents. Likewise, all employees who have had any involvement with the subject of the FOIA inquiry should be contacted to retrieve other responsive electronic records such as records in word processing programs in the event that hard copies of the documents have not been included in the case files. Again, Microsoft Word and similar programs have search capabilities to assist in locating documents through "meta data," that is, through electronic information about data. In Word, such information is available through tabs labeled "Properties," and "Statistics," which provide information such as the name of the document, the date created, saved and accessed, etc. Requests for meta data itself should be processed with the assistance of the General Counsel's FOIA officer in Washington.

regarding the requested release of such documents. As noted above, the FOIA requires that such determinations be made based on a "reasonable efforts" standard.

b. How to Organize Documents Retrieved During the Search

The FOIA processor should review all relevant files uncovered during the search to find all arguably responsive documents. A copy of all original responsive documents that are retrieved in the search must be removed from the file or location where they were found, and two complete copies must be made for the FOIA file. Non-responsive or exempt whole pages of documents with consecutive pages, such as letters or statements, also should be copied. The reason is to enable the requester to know the length of the responsive document. While there are rare occasions that the information on an entire page would be subject to redaction, the blank page with the page number itself must be disclosed.

The originals should immediately be returned to the case file. One set of the copies should be placed in the FOIA file as the "Responsive Documents." The second set of copies of these arguably responsive documents then should be separated into piles and tabbed as Disclosable,[75] Exempt, in whole or in part, or Uncertain. (This second set of documents will be used to create the grease pencil/white-out copy, *see infra*.) Apart from attorney work product (Exemption 5) documents that in their entirety should not be disclosed, the FOIA requires that

[75] Notwithstanding that a document may technically be exempt, the Agency may make a discretionary disclosure of the document only after consideration of both the impact of the FOIA and Privacy Act on such a disclosure. *See* Chapter XVII. Agency Release Policies. If there is a question regarding whether a document should be released within the Agency's discretion, or whether the document has been released within the Agency's discretion, contact the General Counsel's FOIA officer in Washington.

in processing "partially exempt" documents any reasonably segregable portion should be disclosed.[76]

Further, portions of otherwise disclosable material may be non-responsive. This requires a line-by-line review of the document in question. During this search, the processor also should fill out the FOIA Inventory to index the documents and to precisely and completely indicate the FOIA exemptions claimed.

The status of Uncertain documents should be clarified through consultation with the FOIA supervisor, Regional Attorney and Director, if the documents are Regional Office documents, and with the assistance of the General Counsel's FOIA officer in Washington and/or Special Litigation if litigation is expected.

A FOIA requester is entitled to a copy of all copies of a requested document that are uncovered in the search if they differ from any other copy in the slightest fashion, *e.g.*, faxed copy or signed original. Rarely, however, do requesters want every copy of a document unless there are substantive differences. Accordingly, the best practice is for the FOIA processor to contact the requester to seek clarification of the request. The processor can suggest that only the clearest copy in the file be supplied in order to shorten the time for response and limit the cost to the requester. Even if a document is exempt, a copy must be made for the FOIA file. The FOIA file must be complete. The information may be needed by the Office of Appeals or by the Special Litigation Branch in the event of further proceedings.

The FOIA processor must take care to manage in an organized fashion all the original responsive documents uncovered in the search, as well as the copies for the FOIA file, which

[76] 5 U.S.C. § 552(b).

must exactly match the order of the originals. This is especially important in the event of an appeal or lawsuit. Indeed, in the event of an appeal or lawsuit, the processing offices must send the documents in question to Washington for review. Thus, the FOIA processor must make sure that the pages of multi-page documents are in consecutive order, that documents are complete, that the original documents are accurately copied,[77] that fax cover sheets or memoranda remain attached to the appropriate documents and that all documents are identified to indicate the portion of the request to which they are responsive.[78]

E. How To Prepare Documents for Release

1. Generally

After it has been determined which documents or portions of documents are disclosable either pursuant to the FOIA or in the Agency's discretion, the FOIA processor must prepare them for release by redacting exempt and non-responsive portions. As discussed with regard to the contents of the FOIA file, *supra*, the FOIA processor should initially make two complete copies[79] of all pages of arguably responsive documents.[80] One is the original copy of the arguably responsive document. This copy should not be marked in any manner. The second

[77] The processor must assure that all documents are properly photocopied so that no marking on the outer edges are left out. This sometimes requires that documents be photocopied one at a time or in reduced-size format, rather than by means of automatic feed.

[78] If one document, such as a letter, is responsive to different parts of the request, for example it is an attachment to a requested witness statement, but is also responsive on its own as one of "all letters" requested, then only one copy need be furnished, with an explanation that the letter was also an attachment to the witness statement.

[79] In the first edition of the FOIA Manual, processing offices were asked to make a copy of documents highlighted with redactions for supervisory review prior to making a grease-pencil copy. Processing offices may continue that practice, or may use the grease-pencil copy for internal review. If supervisory changes are made to pages of the draft grease-pencil copy, then these pages must be redone to create the final copy that will be photocopied for release. All copies should be retained in the FOIA file.

[80] Again, while the cost of duplicating only one copy may be charged to the requester, the total cost of duplication in the process of responding to the FOIA request should be noted in the FTS for the purposes of the Annual Report.

copy (the working copy) is the grease pencil/white-out copy on which redactions are made and the reasons for redacting indicated, and serves as the copy that is photocopied for release to the requester.[81] Both copies must be kept in the FOIA file.

Again, where information is withheld pursuant to an exemption, any reasonably segregable portion must be provided.[82] The exemption under which a deletion is made, as well as the amount of information deleted, should be indicated in the record where the deletion was made, if technically feasible, unless including the indication would harm a protectible FOIA interest.[83]

2. The FOIA Processor's Working Copy

On the working copy, the FOIA processor should use a felt-tip pen overlaid with grease pencil.[84] All parts of the document that are either non-responsive or exempt should be marked neatly, and care should be taken that all privileged original notations or signatures are completely concealed. Beside each redaction, the FOIA processor should indicate why it is being deleted. If the reason is that the information is non-responsive, the processor should so

[81] As stated above, if this second copy is modified in any way prior to photocopying for release to the requester, it must be retained in the FOIA file. It may be needed by the Office of Appeals or Special Litigation to understand the processing office's process in determining whether to disclose the document. It will also provide invaluable assistance to the processing office's FOIA processor in remembering how the request was processed, should the processor be requested to provide an affidavit in litigation about the processing of the case.

[82] 5 U.S.C. § 552(b).

[83] *Id*. While the Agency's practice has always been to identify the exemption supporting a redaction, the 2007 FOIA Amendments now require such practice. OPEN Government Act of 2007, Pub. L. No. 110-175, § 12, 121 Stat, 2524, 2530-2531 (2007) (to be codified at 5 U.S.C. § 552(b)). This change is effective December 31, 2008.

[84] Because the wording under a felt tip pen marking can be read, even if photocopied, use of a felt tip pen alone is insufficient to protect the redacted material.

indicate. If the information is being deleted pursuant to a FOIA exemption, the exemption number[s] should be noted.[85]

The particular FOIA exemption claimed should be noted even if the Board has made a determination that the material, although technically exempt, should be disclosed within its discretion. In this case, the exemption and the notation "Disclosed within the Agency's Discretion" should be marked at the appropriate highlighted text.[86] The FOIA processor also must indicate whether any portions of the original document are blank.[87]

White-out tape or fluid usually should not be used. Its use is appropriate only with typewritten documents where isolated words and phrases are deleted. Otherwise, the requester would not be able to distinguish blank portions of a document (unless there are clearly indicated) from redacted portions. However, white-out tape or fluid may also be used in other documents where the deleted material can be set off in brackets.

The working copy should be approved by the FOIA supervisor before making final redactions for disclosure. The working copy should include the retention of pages that state the basis for Exemption 5 redactions (*i.e.*, attorney work-product or deliberative process) and the substituted pages that limit the notation to "Exemption 5."[88] The grease-pencil copy serves as

[85] If the same exemption[s] are claimed for every marking on the page or a discrete portion of the page, the FOIA processor may so indicate in the margin or other suitable place on the face of the document. If Exemption 5 is claimed, the specific privilege—*i.e.*, attorney work-product or deliberative process must be noted on a draft working copy for internal use. Similarly, any special handling notations must be noted on a draft working copy for internal use. On the released document only the exemption number should be noted.

[86] *See* note 75, *supra*, for limitations on discretionary disclosures.

[87] OPEN Government Act of 2007, Pub. L. No. 110-175, § 12, 121 Stat, 2524, 2530-2531 (2007) (to be codified at 5 U.S.C. § 552(b)). This change is effective December 31, 2008.

[88] *See* note 85, *supra.*

the template that is photocopied for release to the requester and is maintained in the FOIA file as a back-up.

3. The Final Copy for Release

The grease-pencil or white-out copy must be photocopied for release to prevent the requester from discerning the underlying redactions. Care should be taken so that the FOIA processor's markings on the document, which indicate the redactions or the reasons for redaction, are not confused with original markings.[89] After photocopying, carefully re-read each redacted section to insure that materials meant to be deleted cannot be read on the final copy.

4. Pointers on Redactions

It is important in making redactions to keep in mind the precise extent of the disclosable information as well as the purpose of the redaction. The impact of disclosure in open cases, or in closed cases where there is an open related case, should always be examined. This is best accomplished by involving those Board agents who are actively involved in the open case.

FOIA processors should be sensitive to the privacy and confidentiality interests of charging parties, discriminatees and third parties mentioned in the agency record. This includes not just the name of the individual but also other personal identifiers. The name of an individual must be marked out with one stroke, so that initials or the length of the first and last name is not indicated in such a way as to reveal the individual's identity. This is especially important when the context of the document or the circumstances of the request demonstrate

[89] In those rare cases where there might be some confusion, such as where a "scratched out" word or phrase in an original might be misconstrued as a FOIA redaction, the FOIA processor should underline the FOIA markings with colored pen and advise the requester of such in the cover letter that accompanies the release of the documents.

that only a few individuals are involved, so that privacy or confidentiality risks are magnified. Further, when personal identifiers must be redacted in a list, unless the actual number of the items on the list is protected,[90] each written entry must be redacted separately, leaving the spaces between the entries blank, so that their total number can be ascertained. For example, in a list of license plate identifiers [numbers and letters] of cars seen near a picket line, the cars' license plate identifiers would be redacted but the blank spaces, as they appear on the original document, would be apparent and would allow the requester to count the number of vehicles involved.

Any special redaction problems, including those involving information from photographs, video or audio tapes, or handwritten material where the handwriting would reveal privileged information, such as the identity of the author, should be brought to the attention of the General Counsel's FOIA officer in Washington or the Special Litigation Branch if litigation is expected, for further instructions.

Finally, there are special considerations regarding first-party requesters. FOIA processors should be aware that the fact that a requester seeks information furnished by or copied to that requester does not create any special entitlement to that information, redacted or unredacted.[91] Contact the General Counsel's FOIA officer in Washington with any questions about such requests.

[90] While the numbers generally are not exempt, the processor should analyze the case and make that determination on a case by case basis. For example, the Agency has taken the position that the number of union authorization cards is protected under Exemption 4. 5 U.S.C. § 552(b)(4); *Am. Airlines, Inc. v. NMB*, 588 F.2d 863 (2d Cir. 1978) (holding Exemption 4 protects disclosure of the number of authorization cards).

[91] *See* Chapter XII. First-Party Requesters for a more complete discussion.

F. What Charges Are Assessed to the Requester?

The Board's regulations regarding the assessment of fees for responding to FOIA requests are located at 29 C.F.R. § 102.117(d). Also included in this section are provisions regarding the appropriate user fee category and the possibility of a fee waiver or a fee reduction. For a full discussion of fee categories, fee waivers and reductions and appeals of fee-related issues, *see* Chapter XV. Fees and Fee Waivers under the FOIA.[92]

[92] The FOIA fee provisions should not be confused with the Agency's Privacy Act fee provisions located at 29 C.F.R. § 102.119.

XVII. The Agency's Release Policies

A. General Release Policy

In open and closed cases, the Regions should release to all requesters, *whether a party to the case or not*, based on a specific request, any formal documents in a case and any other non-privacy and non-confidential material in the case file, such as collective-bargaining agreements and most newspaper clippings.[1] *See*, *e.g.*, 29 C.F.R. § 102.45, defining formal record documents in unfair labor practice proceedings. Additionally, if the request includes transcripts and the transcript is available on CD for a minimal cost, the request can be processed. If only a hard copy is available, prior to processing the request, in light of the considerable expense of duplication, the FOIA processor should obtain the consent of the requester to assume costs.[2]

In addition, FOIA processors should not withhold or redact any material solely because it identifies Agency personnel unless some harm would result from disclosure, for example, where there is evidence of harassment or threats of violence to the Board agent involved in the case or if there are allegations of Board agent misconduct.[3] For a discussion regarding disclosure of Board agent information, *see* Chapter IX. Exemption 6.

[1] *See* Appendix for Sample Language for Letters referring to the formal documents and to documents the requester already has in its possession where the request is for all documents in the investigative file.

[2] Federal Advisory Committee Act**,** 5 U.S.C. app. 2, § 11 ("agencies . . . shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings"). Pursuant to the Agency's contract with its court reporting companies, the Agency can reproduce and turn over a transcript in response to a formal FOIA request. However, if an informal request is made for a transcript, the requester should be referred to the court reporting company and will have to purchase a copy from the company.

[3] The identity of Board-side personnel assigned to a particular case should never be disclosed. Contact the Board's FOIA officer in Washington with any questions.

B. Discretionary Disclosure Policy

A discretionary disclosure under the FOIA is where a FOIA exemption could be claimed for a requested document but as a matter of administrative discretion the Agency chooses not to claim the exemption. The ability to make discretionary disclosures of FOIA-exempt information is limited because most files are subject to the requirements of the Privacy Act of 1974.[4] The Privacy Act generally prohibits the disclosure of certain covered documents about individuals, but permits disclosures to FOIA requesters if *required* under the FOIA (*i.e.*, when there is no applicable FOIA exemption).[5] In addition, the Privacy Act permits disclosures pursuant to Agency-published "routine uses." *See* Chapter III. Related Statutes, Section A. One such routine use (Standard Routine Use 12) applies to most Agency files and permits Agency records to be disclosed "to FOIA requesters . . . under the Agency's discretionary release policy, set forth in the Agency's FOIA Manual. . . ."[6] Accordingly, to help ensure compliance with the Privacy Act, *only* the types of discretionary disclosures as defined here in this Chapter (*see* below) are authorized to be made without consultation with the General Counsel's FOIA officer in Washington.

[4] 5 U.S.C. § 552a. *See U.S. Dep't of Def. 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* Chapter III. Related Statutes, Section A.; *FOIA Post*, including then Attorney General Ashcroft's FOIA Memorandum (posted 10/15/01) (recognizing the continued agency practice of considering whether to make discretionary disclosures of FOIA-exempt information, subject to statutory prohibitions as well as protection of privacy interests).

[5] The Privacy Act contains 12 statutory exemptions that permit disclosures. *See* 5 U.S.C. § 552a(b)(1)-(12). Exemption (b)(2) permits disclosures as "required" under the FOIA.

[6] *See* Fed. Reg. Vol. 71, No. 239, December 13, 2006, p. 74,942. Other "routine uses" include, for example, disclosures to parties, party representatives, and witnesses, in the course of investigating or settling cases (Standard Routine Uses 4 and 5, p. 74,942), and disclosures in federal, state, or local proceedings, in accordance with the procedures of § 102.118 of the Board's Regulations, when "such records are determined by the Agency to be arguably relevant to the litigation." (Standard Routine Use 2, p.74,942). These documents are available online at *http://a257.g.akamaitech.net/7/257/2422/ 01jan20061800/edocket.access.gpo.gov/2006/pdf/06-9683.pdf* (notice of systems of records); and *http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-13684.pdf* (final rule). A listing of all other Agency systems of records can be found at http://www.nlrb.gov/privacy_act_systems.aspx.

If, however, the FOIA processor perceives a significant need to make a discretionary disclosure of information that is *not* provided for herein, the processor must first consult with the General Counsel's FOIA officer in Washington.

1. Trivial, administrative or internal information, or "low 2" documents. Regions may release "low 2" documents, if technically exempt only by that exemption, because Exemption 2 is designed solely to shield agencies from the administrative burden of processing and releasing such trivial material in which there is no genuine public benefit, rather than from any substantive disclosure harm. *See* Chapter VI. Exemption 2.[7] In many instances, especially when the "low 2" information in question is a portion of a document page not otherwise exempt, it is more efficient for the FOIA processor to release the "low 2" information than to withhold it.[8] Prior to any disclosure of "low 2" documents, FOIA processors must review the information and make the appropriate redactions to protect any confidential source and personal privacy information, information that would jeopardize the physical safety of a person, and/or the confidential commercial or financial interests of the parties, as well as any work product or deliberative process information privileged by Exemption 5. FOIA processors may not, however, make a discretionary disclosure of "high 2" material—which includes more substantial internal information such as Agency casehandling memoranda that contain

[7] As a matter of practice, FOIA processors should not include routine, ministerial, or internal documents in a response to a request that does not explicitly seek them, such as a request for "all documents" in an investigative file. If a follow-up request is received, the FOIA processor may then supply the "low 2" material after it is determined that no other exemptions apply and/or appropriate redactions are made. *See* Sample Language for Letters in the Appendix.

[8] *See FOIA Update*, Vol. V, No. 1, at 11-12 ("FOIA Counselor: The Unique Protection of Exemption 2") (advising agencies to invoke "low 2" aspect of Exemption 2 where doing so truly avoids burden); accord Exec. Order No. 13, 392 § 1(c), 70 Fed. Reg. 75,373 (requiring agencies to "process requests under the FOIA in an efficient and appropriate manner.").

instructions to staff regarding the prosecution of ULP cases and the assessment of the General Counsel's Section 10(j) priorities—due to the potential risk of circumvention of the Agency's regulations or statute.[9]

2. Briefs, letters, or statements submitted in support of or in opposition to an appeal of a dismissal of an unfair labor practice charge. All requests for Appeals documents in open unfair labor practice cases should be forwarded to the General Counsel's FOIA officer in Washington.

In open cases where an appeal is pending in the Office of Appeals, FOIA processors may be permitted to release **to the parties only**, as a matter of administrative discretion and apart from FOIA considerations *but with appropriate redactions* to protect privacy, confidential, and other information noted below, briefs, letters, or statements submitted in support of or in opposition to an appeal of a dismissal of an unfair labor practice charge, even though these documents arguably may be withheld pursuant to Exemption 7(A).[10] However, in open cases where (1) an appeal has been sustained, (2) the case was on appeal but has been referred back to the Region, or (3) the Regional Director has withdrawn the dismissal of a charge, and the information sought would be protected by a FOIA exemption, that information should not be disclosed.

[9] In addition, FOIA processors may not make any discretionary disclosures under the FOIA for information that falls within Exemption 3. *See* 5 U.S.C. § 552(b)(3). This information accommodates non-disclosure provisions in other federal statutes such as tax return information under 26 U.S.C. § 6103.

[10] In open cases, the General Counsel does not disclose attachments to such appeals documents because attachments tend to be voluminous and accordingly burdensome to review for information that may be covered by other exemptions, which restrict discretionary disclosures. Therefore, appropriate redactions to the appeal should be made.

Prior to any disclosure, the Appeals documents described above must be redacted to remove any information that reveals confidential source identity, personal privacy information, information that would jeopardize the physical safety of a person, and/or confidential commercial or financial interests of the parties.

In closed cases, whether an appeal has been sustained or denied, appeals and attachments thereto (except for confidential witness affidavits) may be released to requesters, after making all appropriate redactions to protect confidential source identity, personal privacy, physical safety, and/or confidential commercial or financial information.

To ensure uniformity in closed cases, FOIA processors should confer with the General Counsel's FOIA officer in Washington to ascertain if a request for appeals documents had been made when the case was open and, if so, the redactions that had been made at that time.

3. OM and GC memoranda and selected "go" Advice Memoranda and/or General Counsel (GC) Minutes. The Agency regularly releases certain OM and GC memoranda by placing them on the Internet. In addition, the General Counsel publishes, as a matter of his administrative discretion, selected "go" Advice Memoranda after the case, and any related cases, have closed. GC Minutes prepared by the Office of Appeals also may be released, upon request, as a matter of administrative discretion, once a case has been closed—even though they are technically covered by Exemption 5.

To ensure uniformity in these disclosures and types of redactions, it is the General Counsel, rather than the Regions, who exercises this discretion and coordinates the release of these memoranda. If there is a request for one of these memoranda that has not

been published or for a GC Minute in a closed case, contact the General Counsel's FOIA officer in Washington.

It is important to note that when the Agency exercises its administrative discretion and makes a discretionary disclosure of FOIA-exempt information, it will not be held to have waived the ability to invoke applicable FOIA exemptions for any arguably similar or "related" information. *See* Chapter XIII. Waiver.

APPENDIX

Overview of the FOIA

The FOIA is an Act of Congress, originally passed in 1966, and substantially amended in 1974, 1986, 1996, and 2007. The purpose of the FOIA, since its inception, has been ". . . 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."[1] The disclosure of "[o]fficial information that sheds light on any agency's performance of its statutory duties falls squarely within that statutory purpose."[2] FOIA disclosure is the rule rather than the exception. The task of employees in processing FOIA requests is to strike a balance between the public's right of access to requested information and the Agency's legitimate need to maintain the confidentiality of certain types of information. Thus, Congress coupled FOIA's liberal disclosure provisions with nine specific exemptions that allow some types of information to be withheld, to the minimum extent necessary to safeguard the Agency's effectiveness by preserving the confidentiality of certain personal, commercial, and other governmental information.

Following is a brief summary highlighting the provisions of the FOIA:

The FOIA has two automatic disclosure provisions—(a)(1) and (a)(2). The first automatic disclosure provision requires the publication in the Federal Register of basic information regarding how the agency transacts its business, including its rules and regulations, statements of procedure, and its organization and functions.[3] The second automatic disclosure provision requires the creation of conventional and electronic reading rooms, where certain categories of documents are routinely made available for public inspection and copying, unless the materials are promptly published and copies offered for sale.[4] Reading room documents consist of: final opinions and orders made in the adjudication of cases, agency statements of

[1] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).
[2] *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).
[3] 5 U.S.C.§ 552(a)(1).
[4] 5 U.S.C. § 552(a)(2). Further, the FOIA (5 U.S.C. § 552(a)(5)), requires that a record of each member's final votes in every agency proceeding be made available for public inspection. While not technically within the FOIA, Agency records consisting of "the formal documents constituting the record in a case or proceeding are matters of official record" (*e.g.*, docketed pleadings, transcripts, and Board and General Counsel Exhibits put into the record at a hearing) and are available to the public for inspection and copying during normal business hours at the Board's office in Washington, D.C. or at the appropriate Regional office. *See* 29 C.F.R. § 102.117(b)(1).

policy and interpretations that are not published in the Federal Register, administrative staff manuals and instructions that affect the public, copies of records that have become or are likely to become the subject of subsequent FOIA requests, and a general index of these documents.[5] All of the reading room documents must be indexed to facilitate public inspection.[6]

Subsection (a)(3) is the most commonly utilized portion of the FOIA,[7] covering proper access requests from any person for those records that are not automatically disclosed, as just discussed, or that are not exempt under one of the nine specific exemptions or exclusions.[8] These requests require search, including by electronic means, and review by Agency personnel prior to disclosure to the requester in his preferred form or format, including electronic format. This subsection also requires that each agency promulgate administrative regulations regarding the time,[9] place, fees, and procedures to be followed in making a FOIA request.

In Subsection (a)(4), each agency is required to promulgate regulations specifying the schedule of fees applicable to processing requests, including fee category placement and the applicability of fee waivers or reductions.[10] These schedules are to conform to the Office of Management and Budget's uniform schedule of fees. The OMB policy memorandum on "FOIA Uniform Fee Schedules and Guidelines" (52 Fed. Reg. 10,012 (1987), *see* Appendix), sets forth the underlying rationale, binding on all agencies, for fee category placement and fee waivers.[11]

Further, this subsection provides that upon complaint,[12] with an answer required within 30 days,[13] United States District Courts have jurisdiction, with de novo review, to enjoin an

[5] 5 U.S.C. § 552 (a)(2)(A)-(E). While regions may maintain a "reading room," which generally refers to its library and files (such as charges, petitions and complaints) that are subject to public inspection and copying, it is NOT required that each region or resident office maintain a reading room or a dedicated computer for access to reading room material. The Agency's home page (http://www.nlrb.gov) contains most of the reading room documents.

[6] 5 U.S.C. § 552 (a)(2) & 2(E). The Legal Research and Policy Planning Branch publishes indexes of Board, General Counsel, and final decisions, including the "Classified Index of NLRB Decisions and Related Court Decisions."

[7] 5 U.S.C. § 552(a)(3).

[8] 5 U.S.C. § 552 (b)(1)-(9). The legal principles to be utilized in the application of these exemptions are the focus of this Manual.

[9] The FOIA itself (5 U.S.C. § 552 (a)(6)(A) sets forth an initial response time of 20 days and an appeal determination within 20 days after receipt (excluding Saturdays, Sundays and legal public holidays). Further, the FOIA sets forth detailed procedures that impact the timing of a response. These include: 5 U.S.C. § 552(a)(6)(B) (extension based on "unusual circumstances" and "aggregation" of related requests); 5 U.S.C. § 552(a)(6)(C) (Agency failure to comply with time limits constitutes exhaustion unless "exceptional circumstances" exist for delay); 5 U.S.C. § 552(a)(6)(D) ("multitrack processing" for faster processing); and 5 U.S.C. § 552(a)(6)(E) (expedited processing where demonstrated "compelling need").

[10] 5 U.S.C. § 552 (a)(4)(A). *See* Board's Rules & Regulations, 29 C.F.R. § 102.117(d).

[11] For a more complete discussion, *see* Chapter XV. Fees and Fee Waivers under the FOIA.

[12] 5 U.S.C. § 552(a)(4)(B).

agency from withholding agency records. If a requester substantially prevails, reasonable attorneys' fees and costs may be awarded.[14] If such occurs, and there is a written finding that the agency personnel acted "arbitrarily or capriciously" in withholding the records, the Special Counsel initiates a proceeding to determine whether disciplinary action is warranted for the employee "primarily responsible" for the withholding.[15] The Special Counsel's recommendations are submitted to the agency, which takes the recommended corrective action. *Id.* Further, in the event a court order is not complied with, the district court may "punish for contempt" the "responsible employee."[16]

In Subsection (d), the FOIA further provides that the Act was not intended to authorize any new withholding of information, including from Congress.[17] In Subsection (e), the FOIA also requires a detailed annual FOIA report to Congress on a fiscal year basis. Beginning with 1998 fiscal year, this report is electronically transmitted to the Attorney General for submission to Congress and is made available on the internet.[18]

In Subsection (f), the FOIA includes limited definitions. The term "agency" includes nearly all executive branch entities.[19] The term "record" is expanded to include information maintained in an electronic format.[20] Finally, in Subsection (g), the Act requires each agency to prepare and make available a reference guide for requesting records or information from the agency.[21] The reference guide is required to contain an index of the agency's major information systems, a description of major information and record locator systems maintained by the agency, and a handbook for obtaining various types and categories of public information from the agency. When available, the guide will be distributed to all FOIA officers and be made available in the agency's reading room and at the agency's web site.

The NLRB has promulgated Subpart K, Section 102.117 of its Rules and Regulations, 29 C.F.R. § 102.117, which sets forth the Agency's administrative FOIA procedures. Subparagraphs (c) and (d) set forth the administrative procedures that a FOIA requester must

[13] 5 U.S.C. § 552(a)(4)(C).
[14] 5 U.S.C. § 552(a)(4)(E).
[15] 5 U.S.C. § 552(a)(4)(F).
[16] 5 U.S.C. § 552(a)(4)(G).
[17] 5 U.S.C. § 552(d). This refers to the body of Congress or its committees. Individual members have the same status as "any person" under 5 U.S.C. § 552 (a)(3).
[18] 5 U.S.C. § 552(e).
[19] 5 U.S.C. § 552(f)(1).
[20] "Agency records," however, is a judicial construct not precisely defined in the FOIA. For a complete discussion of what is an "agency record," *see* Chapter IV. Agency Records and Electronic FOIA.
[21] 5 U.S.C. § 552(g).

follow in making a FOIA request to the Agency, filing an administrative appeal, and exhausting administrative remedies within given time constraints. They also provide for fee category placement, assessment of costs, and the standards for determining whether a fee waiver will be granted. Subparagraph (e) incorporates the nine FOIA exemptions by reference and grants to the General Counsel and the Board the right to make discretionary FOIA disclosures.

Agency Document Index

The documents listed herein are often requested under the FOIA. This Index will assist FOIA processors by suggesting exemptions for listed documents. This index is not to be used as the sole basis for granting or denying a FOIA request. The FOIA processor should independently analyze each request and each responsive document to determine if the suggested exemption applies. Further, even if the suggested exemption is applicable, partial disclosure may be required and redactions may be appropriate. (This is especially the case involving the privacy Exemptions 6 and 7(C)). In all cases, handwriting from witnesses or confidential sources must be redacted for privacy considerations if the handwriting could reveal the identity of the person. Moreover, please remember that in some situations the Agency will be required to use a *Glomar* response, neither confirming nor denying the existence of a document so as to protect an interest protected by the FOIA exemptions. Consequently, before disclosing any document listed in this index, a FOIA processor should analyze whether a *Glomar* response is appropriate.

Finally, because Exemption 7(A) is applicable to all documents if the case is open (or closed, but related to an open case), that exemption is not separately listed in this Index, but should be considered by FOIA processors for every FOIA request in every open or open-related case.

Document Type[1]	Suggested Exemptions[2]
Administrative Staff Manuals (published or available to public)	Refer requester to Agency website[3]
Advice "go" memoranda	Contact Headquarters
Advice "no go" memoranda	Refer requester to Agency website[4]
Advice memoranda (other)	5, 6, 7(C), 7(D), 7(F)
Advice mixed "no go" and "go" memoranda, including casehandling memoranda	Contact Headquarters
Affidavit/confidential witness affidavit (Agency prepared)[5]	4, 6, 7(C), 7(D), 7(F)
Affidavit/confidential witness affidavit attachments	Disclose; 4, 6, 7(C), 7(D), 7(F)[6]
Affidavit of Service (NLRB 877)	Disclose
Agency decision making or investigation guidelines (memoranda that provide instructions how to process particular cases that are not otherwise available to the public)	2, 5, 7(E)
Agency personnel information (limited to names, titles, grades, salaries, duty stations)	Disclose[7]

[1] If applicable, NLRB form numbers will be provided next to the document type. Not every document listed in this index will have an agency form number, and there may be additional form numbers for each document type that may not be listed.

[2] Note that all of the suggested exemptions listed for a particular document may not apply. When the word "Disclose" is utilized, the documents should be released, but may have to be redacted for privacy and confidentiality considerations under Exemptions 6, 7(C), and 7(D). Where the word "Disclose" is utilized followed by a semi-colon, the suggested exemptions listed may protect parts of the document. Finally, where the term "Contact Headquarters" appears, the Region is required to contact the General Counsel's FOIA officer in Washington for guidance.

[3] Copies of administrative staff manuals should be listed at www.nlrb.gov (herein "Agency website"). If the requested document is not found on the Agency website, the Regional personnel should contact the General Counsel's FOIA officer in Washington.

[4] Requesters should be directed to the Agency's website. If the requester does not have a computer or still wants a copy, and the document is not otherwise exempt in full or in part, we must provide it. If the requested memoranda is not on the Agency's website, contact the General Counsel's FOIA officer in Washington.

[5] For statements prepared by non-Board Agents, *see* the listing for "Witness Statements" in this Agency Document Index.

[6] Unless the attachment identifies the affiant, it should be disclosed subject to redactions for any exempt material. If the attachment could disclose the affiant's identity, then the document should be withheld in its entirety pursuant to Exemptions 6, 7(C), 7(D), and 7(F).

[7] The name and work phone number of the Board Agent assigned to the case should be disclosed unless there is evidence that the requester may harass the Board Agent, has done so in the past to other Board Agents, or

Document Type[1]	Suggested Exemptions[2]
Agenda Minutes (Regional)	5, 6, 7(C), 7(D)[8]
Appeals	Contact Headquarters
Appeals Form (NLRB 4767)	Disclose
Appeals internal memoranda	5, 6, 7(C), 7(D)
Appearance Form (NLRB 1801)	Disclose; 6[9]
Arbitration decisions	4, 6, 7(C), 7(D), 7(F)
Authorization cards and lists of authorization card signers	4, 6, 7(C)
Backpay calculations (Board agent notes)	5
Backpay Claimant Information (NLRB 916)	6, 7(C)
Ballots (impounded, marked, or used)	6
Ballots (sample)[10]	Disclose
Bargaining notes, minutes, proposals	4, 6, 7(C), 7(D), 7(F)
Board agent letters transmitting election agreements for signatures of parties	Disclose; 6, 7(C)
Briefs	Disclose[11]
Card check/recognition – neutrality agreements	Contact Headquarters
Case assignment cards	Low 2, 5, 6, 7(C), 7(D), 7(F)[12]
Casehandling Log (NLRB 4690)	5, 6

has a violent or threatening disposition. *See* the discussion in Chapter XI. Exemption 7, Section F. This information should also not be disclosed when there are allegations that the Board Agent has engaged in misconduct. Moreover, the identity of Board-side attorneys assigned to a particular case should never be disclosed.

[8] *See* discussion in Chapter VIII. Exemption 5 pertaining to the meaning of a predecisional document and the preparation of agenda minutes and final investigative reports.

[9] Personal information (non-business addresses, phone numbers) should not be disclosed for individuals. The business phone/cell phone numbers and addresses of attorneys are discloseable; personal addresses and phone/cell phone numbers are not discloseable.

[10] NLRB 4135B, 5165, 5219.

[11] Agency briefs filed for enforcement or on review before a U.S. Court of Appeals are available at the Agency's website.

[12] Although Exemption Low 2 applies and protects this document (and others listed herein) from disclosure, the General Counsel has decided that discretionary disclosure is appropriate under Exemption 2 for nearly all trivial administrative material. The Regional Office should therefore not rely on Exemption Low 2 to protect the document from disclosure. *See also*, n.7, supra, regarding disclosure of Agency personnel information.

Document Type[1]	Suggested Exemptions[2]
Casehandling Manual	Requesters should be directed to the Agency website or the U.S. Government Printing Office
Certification of Representative (NLRB 4279)	Disclose
Checks (including photocopies)	4, 6, 7(C)
Closed Case Report (NLRB 4582)	Disclose; 5 (redact for legal theories set forth on the document), 6, 7(C) (redact for privacy information set forth on the document)
Certification of Notice Posting	Disclose
Certification of Results (NLRB 4280, 4889)	Disclose
Challenge Ballot envelopes, stubs, and outer envelopes	6, 7(C)
Collective-bargaining agreements	Disclose
Comments on Appeals	5, 6, 7(C), 7(D), 7(F)
Commercial information[13]	4, 6, 7(C)
Complaints; answers to complaints (including amended complaints and amended answers)	Disclose
Completed Commerce Questionnaire (NLRB 5081)	Disclose; 4, 6, 7(C)[14]
Compliance Information (interim earnings, social security numbers, W-2s, names of persons who know whereabouts of discriminatees; payroll information)	*See* Section 10650.5 of the Compliance Manual for guidance on what information can be released[15]
Computer generated access code certifications (for Office of	High 2, 7(E)

[13] The definition of commercial information is set forth in Chapter VII. Exemption 4.

[14] Where the request concerns information provided by a sole proprietorship, partnerships, or closely held corporations, contact the General Counsel's FOIA officer in Washington for guidance.

[15] Section 10650.5 of the Compliance Manual provides that after issuance of a compliance specification, respondents in Board cases are permitted to see certain information delineated in that section. However, a respondent is to be treated like all other requesters once the case has closed. In the closed case situation, the requester is permitted to receive compliance information subject to redactions for privacy considerations. Remember that employer Tax ID numbers are to be disclosed since employers do not have privacy rights under the FOIA.

Document Type[1]	Suggested Exemptions[2]
Appeals EOTs)	
Confidential witness affidavits/affidavits (Agency prepared)[16]	4, 6, 7(C), 7(D), 7(F)
Confidential witness affidavit/affidavit attachments[17]	Disclose; 4, 6, 7(C), 7(D), 7(F)
Consultant/expert witness recommendations and memos	Contact Headquarters
Correspondence between Board and parties or "cc'd" to Board	Disclose; 6 (redact for privacy information), 7(C)
Court Pleadings	Disclose
Dana (voluntary recognition) documents	Contact Headquarters
Decision and Direction of Election (NLRB 4478)	Disclose
Decision and Order (R and UD Cases) (NLRB 4479)	Disclose
Decisions, Judgments, and Orders	Disclose
Deposition transcripts and exhibits	Contact Headquarters[18]
Descriptions of Agency Organization	Disclose
Disclaimer of Interest	Disclose; 6 (redact for privacy information)
Dismissal (Regional) and Denial (Office of Appeals) Letters	Disclose[19]
Docketing letters (disclosing that a charge has been filed and assigned to a Board agent)	Disclose[20]
Drafts of documents prepared by Agency	5, 6, 7(C), 7(D)
Drawings and/or Maps	Disclose; 4, 6[21]
Election Agreements (Approved)(NLRB 651, 652, 4931, 4932, 5509)	Disclose

[16] *See* n.5, *supra*.
[17] *See* n.6, *supra*.
[18] These documents should be treated the same as confidential witness affidavits. The processor should contact the General Counsel's FOIA officer in Washington for guidance.
[19] The computer-generated access code attached to dismissal letters should not be disclosed pursuant to Exemption 7(E). *See* note 33, infra.
[20] *See* n.7, *supra*.
[21] Drawing or maps should be disclosed after redacting personal identifiers. If the drawing or map contains commercial information or trade secrets, the Board Agent must analyze whether Exemption 4 applies.

Document Type[1]	Suggested Exemptions[2]
Election Agreements (Drafts or not Approved)	5[22]
Election approval recommendations	5
Election Order Sheet (NLRB 700)	Disclose[23]
E-mails (Intra-Agency e-mails or Agency produced e-mails forwarded to other governmental entities)[24]	5, 6, 7(C), 7(D), 7(F)
E-mails (sent by parties to the Agency, submitted by a party or witness, or between Agency and non-agency persons)[25]	Disclose; 4, 6, 7(C), 7(D), 7(F)
E-mail addresses of Agency personnel	Disclose[26]
Employer Tax ID Numbers	Disclose (with exceptions)[27]
Envelopes	Low 2, 6, 7(C), 7(D)[28]
Excelsior Lists or marked voting lists, including affidavits of voters in the absence of an *Excelsior* List	6, 7(C)
Exceptions and Cross-Exceptions to Board	Disclose
Excerpts from Rules & Regulations (NLRB 1405A)	Disclose
Executive Orders	Disclose
Expert witness/consultant recommendations and memos	Contact Headquarters
Filing instructions	Low 2[29]
Final Decisions (Board, ALJ's)	Disclose
Financial Information (job bids, tax returns, wage	4, 6, 7(C), 7(D), 7(F)[30]

[22] If the election agreement has been shared with the parties, the FOIA processor should contact the General Counsel's FOIA officer in Washington for guidance.

[23] If the names of the observers are included on the sheet and the election does not occur, the names of the election observers should be redacted for privacy reasons pursuant to Exemptions 6 and 7(C). Similarly, if the observer does not appear at the election or another observer is substituted for the observer on the form, the identity information on the form should be redacted for that person.

[24] E-mails should be treated in the same manner under the FOIA as letters.

[25] *See* n.24, *supra*.

[26] The government e-mail addresses of Agency personnel should be disclosed unless there is evidence that the requester may harass the Board agent, has done so in the past to other Board agents, or has a violent or threatening disposition. *See* the discussion in Chapter XI. Exemption 7, Section F. This information should also not be disclosed when there are allegations that the Board Agent has engaged in misconduct.

[27] *See* n.30, *infra.*

[28] *See* n.12, *supra*.

[29] *See* n.12, *supra*.

Document Type[1]	Suggested Exemptions[2]
information, etc.)	
FIRs[31]	5, 6, 7(C), 7(D)
First-Party Requester's request for Documents	*See* Chapter XII. First-Party Requesters
Formal documents (charge, complaint, orders, etc.)[32]	Disclose[33]
GC memoranda	Contact Headquarters[34]
GC Minutes	5
Grievance forms	Disclose; 6, 7(C)
Hearing and Service Sheet (NLRB 857)	Disclose (*See* n.9, *supra*)
Hearing Officer's Report on Objections or Challenges	Disclose
Information Officer (IO) memos	5
Information on Final Draft of Decision (NLRB 4851)	Low 2, 5[35]
Information service materials (such as Autotrak, Lexis Nexis, Pacer, Standard and Poors)	4[36]
Initials on Agency memoranda or notes	Low 2,[37] 5
Instructions to Temporary Election Agents/Observers in Elections (NLRB 721, 722, 722 (sp))	Disclose
Insurance, medical Information submitted by discriminatees or witnesses	6, 7(C)

[30] Corporations, business associations, and unions do not possess protectable privacy interests. If the provided information pertains to a sole proprietorship, partnership, or closely held corporation, contact the General Counsel's FOIA officer in Washington for guidance.

[31] *See* n.8, *supra*.

[32] Includes all amendments to such documents including amended charges and amended complaints.

[33] Formal documents are discloseable subject to redactions for privacy considerations. *See* Chapter XVII. Agency Release Policies and Chapter XII. First-Party Requesters.

[34] Policy statements such as GC or OM memos normally have a designation at the end of the memo designating whether they are disclosable to the public. The Agency's FOIA Office maintains a list of the memos that have been disclosed in the past and should be contacted if there is any doubt as to whether a particular GC or OM memo should be disclosed in full or in part. GC and OM memos that have been designated to be released to the public are available on the Agency's website.

[35] If the documents contain comments in the remarks section, Exemption 5 may be used to protect those comments from disclosure.

[36] Because of the contractual agreements between such information service companies and the Board, these records should not be disclosed.

[37] *See* n.12, *supra*.

Document Type[1]	Suggested Exemptions[2]
Internal time deadline and procedure memoranda	High 2, 7(E)
Investigation of Interest (NLRB 4069)	Disclose
Legal Research prepared by Board agents	5
Letter/e-mail from Regional Director Approving Withdrawal Request[38]	Disclose
Letter/e-mail from Party Setting Forth Evidence and/or Witnesses In support of R or C Cases[39]	Disclose; 4,6, 7(C), 7(D), 7(F)
Letters/e-mail from Board agent submitting settlement agreement for consideration or in assistance for trial preparation[40]	Disclose; 6, 7(C), 7(D), 7(F)
Letters/e-mails by Board agent requesting answers to specific questions[41]	Disclose; 6, 7(C), 7(D), 7(F)
Letters/e-mails from Board agent to Charging Party discussing reasons for dismissal after RD decision to dismiss	Disclose; 6, 7(C), 7(D), 7(F)
Letters/e-mails from Board agent to parties regarding submission of evidence in support of challenges or objections[42]	Disclose; 6, 7(C), 7(D), 7(F)
Letters/e-mails from Board agent to party requesting assistance in locating witnesses and/or deadlining the party for presentation of evidence[43]	Disclose; 6, 7(C), 7(D), 7(F)
Letters/e-mails from parties responding to inquiries on status of deferred cases[44]	Disclose; 6, 7(C), 7(D), 7(F)
Letters/e-mails to parties inquiring about status of deferred cases[45]	Disclose; 6, 7(C), 7(D), 7(F)
Letters/e-mails to parties setting forth election arrangements[46]	Disclose; on names of observers — 6, 7(C)

[38] Letters should be treated in the same manner under the FOIA as e-mails.
[39] *See* n.38, *supra*.
[40] *See* n.38, *supra*.
[41] *See* n.38, *supra*.
[42] *See* n.38, *supra*.
[43] *See* n.38, *supra*.
[44] *See* n.38, *supra*.
[45] *See* n.38, *supra*.
[46] *See* n.38, *supra*.

Document Type[1]	Suggested Exemptions[2]
Lists of employee names and job classifications submitted to check sufficiency of showing of interest	6, 7(C)[47]
Motions; Rulings on Motions	Disclose
Newspaper clippings (including commercial brochures and pamphlets, and magazines)	Disclose
Non-Board Settlement Documents	Disclose; 4, 6, 7(C), 7(D), 7(F)[48]
Notes prepared by Board agents	5, 6, 7(C), 7(D), 7(F)
Notice of Election (NLRB 707)	Disclose
Notice of hearing recommendation memos	5
Notice of Representation Hearing (NLRB 852)	Disclose
Notices[49]	Disclose
Objections of Charging Party to Approval of Settlement	Disclose; 6, 7(C), 7(D), 7(F)
Objections to elections	Disclose
OM memoranda	Contact Headquarters if not on Agency website[50]
Order Transferring Proceeding (NLRB 1405)	Disclose
Order Transferring Representation Case (NLRB 4481)	Disclose
Parties Involved in Unfair Labor Practice Investigation Procedures (NLRB 4541)	Disclose
Party's Comments on Omissions or Disagreements with *Excelsior* Lists	Disclose; 6, 7(C), 7(D), 7(F)
Payroll documents submitted by Employer	4, 6, 7(C)
Payroll documents submitted by Discriminatees	6, 7(C), 7(D), 7(F)

[47] Names, addresses, phone numbers, social security numbers, personal identifiers, and the number of employees on such lists should be redacted.

[48] If the non-Board settlement agreement contains a clause wherein the parties thereto agree to keep the terms of the settlement agreement confidential, the processor should contact the General Counsel's FOIA officer in Washington for guidance.

[49] Notice forms: 707, 852, 4022, 4030, 4032, 4135, 4338, 4722, 4723, 4725, 4726, 4727, 4758, 4781, 4782, 4783, 4787, 4820, 5002, 5003, 5154, 5157, 5268, 5469, 5492, 4722 (sp), 4726 (sp), 4727 (sp), 4758 (sp), 4775 (sp), 4781 (sp), 4783 (sp), 4787 (sp), 5154 (sp), 5492 (sp).

[50] *See* n.34, *supra*.

Document Type[1]	Suggested Exemptions[2]
Pay stubs	6, 7(C) 7(D), 7(F)
Personal information about FOIA requesters (addresses, social security numbers,[51] etc.)	6, 7(C)
Personal information of persons listed in file (addresses, social security numbers, etc.)	6, 7(C), 7(D), 7(F)
Personal logs or notes of Board agent (if found in the Regional Office file)	5, 6, 7(C), 7(D), 7(F)
Petitions (RC, RD, RM, UC, UD, AC) (NLRB 502)	Disclose
Photographs	4, 6, 7(C), 7(D), 7(F)[52]
Position Statements	Disclose; 4, 6, 7(C), 7(D), 7(F)[53]
Position Statements or Briefs in Support of Objections to Elections	Disclose[54]
Procedure for filing Compliance Appeal (NLRB 5436)	Disclose
Public Information Charge Disposition Report (NLRB 5123)	5, 6, 7(C), 7(D), 7(F)
Questionnaires (Agency form questionnaires submitted in lieu of affidavit)	4, 6, 7(C), 7(D), 7(F)
Regional Director Orders	Disclose
Receipt for Authorization Cards (Submitted in support of petition)	Disclose; 6, 7(C)
Recommendation to Issue Notice of Hearing	5, 6, 7(C)
Recommendations to grant/deny Extensions of Time or to grant/deny election agreements	5
Recommendations to Issue Complaint; Grant or Deny Postponement Requests; Approval of Settlement Agreement	5, 6, 7(C), 7(D), 7(F)

[51] *See* n.30, *supra* for information pertaining to Employer Tax ID numbers.

[52] If the photograph shows persons or can lead to the identity of persons, it cannot be disclosed because of privacy considerations. If the photograph contains commercial information, the decision to release the photograph must be analyzed pursuant to Exemption 4 considerations. If there are any questions on whether a photograph can be disclosed, contact the General Counsel's FOIA officer in Washington.

[53] *See* OM Memorandum 99-35 (July 14, 1999).

[54] If Board Agent prepared confidential witness affidavits or non-Board witness statements are attached, contact Headquarters.

Document Type[1]	Suggested Exemptions[2]
Record keeping directions	2, 5, 7(E)
Regional Director's Report on Objections or Challenges	Disclose
Remand memoranda (Advice or Appeals)	5, 6, 7(C); Contact Headquarters
Report on Investigation of Interest (NLRB 4069)	Disclose
Request for Review of RD Decision	Disclose
Request for Postponement of Hearing (NLRB 4447)	Disclose
Request to Proceed in Related Unfair Labor Practice Case (NLRB 4551)	Disclose
Requests for Advice (Advice Submissions)	5, 6, 7(C), 7(D)
Requests for Extensions of Time	Disclose
Return receipt slips	Low 2, 6, 7(C)[55]
Routing slips	Low 2, 5, 6, 7(C)[56]
Rules and Regulations (Agency)	Direct the requester to the Agency website[57]
Section 10(j) internal memoranda	High 2, 5, 6, 7(C), 7(D), 7(E), 7(F)
Service Sheets	Disclose[58]
Settlement Agreements prepared by Agency (drafts or non-approved settlements) or memoranda pertaining thereto	5, 6, 7(C)
Settlement Agreements approved by Regional Director or by Administrative Law Judge (NLRB 4775, 5378)	Disclose
Seven (7) day letter to party regarding unilateral approval of Settlement Agreement	Disclose; 6, 7(C), 7(D), 7(F)[59]

[55] *See* n.12, *supra*.
[56] *See* n.12, *supra*.
[57] *See* n.3, *supra*.
[58] Personal information (non-business addresses, phone numbers) should not be disclosed for individuals. The business phone/cell phone numbers and addresses of attorneys are discloseable; personal addresses and phone/cell phone numbers are not discloseable.
[59] The Seven (7) day letter should be disclosed whether or not a settlement was ultimately approved, with appropriate redactions for privacy, confidentiality and physical safety considerations.

Document Type[1]	Suggested Exemptions[2]
Showing of Interest form (NLRB 4069)	Disclose
Statement of Procedures	Requesters should be directed to the Agency website or the U.S. Government Printing Office
Statement or Brief in Support of Request for Review of RD Decision	Disclose[60]
Substantive Rules	Refer the requester to the Agency website[61]
Subpoena	6, 7(C), 7(D), 7(F)[62]
Tally of Ballots or Revised Tally of Ballots (NLRB 760, 4168, 4888, 5218)	Disclose
Tally Sheet (NLRB 741)	Disclose
Tape recordings	Contact Headquarters
Telephone logs	Low 2, 5, 6, 7(C), 7(D), 7(F)[63]
Trade Secrets (formulas, production plans, devices, etc.)	4
Transcripts (or Exhibits) of Agency or Court case proceedings	Disclose[64]
Unfair Labor Practice Charges (NLRB 501, 508, 509)	Disclose[65]
Union authorization cards	4 (# of cards only), 6, 7(C)
Union Constitution, By-laws, and other governing documents	Disclose

[60] *See* n.54, *supra*.

[61] *See* n.57, *supra*.

[62] If the subpoena is directed to an individual, the document should not be disclosed to protected privacy, confidentiality and physical safety considerations pursuant to Exemption 6 and 7(C). If the subpoena is directed to a union or employer, the subpoena must be disclosed as such entities do not have privacy rights. *See* n.30, *supra* for certain possible exceptions to this rule. However, a subpoena directed to a union or employer must be redacted for privacy considerations if it contains information pertaining to individuals.

[63] *See* n.12, *supra*.

[64] If the exhibits have not been entered into evidence, a separate determination will have to be made to ascertain if any FOIA exemption protects the exhibit from disclosure. For transcripts and exhibits pertaining to witness depositions, *see* the entry above for deposition transcripts and exhibits.

[65] If the charge is not docketed, the charge must be disclosed subject to redactions for privacy considerations. *See* n.33, *supra*.

Document Type[1]	Suggested Exemptions[2]
Union Internal Appeal documents	Disclose; 6, 7(C), 7(D), 7(F)
Video Tapes	4, 6, 7(C), 7(D), 7(F)[66]
Visitor Logs (NLRB 5427)	6, 7(C), 7(D), 7(F)
Voluntary recognition (Dana) documents	Contact Headquarters
Waiver (NLRB 4480)	Disclose
Withdrawal form (NLRB 601)	Disclose[67]
Withdrawal letter to charging party (containing explanation)	Disclose; 6, 7(C), 7(D), 7(F)
Witness phone numbers and addresses provided by charging party or other witnesses	6, 7(C), 7(D), 7(F)
Witness statements (non-Board prepared)	Contact Headquarters

[66] If the video shows persons or can lead to the identity of persons, it cannot be disclosed because of privacy considerations. If the video contains commercial information, it may have to be redacted pursuant to Exemption 4. If there are any questions on whether a video can be disclosed, contact the General Counsel's FOIA officer in Washington.

[67] A signed withdrawal form should be disclosed in full unless it contains additional statements made by the charging party. The additional statements may need to be redacted for privacy, confidentiality and/or physical safety reasons under Exemptions 6, 7(C), 7(D), and 7(F).

Sample Language for Letters

Because of the variety of circumstances that may arise under the FOIA, FOIA processors should first review portions of this FOIA Manual to ensure that the sample language set forth in this Appendix is appropriate. Further, as noted in the Manual, the FOIA processor should first contact the requester with any questions pertaining to a FOIA request. Confirming letters should be sent to the requester reflecting any agreements reached. If there are any questions concerning the use of these samples, please contact the General Counsel's FOIA officer in Washington.

A. Procedural Issues

1. Introduction

This is in response to your letter of [date] to [addressee] received in this Office for reply on [date] in which you request, pursuant to the Freedom of Information Act (FOIA), a copy of [identify document requested].

2. Appeal Rights (A section on appeal rights should be included in every Determination Letter just prior to the signature block of the letter.)

The undersigned is responsible for the above determination. You may obtain a review thereof under the provisions of the NLRB's Rules and Regulations, Section 102.117(c)(2)(v), by filing an appeal with the General Counsel,[1] National Labor Relations Board, Washington, D.C., 20570, within 28 calendar days of the service of this letter. Thus, the appeal must be received by the close of business at 5:00 p.m. (ET) on [28 days from service]. Any appeal should contain a complete statement of the reasons upon which it is based.

[1] If the adverse determination was made by the Executive Secretary of the Board or the Inspector General, the appeal shall be filed with the Chairman of the Board in Washington, D.C.

3. Adequate Search (The language set forth herein should also be included in every Determination Letter.)

In accordance with the FOIA, the Agency has conducted a reasonable search for the documents.

4. Continuing Request

Because the Freedom of Information Act, 5 U.S.C. § 552, does not obligate the Agency to provide documents as they are created, you will receive no further responses to your request. *Mandel Grunfeld and Herrick v. U.S. Customs Serv.*, 709 F.2d 41 (11th Cir. 1983); *Blazy v. Tenet*, 979 F. Supp. 10, 17 (D.D.C. 1997), *aff'd*, 1998 WL 315583 (D.C. Cir. 1998); *Church of Scientology v. IRS*, 816 F. Supp. 1138 (W.D. Tex. 1993).

5. Files Destroyed

The files for these cases have been destroyed by the Federal Records Center pursuant to this Agency's file retention policy. Under this policy, case files are retained for a six-year period, which commences at the close of the calendar year during which the case is closed. The files are then destroyed unless they are selected for permanent retention based on their legal significance. The cited cases were closed in [year], and their files were not permanently retained. Accordingly, while there may be information about the case available, there are no documents maintained by this Agency that are responsive to your request.

6. No Requirement to Answer Questions or Create Documents

The Freedom of Information Act, 5 U.S.C. § 552, 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 the nine exemptions or three special law enforcement record exclusions. Accordingly, the FOIA applies only to "records" maintained by federal agencies, and does not require an agency to create documents or to answer

questions. Therefore, to the extent that your request requires the Agency to create documents or concerns answers to specified questions, your request is denied.

7. No Requirement to Provide an Index of Documents

Finally, to the extent that you are requesting the Agency to provide you with an index of documents in the files, it is settled that such indexes are not required during the administrative stage of a FOIA request. *See*, *e.g.*, *Judicial Watch v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996).

8. Referral of Request to Office Where Documents Are Held

Pursuant to a search of the records of this Office, [select appropriate choice(s)] we were able to locate several documents encompassed by your request. I have enclosed those documents. [Or] Those documents are partially or fully exempt under the FOIA, (*See* sample exemption paragraphs herein for explanation of exemption) [Or] We were unable to locate any responsive documents. To the extent that there may be documents maintained by the [General Counsel or the Board's Executive Secretary in Washington, D.C. and/or in the Regional Office that has jurisdiction over the State of ( )(Region)], I am referring your request to those offices, pursuant to the Board's Rules and Regulations, Section 102.117(c)(1). The applicable time limit for their responses will be calculated from the date of receipt by those offices of your letter, which is being forwarded as of this date. [as of December 31, 2008, substitute the following sentence for the final sentence of this paragraph: The applicable time limit for their responses will start to run no later than 10 days after the request was received by this Office.]

9. Suggestion to Renew Request When Case Closes

Finally, some documents in the file may become disclosable after the case closes, that is, once a Board decision issues, there has been full compliance with a settlement, or the case has

otherwise been closed under Agency procedures. Accordingly, you may wish to renew your request at that time.

10. Segregability

a. Where document[s] is [are] partially disclosable because the nonexempt information can be segregated and disclosed

The enclosed portion[s] of the requested document[s] is [are] being provided to you because they were found to be reasonably segregable from the exempt portions of that [those] document[s].

b. Where non-exempt information in the document[s] is withheld because the non-exempt information is not segregable and therefore disclosable

The Agency has carefully reviewed the document[s] and has determined that there is no reasonably segregable nonexempt information that can be disclosed. In this regard, it was concluded that the non-exempt material is so inextricably intertwined with the exempt material that it would be impossible to reasonably segregate meaningful portions of the non-exempt information from the exempt information without resulting in a useless disclosure.

11. Requirement to Advise Requester of Amount of Documents Withheld[2]

As required by Section 552(b) of the FOIA, 5 U.S.C. § 552(b), the Agency hereby informs you that it has not provided you with approximately [insert number of] pages of information in response to your request under the FOIA.

[2] Unless the disclosure of the existence of the amount of information withheld would "harm an interest protected by [an applicable] exemption," 5 U.S.C. § 552(a)(6)(F) requires that agencies estimate the volume of the denied material and advise the requester of this information. If the Agency is responding to any portion of the request by neither confirming nor denying the existence of the document (*see* Chapter X. The "Glomar" Principle), exclude those pages, if they exist. Do not use this sentence if the entire request is being responded to with Glomar.

12. Time Extension to Consult with Other Agency Offices[3]

a. Time Extension to 10 working days

The Agency needs an extension of time because [select appropriate choice(s)] of the need to search for and collect records from other offices of the Agency [or] the Federal Record Center, [or] to consult with other offices of the Agency] [or] to consult with other agencies that have a substantial interest in the requested documents, [or] to search for, collect, and review a voluminous number of documents. Accordingly, the Agency will require another ten working days, until [date] to respond.

b. Time Extension to more than 10 working days

As we have discussed and you have agreed to, the Agency needs an extension of time of [state the amount of time agreed to] because [select appropriate choice(s)] of the need to search for and collect records from other offices of the Agency [or] the Federal Record Center, [or] to consult with other offices of the Agency] [or] to consult with other agencies that have a substantial interest in the requested documents, [or] to search for, collect, and review a voluminous number of documents. Accordingly, the Agency will require another [insert number of] working days, until [date] to respond.

13. Expedited Treatment[4]

The Board's Rules and Regulations provide that expedited treatment may be granted whenever it determines that the request for information [or an appeal] involves "[c]ircumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; an urgency to inform the public about an

[3] Before taking an extension of time to respond to a FOIA request, the FOIA processor should review Chapter XVI. Processing FOIA Requests, which sets forth the criteria for whether an extension of time is authorized under the FOIA.

[4] For discussion of expedited treatment under FOIA *see* Chapter XVI. Processing FOIA Requests. If you receive a request for expedited treatment you must make a determination in ten calendar days. If the Agency fails to timely respond to a request for expedited treatment, the requester is deemed to have exhausted his administrative remedies and may proceed to court.

actual or alleged federal government activity, if made by a person primarily engaged in disseminating information; the loss of substantial due process rights; or a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." *See* Board's Rules and Regulations, Section 102.117(c)(2)(ii).

a. Grant Expedited Treatment

Your request for expedited treatment is granted. Your request for information [or an appeal] will be given priority and shall be processed as soon as possible.

b. Deny Expedited Treatment

Your request for expedited treatment is denied because the request for information[or an appeal] does not involve information as specified above and/or because you have failed to submit a statement that sufficiently explains the basis for requesting expedited processing of your request[or appeal].

14. Record Does Not Exist[5]

Apart from considerations under the Freedom of Information Act, the document requested can not be provided as it does not exist.

15. Agency Record Letter to Requester

The undersigned has determined that the documents you have requested [or if just a portion of the documents, list them] are not "agency records" subject to disclosure under the FOIA. Your request is, therefore, denied [in whole or in part].

[Use this paragraph only if claiming that some or all of the requested records are not agency records because they are personal records] The courts have established a "totality of the

[5] This language should not be utilized where the Agency neither confirms nor denies the existence of the document, but the disclosure of the very existence of the document would harm an interest protected under the FOIA. *See* Sample Language for Letters in Appendix.

circumstances test to distinguish 'agency records' from personal records." *See Consumer Fed'n of Am. v. USDA*, 455 F.3d 283, 287 (D.C. Cir. 2006). The test "focus[es] on a variety of factors surrounding the creation, possession, control, and use of the document by an agency." *Id.* (quoting *Bureau of Nat'l Affairs v. U.S. Dep't of Justice*, 742 F.2d at 1490). Specifically, based on the Supreme Court's decision in *Kissinger v. Reporters Committee For Freedom of the Press*, 445 U.S. 136 (1980), the test is "whether the document [1] was generated within the agency, [2] has been placed into the agency's files, [3] is in the agency's control, and [4] has been used by the agency for an agency purpose." *Bureau of Nat'l Affairs v. U.S. Dep't of Justice*, 742 F.2d at 1494; *see also Consumer Fed'n of Am. v. USDA*, 455 F.3d at 288. In this case, factors [list 1, 2, 3, and/or 4, depending on the facts of the case] are not met because [state why]. Accordingly, under the totality of the circumstances in this case, the requested records [or list which records if claiming that only some of the requested records are personal records] are personal records that do not qualify as agency records that may be disclosed under the FOIA.

[Use this paragraph if claiming that some or all of the requested records are not agency records other than because they are personal records] For a requested record to qualify as an agency record, an agency must (1) either "create or obtain" the requested materials, and (2) "be in control of the requested materials at the time the FOIA request is made." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-145 (1989). The courts have articulated four necessary factors to examine to determine whether the "control" prong of the agency record test is satisfied. These factors are "(1) the intent of the document's creator to retain or relinquish control over the records, (2) the ability of the agency to use and dispose of the record as it sees fit, (3) the extent to which agency personnel have read or relied upon the document, and (4) the degree to which the document was integrated into the agency's record system or files." *See Tax Analysts v. U.S.*

Dep't of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd*, 492 U.S. 136 (1989); *Burka v. HHS*, 87 F.3d 508, 514 (D.C. Cir. 1996). Under this test, all four factors must be present for the requested document to be an agency record. *See Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d at 1069. In this case, factors [list 1, 2, 3, and/or 4 depending on the facts of the case] are not met because [state why]. Accordingly, the requested records [or list which records if claiming that only some of the requested records are not agency records] do not qualify as agency records subject to disclosure under the FOIA.

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

B. Exemption 2

1. Letter to Requester Who Requests All Formal Documents in Investigative File

[This or These] file[s] contain[s] formal documents including the charge, dismissal or denial letters, and other non-confidential material, such as [identify documents such as collective-bargaining agreements, and newspaper clippings]. These documents are being forwarded to you.

2. Letter to Requester Where Information Sought Includes Documents or Records Previously Submitted by, Addressed to, or Copied to Requester

In addition, we are not providing [describe the requested documents, if you wish] documents submitted by you or previously addressed or copied to you (or your client) during the investigation of the charge, with the understanding that you should already possess these documents. If this understanding is incorrect, please submit a written request for the specific previously furnished records or documents you wish us to provide.[6]

[6] Upon receipt of this written request, review Chapter XII. First-Party Requesters, and contact the General Counsel's FOIA officer in Washington.

3. Letter to Requester Who Requests All Documents in Investigative File Regarding "Low 2" Material in File

Further, the file[s] contain[s] routine administrative material, such as internal transmittal slips, NLRB casehandling forms, return receipt slips, and envelopes that are not being forwarded at this time because we assume that you do not want this material. In fact, this information constitutes internal trivial administrative material of no genuine public interest and is automatically exempt under Exemption 2, 5 U.S.C. § 552(b)(2). *See*, *e.g.*, *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). However, within its discretion, the Agency does disclose such information, after appropriate deletions have been made to protect interests privileged from disclosure by FOIA. If our assumption is incorrect and you do want this material, please make a written request addressed to the Regional Director (or the undersigned) and the documents, with the appropriate deletions, will be forwarded to you.

(*See* Sample Language for Letters for Requester Who Makes Follow-Up Request for "Low 2" Material.)

4. Letter to Requester Who Makes Follow-Up Request for "Low 2" Material

This letter is in response to your letter dated [insert date], in which you request [describe "low 2" information] which was not previously provided to you in our response dated [insert date], to your Freedom of Information Act ("FOIA") request dated [insert date]. This information constitutes internal trivial administrative material of no genuine public interest and is automatically exempt under Exemption 2, 5 U.S.C. § 552(b)(2). *See*, *e.g.*, *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). Within its discretion, however, the Agency has decided to disclose this information, after appropriate deletions have been made to protect interests privileged from disclosure by FOIA Exemption(s) _____.

5. Letter to Requester Who Makes Specific Request for "Low 2" Material

The information you requested, which includes [insert description of requested documents, *i.e.*, internal transmittal slips, NLRB casehandling forms including computer forms, return receipt slips, envelopes, and facsimile cover sheets (which contain no substantive exempt material)], constitutes internal trivial administrative material of no genuine public interest and is automatically exempt under Exemption 2, 5 U.S.C. § 552(b)(2). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). Within its discretion, however, the Agency has decided to disclose this information, after appropriate deletions have been made to protect interests privileged from disclosure by FOIA Exemptions _____.

6. Letter to Requester Who Makes Request for "High 2" Material[7]

After a complete search and review of the responsive documents, the undersigned has determined that the documents [and/or] portions of the documents you have requested are privileged from disclosure under FOIA Exemption 2, 5 U.S.C. § 552(b)(2) ("high 2"). [If the documents are not entirely protected, include: Those portions of the responsive documents that are not exempt are enclosed.] Your request is, therefore, denied [in whole or in part].

Exemption 2 privileges from disclosure substantial internal matters such as procedural manuals and guidelines, where disclosure "significantly risks circumvention of agency regulations or statutes." *See Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992); *Crooker v. ATF*, 670 F.2d 1051, 1074 (D.C. Cir. 1981 (en banc)). The case law has established that this exemption privileges from disclosure those parts of internal instructions to staff that establish internal operating guidelines and procedures for the investigation, litigation, and settlement of cases. *See, e.g., Schiller v. NLRB*, 964 F.2d at 1207-1208; *Crooker v. ATF*, 670 F.2d at 1073. The withheld portion of [describe the information sought by the requester and set forth briefly

[7] Contact the General Counsel's FOIA officer in Washington if the FOIA processor plans to claim a "high 2" exemption.

the reasons why the documents are internal and why disclosure would be harmful, *e.g.*, GC and OM Memoranda contain instructions to the General Counsel's regional staff concerning the prosecution of unfair labor practice cases.] Accordingly, production of this material could risk circumvention of the law because it would "benefit those attempting to violate the law and avoid detection." *Crooker v. ATF*, 670 F.2d at 1054.

C. Exemption 4

1. Letter to Requester Indicating Need to Follow Executive Order Procedures Prior to Disclosure of Possible Exemption 4 Material[8]

The records you request contain information [arguably covered by FOIA Exemption 4, 5 U.S.C. § 552 (b)(4)] and/or [which has been designated as confidential by the submitter of the records] [select appropriate choices]. Accordingly, the Agency will undertake the following evaluation process with respect to these records [attach redacted documents] and/or [attach a list of documents as an Appendix to the letter, *see* attached] or [restate portion of request calling for confidential information] being withheld at this time. *See* Executive Order No. 12,600, 3 C.F.R. § 235 (1988), reprinted in 5 U.S.C. § 552 note (1994); Board's Rules and Regulations § 102.117 (c)(2)(iv)(H).

We ask that you review the [redacted documents and/or list or restated description] and identify those documents that you still want as part of your FOIA request. After we receive your response noting which [withheld documents] or [portions of documents] you continue to request, we will compile [a list of the requested documents] or [the requested documents] and send them to the companies whose information therein is arguably protected under Exemption 4, 5 U.S.C. § 552 (b)(4). Those companies must be given the opportunity to assert objections to disclosure under the governing legal standards of *National Parks & Conservation Ass'n v. Morton*, 498

[8] As set forth above, the FOIA processor should contact the General Counsel's FOIA officer in Washington in every Exemption 4 case.

F.2d 765, 766 (D.C. Cir. 1974) and *Critical Mass Energy Project v. NRC,* 975 F.2d 871, 879-880 (D.C. Cir. 1992) (en banc). *See* Executive Order No. 12,600, 3 C.F.R. § 235 (1988), reprinted in 5 U.S.C. § 552 note (1994).

[Note: Do not include notice of appeal rights as set out in Sample Language A. 2. because this is not a determination letter and requesters do not have administrative appeal rights at this stage.]

2. Letter to Submitter Who Has Submitted Records Containing Arguably Confidential Commercial Information

Pursuant to Executive Order No. 12,600 (*see* 3 C.F.R. § 235 (1988), reprinted in 5 U.S.C. § 552 note (1994)), and the Board's Rules and Regulations § 102.117 (c)(2)(iv), we wish to inform you that the National Labor Relations Board has received a Freedom of Information Act ("FOIA") request for records, including the [attached records] or [list of documents] [attach redacted documents or list of documents as an appendix to the letter].

Our review of these records indicates that they were submitted to the National Labor Relations Board on [date] by [submitter's identity and position], in connection with [explain circumstances]. The attached [documents or list of documents] may contain information arguably covered by FOIA Exemption 4, 5 U.S.C. § 552(b)(4).

Accordingly, we are providing you with the opportunity to consent or object to disclosure of the requested information.

If you wish to object to disclosure of this information, you may submit a written opposition, to be postmarked or faxed to the Agency within 10 working days of the date of this letter. If you do not submit a timely written objection, the Agency will assume that you have no objection to disclosure of the information and may release that information. *See* Board's Rules and Regulations § 102.117 (c)(2)(iv)(D).

If you submit a written opposition to disclosure, it must specify those portions of the requested information that you assert should not be disclosed, and should state in detail all grounds upon which disclosure is opposed, including, if the information was required to be submitted, whether and how disclosure of the records is likely to cause substantial competitive harm to your organization and is likely to impact on the government's ability to obtain reliable information in the future, *see Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974) or, if the information was voluntarily submitted, whether or not the information contained in the records is customarily disclosed to the public. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-880 (D.C. Cir. 1992). Factual assertions in your written submission should, if appropriate, be supported by declarations or affidavits; however, any information you provide in support may itself be subject to disclosure under the FOIA.

If, after review of your submission, the Agency determines to disclose the requested information, you will be sent a written statement briefly explaining the Agency's decision and indicating a designated disclosure date. *See* Board's Rules and Regulations § 102.117 (c)(2)(iv)(E).

If you wish to consent to disclosure, you may either: (1) not respond to this letter, in which case the Agency must wait at least 10 working days from the date of this letter before we can release the information at issue to the FOIA requester, or (2) to expedite the Agency's release of the records, you may immediately submit a letter consenting to the disclosure of the requested information notwithstanding their potential Exemption 4 protections.

[Note: Do not include notice of appeal rights as set out in Sample Language A. 2. because submitters do not have any administrative appeal rights.]

3. Letter to Submitter Who Has Designated Material as Confidential Commercial Information

Pursuant to Executive Order No. 12,600 (*see* 3 C.F.R. § 235 (1988), reprinted in 5 U.S.C. § 552 note (1994)), and the Board's Rules and Regulations § 102.117 (c)(2)(iv), we wish to inform you that the National Labor Relations Board has received a Freedom of Information Act ("FOIA") request for records, including the [attached records] or [list] [attach redacted documents list of documents as an appendix to the letter].

[You/your organization] previously designated these records as confidential commercial information. However, after reviewing the FOIA request and the responsive records, we believe that the Agency may be required to disclose the records to the requester. *See* 5 U.S.C. § 552(a)(3). Accordingly, we are providing you with the opportunity to consent or object to disclosure of the requested information.

If you wish to object to disclosure of this information, you may submit a written opposition, to be postmarked or faxed to the Agency, within ten (10) working days of the date of this letter. If you do not submit a timely written objection, the Agency will assume that you have no objection to disclosure of the information and may release that information. *See* Board's Rules and Regulations § 102.117 (c)(2)(iv)(D).

If you submit a written opposition to disclosure, it must specify those portions of the requested information which you assert should not be disclosed, and should state in detail all grounds upon which disclosure is opposed, including, if the information was required to be submitted, whether and how disclosure of the records is likely to cause substantial competitive harm to your organization and is likely to impact on the government's ability to obtain reliable information in the future, s*ee Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765, 766

(D.C. Cir. 1974) or, if the information was voluntarily submitted, whether or not the information contained in the records is customarily disclosed to the public. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-880 (D.C. Cir. 1992). Factual assertions in your written submission should, if appropriate, be supported by declarations or affidavits; however, any information you provide in support may itself be subject to disclosure under the FOIA.

If, after review of your submission, the Agency determines to disclose the requested information, we will send you a written statement briefly explaining the Agency's decision and indicating a designated disclosure date. *See* Board's Rules and Regulations § 102.117 (c)(2)(iv)(E).

If you wish to consent to disclosure, you may either: (1) not respond to this letter, in which case the Agency must wait at least 10 working days from the date of this letter before we can release the information at issue to the FOIA requester, or (2) to expedite the Agency's release of the records, you may immediately submit a letter consenting to the disclosure of the requested information notwithstanding their potential Exemption 4 protections.

[Note: Do not include notice of appeal rights as set out in Sample Language A. 2. because submitters do not have any administrative appeal rights.]

4. Letter to Submitter Announcing Decision to Withhold Records Pursuant to Exemption 4

After a careful review of the FOIA request, the responsive records and your written opposition to disclosure of records requested under the FOIA, the Agency has determined that the records requested are privileged from disclosure pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4). This privilege exempts from disclosure (i) voluntarily submitted commercial or financial information provided that the submitter does not "customarily" disclose the information

to the public, *see Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-880 (D.C. Cir. 1992), or (ii) compelled information likely to cause substantial harm to the competitive position of the person from whom it was obtained and likely to impact on the government's ability to obtain reliable information in the future. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974).

[Note: Do not include notice of appeal rights as set out in Sample Language A. 2. because in this scenario, the submitter would have no need to file an administrative appeal.]

5. Letter to Requester Announcing Decision to Withhold Records Pursuant to Exemption 4

After a careful review of your FOIA request, the responsive records, and the submitter's objections, the Agency has determined that the records requested are privileged from disclosure pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4). This privilege exempts from disclosure (i) voluntarily submitted commercial or financial information provided that the submitter does not "customarily" disclose the information to the public, *see Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-80 (D.C. Cir. 1992), or (ii) compelled information likely to cause substantial harm to the competitive position of the person from whom it was obtained and likely to impact on the government's ability to obtain reliable information in the future. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974).

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

6. Letter to Submitter Announcing Decision to Disclose Notwithstanding Objection [9]

The Agency has carefully reviewed your written objections to disclosure of [describe the requested records] under the FOIA. In accordance with the Board's Rules and Regulations § 102.117 (c)(2)(iv)(E), we are notifying you that for the following reasons, we have decided not to sustain your objections and instead to release the records to the FOIA requester:

[insert explanation of reasons why each of the submitter's objections were not sustained]

Accordingly, the Agency intends to release these records to the FOIA requester on or after [insert date which is at least ten (10) working days after date of this letter].

[Note: Do not include notice of appeal rights language as set out in Sample Language A. 2. because that language is inapplicable to this situation.]

7. Letter Notifying Requester of Reverse FOIA Action by Submitter

This is to notify you, in accordance with the Board's Rules and Regulations § 102.117 (c)(2)(iv)(H), that on [date] the submitter of the business/commercial records which you requested under the Freedom of Information Act ("FOIA") has filed an action against the Agency in the United States District Court for the District of _____ seeking to prevent the disclosure of the records.

[insert additional details as appropriate]

8. Letter Notifying Submitter of the Commencement of FOIA Action by Requester

This is to notify you, in accordance with the Board's Rules and Regulations § 102.117 (c)(2)(iv)(G), that on [date] the requester of the records which you have submitted to the Agency has filed a lawsuit under the Freedom of Information Act ("FOIA") against the Agency in the

[9] The requester will be informed of decision to disclose by the Determination Letter sent after the deadline set forth in the final paragraph of this letter.

United States District Court for the District of _____. The FOIA lawsuit, among other things, seeks the disclosure of the requested records.

[insert modifications and/or additional details as appropriate]

D. Exemption 5

1. Where Information Sought is Protected by Exemption 5's Deliberative Process Privilege

a. Denying information in whole (if there are no factual portions that can be disclosed)

After a complete search and review of the responsive documents, the undersigned has determined that the information you have requested is privileged from disclosure under FOIA Exemption 5, § 552(b)(5), as deliberative process material. The Agency has carefully reviewed the document[s] and has determined that there is no reasonably segregable non-exempt information that can be disclosed, 5 U.S C. § 552(b). In this regard, it was concluded that [select appropriate choice(s)] the factual material is so inextricably intertwined with the privileged deliberative material that its disclosure would expose or cause harm to the Agency's deliberations or decision-making process [and/or] the very act of separating the significant facts from the insignificant facts in a file constitutes an exercise of deliberative judgment by agency personnel [and/or] it is impossible to reasonably segregate meaningful portions of the factual information from the deliberative information without imposing an inordinate burden and resulting in a useless disclosure.] Your request is, therefore, denied in whole.

The requested information consists of intra- or inter-[select one or both if appropriate] agency memoranda that would not be available by law to a party in litigation with this Agency. FOIA Exemption 5 has been construed to exempt those documents normally privileged in the

civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). It is designed to protect and promote the objectives of fostering frank deliberation and consultation within the Agency in the predecisional stage, and to prevent a premature disclosure that could disrupt and harm the Agency's decisionmaking process. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150-151, 152. The protected status of a predecisional document is not altered by the subsequent issuance of a decision, *see, e.g., Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005), by the agency opting not to make a decision, *see Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996), *citing Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), or by the passage of time, *see Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 16 (D.D.C. 2000) (finding that the deliberative process privilege is not temporary).

The information you have requested was prepared in order to assist the Agency decision makers in arriving at their [select either or both] decision [or] policy recommendation and formed a part of the Agency's deliberative process in making such a [select either or both] decision [or] policy recommendation.

[include brief statement of reasons why the information requested falls within this category]

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

b. Denying information in part (because factual information can be disclosed)

After a complete search and review of the responsive documents, the undersigned has determined that a portion of the information you have requested is privileged from disclosure

under FOIA Exemption 5, § 552(b)(5), as deliberative process material. The enclosed portion[s] of the requested document[s] [is or are] being provided to you because they were found to be reasonably segregable from the exempt portions of that [those] document[s]. 5 U.S.C. § 552(b). Your request is, therefore, denied in part.

The requested information that has been withheld consists of intra- or inter-[select one or both if appropriate] agency memoranda that would not be available by law to a party in litigation with this Agency. FOIA Exemption 5 has been construed to exempt those documents normally privileged in the civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). It is designed to protect and promote the objectives of fostering frank deliberation and consultation within the Agency in the predecisional stage, and to prevent a premature disclosure that could disrupt and harm the Agency's decisionmaking process. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150-151, 152. The protected status of a predecisional document is not altered by the subsequent issuance of a decision, *see, e.g., Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-113 (D.D.C. 2005), by the agency opting not to make a decision, *see Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996), *citing Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), or by the passage of time, *see Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 16 (D.D.C. 2000) (finding that the deliberative process privilege is not temporary).

The information you have requested that has been withheld was prepared in order to assist the Agency decision makers in arriving at their [select either or both] decision [or] policy recommendation and formed a part of the Agency's deliberative process in making such a [select either or both] decision [or] policy recommendation.

[include brief statement of reasons why the information requested falls within this category]

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

2. Where Information Sought is Protected by Exemption 5's Attorney Work-Product Privilege

After a complete search and a review of the responsive documents, the undersigned has determined that the information you have requested is privileged from disclosure under FOIA Exemption 5, § 552(b)(5), as attorney work-product material. Your request is, therefore, denied.

The attorney work-product privilege protects documents and other memoranda that reveal an attorney's mental impressions and legal theories and that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. *See United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-510 (1947). Additionally, the protection provided by Exemption 5 of the FOIA for attorney work-product material is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. *See FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, the protection against disclosure of work-product documents extends even after litigation is terminated and the case for which they were created is closed. Id.

The information you seek here contains an evaluation and analysis of the critical facts and legal theories governing the case and other similar matters, thereby falling squarely within the protection of Exemption 5's attorney work-product privilege.

[include brief statement of reasons why the information requested falls within this category]

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

3. Where Information Sought is Protected by Exemption 5's Attorney-Client Privilege[10]

After a complete search and a review of the responsive documents, the undersigned has determined that the information you have requested is privileged from disclosure under FOIA Exemption 5, § 552(b)(5), as confidential communications within the attorney-client privilege. Your request is, therefore, denied.

The attorney-client privilege protects from disclosure "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent., Inc. v. U.S Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The privilege extends to communications between an attorney and all agents or employees of the agency or organization. *Id.* at 253, n.24. Exemption 5 protection under this privilege exists for these documents because the information requested involves communications in which "the government is dealing with its attorneys as would any private party seeking advice to protect personal interests." *See Coastal States Gas Corp. v. U.S Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980).

[include brief statement of reasons why the information requested falls within this category]

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

[10] If you intend to claim attorney-client privilege, contact the General Counsel's FOIA officer in Washington.

E. Exemption 6

After a complete search and a review of the responsive documents, the undersigned has determined that the documents [and/or] portions of the documents you have requested are privileged from disclosure under FOIA Exemption 6, 5 U.S.C. § 552(b)(6). [If the documents are not entirely protected, include: Those portions of the responsive documents that are not exempt are attached.] Your request is, therefore, denied [in whole or in part].

Exemption 6 permits agencies to withhold information about individuals in "personnel and medical and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The "files" requirement covers all information that "applies to a particular individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601-602 (1982). Exemption 6 requires agencies to balance the public's right to disclosure against the individual right to privacy. The kind of public interest involved is information which if disclosed would "shed [ ] light on an agency's performance of its statutory duties." *U.S. Dep't of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 773 (1989).

The information sought includes the following recognizable privacy interests [set forth briefly the privacy interests, *e.g.*, home addresses and phone numbers]. You have not satisfied your burden of proof as to the public interest in disclosure. The Supreme Court case of *NARA v. Favish*, 541 U.S. 157, *reh'g denied*, 541 U.S. 1057 (2004), explained:

> First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.

Id. at 172. [Then, explain how public interest asserted fails to meet this test.] The information sought is therefore exempt from disclosure under Exemptions 6 [in whole or in part].

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

5. Glomar Response[11]

In this case, the Agency neither admits nor denies the existence of the information you seek, because any such confirmation or denial would harm the interest protected by Exemption [identify FOIA exemption at issue] *See Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). Your request is, therefore, considered denied.

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

F. Exemption 7

1. Exemption 7(A) (Open Cases)

After a complete search and review of the responsive documents, the undersigned has determined that the documents you have requested are entirely privileged from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). Your request is, therefore, denied.

FOIA Exemption 7(A) allows an agency to withhold records included in a law enforcement file in a pending or prospective proceeding when disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). [If this case is closed but related to a pending proceeding, include: Further, even if a proceeding is closed the exemption is applicable where disclosures could be expected to interfere with a related pending proceeding. *See New England Med. Ctr. Hosp. v. NLRB*, 548 F.2d 377, 385-86 (1st Cir. 1976).] The FOIA is not intended to function as a private discovery tool. *Robbins Tire*, 437 U.S. at 242. The disclosure

[11] It must be remembered that a "Glomar" response is only effective if it is given consistently for a certain category of responses. For example, it is important to give such a response, whenever denying a request that seeks affidavits from named individuals, even if those individuals did not supply affidavits. Otherwise, savvy requesters would soon learn that a response neither admitting nor denying the existence of an affidavit means that an affidavit was supplied. *See* Chapter X. The "Glomar" Principle.

of the documents that are in the law enforcement file and encompassed by your request would harm the unfair labor practice proceedings by providing advance access to the Board's case. The protections of Exemption 7(A) extend to any document whose release would enable a respondent or potential respondent to tailor a defense or otherwise obtain an unfair litigation advantage by premature disclosure. *See Ehringhaus v. FTC*, 525 F. Supp. 21, 23-24 (D.D.C. 1980); *Swan v. SEC*, 96 F.3d 498, 499-500 (D.C. Cir. 1996). Further, disclosure of law enforcement records in an open case, including affidavits, would risk witness intimidation, thereby interfering with enforcement proceedings. *Robbins Tire*, 437 U.S. at 239-41.

2. Exemption 7(C) (Individual Privacy Information) (Open or Closed Case)

After a complete search and review of the responsive documents, the undersigned has determined that the documents you have requested are privileged from disclosure [in whole or in part] under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C). [If the documents are not entirely protected, include: Those portions of the responsive documents that are not exempt are attached.] Your request is, therefore, denied [in whole or in part].

Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation, have such a privacy interest. *See Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985). Further, Exemption 7(C) requires the balancing of the individual right to privacy against the public's right to disclosure.

The kind of public interest involved is information that if disclosed would "shed [ ] light on an agency's performance of its statutory duties." *U.S. Dep't of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 773 (1989).

The information sought includes the following recognizable privacy interests [set forth briefly the privacy interests, *e.g.*, home addresses and phone numbers]. You have not satisfied your burden of proof as to the public interest in disclosure. The Supreme Court case of *NARA v. Favish*, 541 U.S. 157, *reh'g denied*, 541 U.S. 1057 (2004), explained:

> First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.

Id. at 172. [Then, explain how public interest asserted fails to meet this test.] The information sought is therefore exempt from disclosure under Exemption 7(C) [in whole or in part].

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

3. Exemption 7(D) (Confidential Source Identification) (Open or Closed Case)[12]

a. Where Express Assurance of Confidentiality Was Provided

After a complete search and review of the responsive documents, the undersigned has determined that the documents you have requested are privileged from disclosure [in whole or in part] under FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D). [If the documents are not entirely protected, include: Those portions of the responsive documents that are not exempt are attached.] Your request is, therefore, denied [in whole or in part].

Exemption 7(D) permits an agency to withhold from disclosure records or information that "could reasonably be expected to disclose the identity of a confidential source . . . ."

[12] A "Glomar" rather than a 7(D) response will be appropriate to protect a request regarding a named individual. *See* Chapter X. The "Glomar" Principle.

5 U.S.C. § 552(b)(7)(D). The term "source" has been held to include a broad range of individuals and institutions, including persons who give information to the Board. *See United Techs. Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). Exemption 7(D) protection is available where the source "provided information under an express assurance of confidentiality or in circumstances from which an assurance could be reasonably inferred." *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993); *United Techs. Corp. v. NLRB*, 777 F.2d at 93. In this case, [identify the information or documents] that are responsive to your request contain information provided to the Agency under an express promise of confidentiality, and are exempt from disclosure [in whole or in part].

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

b. Implied Assurance of Confidentiality—Where an Express Assurance of Confidentiality Was Not Provided, And Where All of the Surrounding Circumstances of a Case Are Such That An Expectation of Confidentiality Can be Inferred

[Note: Use this implied assurance language where appropriate: i) if the informant was not expressly assured of confidentiality by the Agency, or ii) if the file contains other responsive information or documents submitted by an informant, and there is no express notation on the face of the material that it would be kept confidential].

After a complete search and review of the responsive documents, the undersigned has determined that the documents you have requested are privileged from disclosure [in whole or in part] under FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D). [If the documents are not entirely protected, include: Those portions of the responsive documents that are not exempt are attached.] Your request is, therefore, denied [in whole or in part].

Exemption 7(D) permits an agency to withhold from disclosure records or information that "could reasonably be expected to disclose the identity of a confidential source . . . ."

5 U.S.C. § 552(b)(7)(D). The term "source" has been held to include a broad range of individuals and institutions, including persons who give information to the Board. *See United Techs. Corp. v. NLRB*, 777 F.2 90, 94 (2d Cir. 1985). Exemption 7(D) protection is available where the source "provided information under an express assurance of confidentiality or in circumstances from which an assurance could be reasonably inferred." *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993)*; United Techs. Corp. v. NLRB*, 777 F.2d at 93. In this case, [identify the information or documents] that are responsive to your request contain information provided to the Agency under an implied promise of confidentiality, and are exempt from disclosure [in whole or in part].

[Because a claim of implied confidentiality is based on the particular circumstances of a case, briefly describe the specific circumstances present in the case, *e.g.*, a threatening atmosphere, that show that the witness understood that the information or documents were submitted in confidence.]

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

4. Exemption 7(E) (Law enforcement techniques and procedures) (Open or Closed Case)[13]

After a complete search and review of the responsive documents, the undersigned has determined that the documents you have requested are privileged from disclosure [in whole or in part] under FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E). [If the documents are not entirely protected, include: Those portions of the responsive documents that are not exempt are enclosed.] Your request is, therefore, denied [in whole or in part].

Exemption 7(E) protects from forced disclosure "records or information compiled for law enforcement purposes," the production of which "would disclose techniques and procedures for

[13] Contact the General Counsel's FOIA officer in Washington if there is any question as to whether or not an Agency manual or guideline memorandum is public or should be protected under Exemption 7(E).

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," 5 U.S.C. § 552(b)(7)(E). The withheld portion of [describe the information sought by the requester and set forth briefly the reasons why disclosure would be harmful, *e.g.*, GC and OM Memoranda contain instructions to the General Counsel's regional staff concerning the prosecution of unfair labor practice cases]. Production of this material could reasonably be expected to risk circumvention of the law because it would afford litigants advance knowledge of the General Counsel's investigatory and prosecutorial strategies.

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

5. 7(F) Letter to Requester

After a complete search and review of the responsive documents, the undersigned has determined that the documents you have requested are privileged from disclosure [in whole or in part] under FOIA Exemption 7(F), 5 U.S.C. § 552(b)(7)(F). [If the documents are not entirely protected, include: Those portions of the responsive documents that are not exempt are attached.] Your request is, therefore, denied [in whole or in part].

Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information "could reasonably be expected to endanger the life or physical safety of any individual." The names and identifying information of individuals named in the NLRB's files, including witnesses who provide information to the NLRB during the course of an unfair labor practice investigation, other individuals named in NLRB files, or the NLRB agents involved in the case are protectable under Exemption 7(F) if disclosure could endanger such individuals' physical safety. *See, e.g.*,

Blanton v. U.S. Dep't of Justice, 182 F. Supp. 2d 81, 86 (D.D.C. 2002); *Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002); *Jiminez v. FBI*, 938 F. Supp. 2d 21, 30 (D.D.C. 1996).

The information sought could endanger the lives or physical safety of individuals named in the NLRB's files because [set forth briefly the reasons why harm would result from disclosure of the information in whole or in part]. The information is therefore exempt from disclosure under Exemption 7(F) [in whole or in part].

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

G. Fees and Fee Waivers

Again, as noted in the FOIA Manual, the FOIA processor should first contact the requester by telephone to clarify any questions pertaining to a FOIA request, including fees. Confirmation letters should be sent to the requester pertaining to any agreements reached about a FOIA request, including fees.

1. Failure to assume costs

The FOIA, 5 U.S.C. § 552(a)(4)(A)(i), provides that each agency shall promulgate regulations specifying the schedule of fees applicable to the processing of FOIA requests. Assumption of financial liability is required in all requests. NLRB Rules and Regulations, Section 102.117(d)(2)(vi). Your request includes no such undertaking. Accordingly, we are hereby advising you that in order for us to process your request, you will need to inform us in writing that you are willing to assume full financial responsibility for any fees associated with your request. Your request for records will not be deemed received for purposes of the applicable time limit for response until a written assumption of financial liability is received. NLRB Rules and Regulations, Section 102.117(d)(2)(vi).

2. Advising requester, with history of prompt payment, that processing fees will exceed $250

Under the NLRB's Rules and Regulations, Section 102.117(d)(2)(vi)(A), you are hereby notified that the costs associated with processing your FOIA request will likely exceed $250.00. We estimate that the charges in responding to your request will be [insert $ amount]. In order for us to complete the processing of your request, you will need to advise us in writing that you are willing to assume the financial liability for this estimated amount. The processing of the request will be suspended for purposes of the applicable time limits for response until a written assumption of the new financial liability is received. NLRB Rules and Regulations, Section 102.117(d)(2)(vi)(B).

3. Advising requester, with no history of payment, where fees are likely to exceed $250 that the Agency will require advance payment prior to processing of the request

This is in response to your FOIA request [insert date requested and received], which seeks [description of the request]. Please be advised that we estimate that the cost of processing the request is anticipated to exceed $250.00. The NLRB's Rules and Regulations, Section 102.117(d)(2)(vi)(A), require that as a requester with no history of payment, advance payment of the fees the Agency estimates will be incurred in processing this request is required. Further, the administrative time limits for responding to your FOIA request will begin to run only after such advance payment is made. NLRB Rules and Regulations, Section 102.117(d)(2)(vi)(B).

4. Failure to pay for previous request

The NLRB's Rules and Regulations, Section 102.117(d)(2)(vi)(B), state that if "a requester has previously failed to pay fees that have been charged in processing a request within 30 days of the date when the notification of fees was sent, the requester will be required to pay the entire amount of fees that are owed, plus interest as provided for in paragraph (d)(2)(v) of this section, before the Agency will process a further information request." Inasmuch as you have not remitted to the Agency the assessed fees with respect to the previous FOIA response[s] provided to you on [insert date], no further search will be conducted or documents provided until said fees are paid in full. Further, under the NLRB's Rules and Regulations, Section 102.117(d)(2)(vi)(B), the administrative time limits for responding to this request will begin to run only after the Agency has received the required fee payments.

5. Advising requester that the specified amount he is willing to pay has been exceeded

In your FOIA request dated [insert date], you specified that you would only pay [insert $ amount] toward the processing of your request. Please be advised that the amount of fees for processing the request will exceed that amount. We estimate that the total cost for processing the request will be approximately [insert $ amount]. Pursuant to the NLRB's Rules and Regulations, Section 102.117(d)(2)(vi), we are hereby advising you that in order for us to complete the processing of your request, you will need to inform us in writing that you are willing to assume the financial liability for the new estimated amount. The request for records will not be deemed received for purposes of the applicable time limits for response until a written assumption of the increased financial liability is received. NLRB Rules and Regulations, Section 102.117(d)(2)(vi)(B).

6. Aggregation of requests

The NLRB's Rules and Regulations, Section 102.117(d)(2)(iii)(B) permits the Agency to aggregate FOIA requests made by the same requester or group of requesters to insure that the proper processing fees are paid, where the Agency "reasonably believes" that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees. Our review of your requests establishes [explain basis for reasonable belief, including dates of requests].

Therefore, please be advised that we are aggregating your requests [insert dates] and will charge you accordingly [insert estimated charges]. Further, you will need to advise us in writing that you are willing to assume the increased financial liability for the processing of the aggregated requests. Your requests for records will not be deemed received for purposes of the applicable time limits for response until a written assumption of the increased financial liability is received. NLRB Rules and Regulations, Section 102.117(d)(2)(vi)(B).

7. De minimis fees

The cost involved in furnishing this information has been waived pursuant to NLRB Rules and Regulations, Section 102.117(d)(2)(iii)(A), because the total charges are less than $5.00, which is the Agency's cost of collecting and processing the fee itself.

8. Delinquent requesters

On [insert date], this Agency sent you a letter responding to your request for documents under the FOIA and notifying you of the Agency's determination and the fees due. As of the

date of this letter, we have not received payment. Further, as of [31st day after date of the determination letter] the Agency has begun to assess interest charges. *See* NLRB Rules and Regulations, Section 102.117(d)(2)(v). Consequently, you now owe [insert $ amount]. Failure to remit these charges immediately will result in your case being forwarded to NLRB Headquarters for collection efforts, including litigation.

9. Fee Category

a. General language

Under the NLRB's Rules and Regulations (a copy of the relevant portions of which is enclosed), we have four categories of FOIA requesters: commercial use requesters; educational institution requesters; representative of the news media requesters; and all other requesters.

The basis for this Agency's charge of fees for processing FOIA requests is set forth in NLRB Rules and Regulations, Section 102.117(d)(2).

Determination of a proper fee category for a particular request depends not only on the identity of the requester but also on the purpose for which the information sought will be used, except for commercial user-use only. That is, a requester who seeks information for a particular commercial purpose may be placed in the commercial user category while that same requester may be entitled to be classified differently when the information sought is being used for some non-commercial purpose. Further, under our regulations, unless a requester makes a "reasonably based factual showing that [the] requester should be placed in a particular user category, fees will be imposed as provided for in the commercial use requester category." NLRB Rules and Regulations, Section 102.117(d)(2)(ii)(E).

b. Commercial use

For the purpose of assessing fees, we have placed you in Category A, as a commercial use requester. This category refers to requests "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." NLRB Rules and Regulations, Section 102.117(d)(1)(v).

Consistent with this fee category, you "will be assessed charges to recover the full direct costs for searching for, reviewing for release, and duplicating the records sought." NLRB Rules and Regulations, Section 102.117(d)(2)(ii)(A). Charges for all categories of requesters are: $3.10 per quarter-hour or portion thereof of clerical time; $9.25 per quarter-hour or portion thereof of professional time; and 12¢ per page of photoduplication. NLRB Rules and Regulations, Section 102.117(d)(2)(i).

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

c. Educational institutions and representatives of the news media

For the purpose of assessing fees, we have placed you in Category B, [select appropriate choice] as an educational institution that operates a program or programs of scholarly research, NLRB Rules and Regulations, Section 102.117(d)(1)(vi) [or] as a representative of the news media in that you qualify as a person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public, NLRB Rules and Regulations, Section 102.117(d)(1)(vii).

Consistent with this fee category, you will be assessed charges to recover the full direct costs of duplicating the records sought, but only for those pages in excess of 100 pages. NLRB Rules and Regulations, Section 102.117(d)(2)(ii)(B) (for educational institution) and (C) (for representative of news media). Charges are 12¢ per page of photoduplication. NLRB Rules and

Regulations, Section 102.117(d)(2)(i). Accordingly, please remit [insert $ amount]. [Or] Accordingly, no fee is being assessed. *See* NLRB Rules and Regulations, Section 102.117(d)(2)(iii)(A).

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

d. All other requesters

[Either]

Section 102.117(d)(2)(ii)(D) provides that "[a]ll other requesters [*i.e.*, requesters who are not using the information for commercial purposes or who are not educational institutions or representatives of the news media] will be assessed charges to recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge." This fee category is sometimes referred to as "Category III" after the section of the statute that authorizes it. 5 U.S.C. § 552(a)(4)(A)(ii)(III).

Accordingly, in order to be considered in the category of "all other requesters" you must provide information constituting a "reasonably based showing" that the documents sought are not 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." NLRB Rules and Regulations, Section 102.117(d)(1)(v). Until we can determine the appropriate user category, we are unable to calculate whether your financial undertaking of [insert $ amount] is sufficient to cover any anticipated fees. Accordingly, we cannot process your request until we receive further written clarification from you.

[Or]

For the purpose of assessing fees, we have placed you in Category D, the "all other requesters" category, because you do not fall within any of the other fee categories. Consistent with this fee category, you will be assessed charges to recover the full reasonable direct costs for searching for the requested document[s] and the duplication of that [those] document[s]. As a requester in this category you will not be charged for the first 100 pages of duplication or the first two hours of search time. NLRB Rules and Regulations, Section 102.117(d)(2)(ii)(D). Charges for all categories of requesters are: $3.10 per quarter-hour or portion thereof of clerical time; $9.25 per quarter-hour or portion thereof of professional time; and 12¢ per page of photoduplication. NLRB Rules and Regulations, Section 102.117(d)(2)(i).

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

10. Notifying requester of processing fee information

I have enclosed an invoice that sets forth the charges applicable to your request. [Insert total time spent in hours or fractions thereof] of professional time and [total time spent in hours or fractions thereof] of clerical time were expended in responding to your FOIA request, and [amount] pages were photoduplicated. Accordingly, please remit [insert $ amount due].

To pay this amount by check or money order (do not send cash) please submit your payment along with the invoice to the NLRB's Finance Branch at the address reflected at the top of the invoice. Please make the check or money order payable to the National Labor Relations Board and note on your payment the invoice number to insure that your payment will be properly credited. You may also submit your payment by credit or debit card over the Internet by following the instructions I have enclosed.

11. Notifying requester of requirement of timely payment

Further, please be advised that timely payment of fees must be made, under protest, if necessary, to avoid being deemed a delinquent requester under the FOIA. If you are deemed a delinquent requester by this Agency, you will be required to make advance payment for any subsequent requests under the FOIA before those requests are processed. NLRB Rules and Regulations, Section 102.117(d)(2)(vi)(B).

12. Fee waiver or fee reduction

In your request for documents under the FOIA, you requested that this Agency waive [or reduce] the charges incurred in processing your request. To qualify for a fee waiver or fee reduction, you must submit a written statement in which you affirmatively establish that waiver would be in the public interest because disclosure 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." *See* NLRB Rules and Regulations, Section 102.117(d)(2)(iv). Factors considered in deciding whether waiver of fees in the public interest is warranted include: (1) whether the subject of the requested records concerns "the operations or activities of the government;" (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) whether disclosure of the requested information will contribute to "public understanding" on the subject; and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. *VoteHemp, Inc. v. DEA,* 237 F. Supp. 2d 55, 58-64 (D.D.C. 2002). Once a determination is made that the public interest requirement has been met, the Agency must assess whether disclosure of the information is not primarily in the requester's commercial interest by considering: (5) whether the request involves any commercial interest of the requester that would be furthered by the disclosure; and (6) a balance of the requester's commercial

interest against the identified public interest in disclosure to determine which interest is "primary." Id. at 64-66. To qualify for a fee waiver it is necessary to meet all six factors. Id. at 58. Moreover, you must provide sufficient information concerning each category of documents that you are seeking so that the Agency will be able to make a fee waiver determination for each category of requested documents.

Inasmuch as [select appropriate choice and give brief explanation supporting your choice] you have not established that the disclosure of the requested information would benefit the public and that the public benefit outweighs your commercial interest, your request for a waiver [or reduction] is denied. [Or] In order to proceed with your request, we will require sufficient information so that a determination may be made concerning your request for a fee waiver and/or the proper fee category so that, if appropriate, an assumption of fees may be undertaken. NLRB Rules and Regulations, Section 102.117(d)(2)(vi). [Or] You have established that a certain percentage of the requested records satisfy the fee waiver or reduction test and therefore a partial waiver or reduction of [percentage] is granted. [Or] You have satisfied the fee waiver test and therefore a full fee waiver is granted.

[Note: Remember to include notice of appeal rights as set out in Sample Language A. 2.]

13. Discretionary release

With respect to your request for a fee waiver, such requests are considered by the Agency on a case-by-case basis. *See Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 60 (D.D.C. 2002). As a matter of our administrative discretion, the Agency, in this instance, is voluntarily releasing the FOIA disclosable documents you have requested at no cost. This voluntary disclosure, at no cost, is non-precedential and should not be construed as our granting your fee waiver request.

See Dollinger v. U.S. Postal Serv., No. 95-CV-6174T, slip op. at 7-8 (W.D.N.Y. Aug. 24, 1995) (attached). Accordingly, we are not addressing your fee waiver request.

Contact Headquarters

As described in this manual, in certain situations consultation with Headquarters personnel is required or desirable. For the convenience of FOIA processors, the table below sets forth the issues where such consultation is required or may be advisable.

Issue	Chapter	Comment
Questions about whether a particular requested document is part of a Privacy Act system of records.	III	Contact Special Litigation.
Application of the Privacy Act to first-party requests for documents OTHER THAN documents from CATS/Regional Office Files, ACTS/Headquarters (Appeals) Files, RAILS/Headquarters (Advice) Files.	III	Contact Special Litigation.
Application of the Privacy Act to the Agency's electronic case tracking systems and associated files.	III	Contact Special Litigation with any questions.
If a request is made to supply documents in electronic format (such as transcripts and exhibits, or parties' briefs).	IV	Contact the GC's FOIA officer in Washington so that the Agency can make uniform determinations about whether such requests can be satisfied.
Issues raising claims under Exemptions 1 (national security), 3 (prohibitions contained in other statutes), 8 (related to regulation of financial institutions), and 9 (geological data) and criminal law exclusions to the FOIA for protecting especially sensitive criminal law matters.	V	Either consult the current Justice Department Freedom of Information Act Guide or call the GC's FOIA officer in Washington for advice.
If you plan to use "high 2" in response to any FOIA request.	VI	Contact the GC's FOIA officer in Washington.
In every FOIA request raising Exemption 4 issues before initiating the notice process.	VII	Contact the GC's FOIA officer in Washington.
If an internal agency draft of a settlement	VIII	Contact the GC's FOIA officer

is shared outside the agency (including to the charging or charged party/respondent).		in Washington for guidance.
If a threshold issue arises under Exemption 5 based on *Klamath*.	VIII	Contact the GC's FOIA officer in Washington.
If a question arises about withholding work-product or attorney-client privileged information from "final opinion" documents such as Advice "no go" memoranda.	VIII	Contact the GC's FOIA officer in Washington.
Requests for Advice Memoranda that are not on Agency's internet website.	VIII	Contact the GC's FOIA officer in Washington.
Requests for other "GC" or "OM" Memoranda that are not available on the Agency's internet website.	VIII	Refer to the GC's FOIA officer in Washington.
In every case in which attorney-client privilege is claimed.	VIII	Contact the GC's FOIA officer in Washington.
All requests concerning information provided by a sole proprietorship, partnership, or closely held corporation	Chapter IX (Appendix)	Contact the GC's FOIA officer in Washington for guidance.
When recommending the use of categorical withholding for any other "types of information" other than those types currently named in the manual.	IX; XI	Contact the GC's FOIA officer in Washington for approval.
Should a request raise the issue of whether an individual is living or deceased.	IX; XI	Contact the GC's FOIA officer in Washington who will consult with the Region regarding appropriate searches and responses.
If a FOIA requester seeks records that would identify other persons' first-party FOIA requests.	IX.	Contact the GC's FOIA officer in Washington.
Issuance of "Glomar" responses.	X; XI	To have uniformity throughout the Agency, contact the GC's FOIA officer in Washington.
Issues under Subsection 7(B) regarding the release of records that would deprive a person of a right to a fair trial or an impartial adjudication.	XI	Consult with the GC's FOIA Officer in Washington for advice.
Where an issue arises as to whether Exemption 7(A) can be asserted to protect	XI	Contact the GC's FOIA officer in Washington for guidance.

from disclosure documents in a compliance case.		
When considering claiming Exemption 7 in representation cases where there is no corresponding ULP case.	XI	Contact the GC's FOIA officer in Washington before claiming.
If Exemption 7(F) might apply.	XI	Contact the GC's FOIA officer in Washington or Special Litigation.
Questions concerning potential waiver in the FOIA, Section 102.118, or other contexts.	XIII	Contact Special Litigation.
Charging requesters for "special services."	XV	Consult with the GC's FOIA officer in Washington.
If, in responding to a Section 11 subpoena served upon the Region, there are questions concerning privileges or Privacy Act protections.	XIV	Contact Special Litigation.
If any state or federal court subpoena or discovery request is received seeking Agency records or Board employee testimony.	XIV	Contact Special Litigation.
Before assessing interest on a past due fee.	XV	Contact the GC's FOIA officer in Washington.
For additional guidance on aggregating requests.	XV	Consult the OMB Fee Guidelines and the GC's FOIA officer in Washington.
If issue arises about whether a requester is excused from paying fees in excess of $250.00 without his advance consent after notification by the Agency.	XVI	Contact the GC's FOIA officer in Washington.
If there is a compelling reason to use the date of receipt as the cut-off date for the date of the commencement of the search.	XVI	Contact the GC's FOIA officer in Washington.
If there is any indication that requested documents that are contained in Agency	XVI	Consult with the other agency and follow that agency's

files were created by another agency, such as OSHA or DOL.		release restrictions. Contact the GC's FOIA officer in Washington.
Any special redaction problems involving information from photographs and video or audio tapes or handwritten material where the handwriting would reveal privileged information, such as the identity of the author.	XVI	Bring to the attention of the GC's FOIA officer in Washington, or Special Litigation if litigation is expected, for further instructions.
Any questions about requests for documents furnished by the requester to the agency or copied to that requester from the agency.	XVI	Contact the GC's FOIA officer in Washington.
The identity of Board-side personnel assigned to a particular case should never be disclosed.	XVII	Contact the Board's FOIA officer in Washington with any questions.
If the FOIA processor perceives a significant need to make a discretionary disclosure of information that is *not* provided for in the Manual.	XVII	Consult with the GC's FOIA officer in Washington.
All requests for Appeals documents in open unfair labor practice cases.	XVII	Forward to the GC's FOIA officer in Washington.
All requests for Appeals documents in closed unfair labor practice cases.	XVII	Confer with the GC's FOIA officer to ascertain if a request for appeals documents had been made when the case was open and, if so, the redactions that had been made at that time.
Requests for OM or GC Memoranda that have not been published or for a GC Minute in a closed case.	XVII	Contact the GC's FOIA officer in Washington.

Table of Cases