PROCEDURAL REQUIREMENTS

The Freedom of Information Act requires federal agencies to make their records promptly available to any person who makes a proper request for them.[(1)] To provide a general overview of the Act's procedural requirements, this discussion will follow a rough chronology of how a typical FOIA request is processed -- from the point of determining whether an entity in receipt of a request is subject to the FOIA in the first place to the review of an agency's initial decision regarding a FOIA request on administrative appeal. In administering the Act's procedural requirements, agencies should strive to "carefully consider [all] FOIA requests"[(2)] and "handle [them] in a customer-friendly manner."[(3)]

Entities Subject to the FOIA

Agencies within the executive branch of the federal government, including the Executive Office of the President and independent regulatory agencies, are subject to the FOIA.[(4)] However, the FOIA does not apply to entities that "are neither chartered by the federal government [n]or controlled by it."[(5)]

Thus, it is settled that state governments,[(6)] municipal corporations,[(7)] the courts,[(8)] Congress,[(9)] and private citizens[(10)] are not subject to the FOIA. Nor does the FOIA apply to a presidential transition team.[(11)]

Offices within the Executive Office of the President whose functions are limited to advising and assisting the President also do not fall within the definition of "agency";[(12)] such offices include the Office of the President and the President's personal staff.[(13)] The Court of Appeals for the District of Columbia Circuit illustrated this functional definition of "agency" when it held that the former Presidential Task Force on Regulatory Relief -- chaired by the Vice President and composed of several cabinet members -- was not an agency subject to the FOIA because the cabinet members acted not as heads of their departments "but rather as the functional equivalents of assistants to the President."[(14)]

Under this functional definition of "agency," however, executive branch entities whose responsibilities exceed merely advising and assisting the President generally are considered "agencies" under the FOIA.[(15)] For example, the D.C. Circuit concluded that the Council on Environmental Quality (a unit within the Executive Office of the President) was an agency subject to the FOIA because its investigatory, evaluative, and recommendatory functions exceeded merely advising the President.[(16)] On the other hand, when the D.C. Circuit evaluated the structure of the National Security Council, its proximity to the President, and the nature of the authority delegated to it, the D.C. Circuit determined that the National Security Council is not an agency subject to the FOIA.[(17)]

Agency Records

The Supreme Court has articulated a basic, two-part test for determining what constitutes "agency records" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.[(18)] Inasmuch as the "agency record" analysis usually hinges upon whether an agency has sufficient "control" over a record,[(19)] courts have identified four relevant factors for an agency to consider when making such a determination: the intent of the record's creator to retain or relinquish control over the record; the ability of the agency to use and dispose of the record as it sees fit; the extent to which agency personnel have read or relied upon the record; and the degree to which the record was integrated into the agency's recordkeeping system or files.[(20)] Agency "control" is also the predominant consideration in determining the "agency record" status of records that are either generated[(21)] or maintained[(22)] by a government contractor.

Courts have further refined the "agency record" concept by distinguishing "agency records" from "personal records," which are maintained by agency employees but are not subject to the FOIA.[(23)] In determining the "personal record" status of a record, an agency should examine "the totality of the circumstances surrounding the creation, maintenance, and use" of the record.[(24)] Factors relevant to this inquiry include the purpose for which the document was created, the degree of integration of the record into the agency's filing system, and the extent to which the record's author or other employees used the record to conduct agency business.[(25)]

Agencies also should be mindful of the "agency record" status of research data generated through federal grants. The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999,[(26)] which partly overruled the longstanding Supreme Court precedent of Forsham v. Harris,[(27)] made certain research data generated through federal grants subject to the FOIA.[(28)] In Forsham, the Supreme Court held that data generated and maintained by private research institutions receiving federal grants are not "agency records" subject to the FOIA, and that a grantor agency is not obligated to demand such data in order to respond to any FOIA request for them.[(29)] This statutory provision, however, required the Office of Management and Budget to revise its Circular A-110 (the regulatory publication by which OMB sets the rules governing grants from all federal agencies to institutions of higher education, hospitals, and nonprofit institutions) so that "all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act."[(30)] The final revised version of Circular A-110 requires agencies to respond to FOIA requests for certain grantee research findings by obtaining the requested data from the grantee and processing it for release to the requester.[(31)] (In accordance with OMB's statutory authority over such matters, questions concerning the processing of FOIA requests for grantee research data should be directed to OMB's Office of Information and Regulatory Affairs, Information Policy and Technology Branch, at (202) 395-7856.)

At a more fundamental level, the FOIA applies only to "records," not to tangible, evidentiary objects.[(32)] The courts initially defined "record" by relying on the traditional dictionary meaning of the term.[(33)] However, the Supreme Court subsequently broadened the meaning of "record" by incorporating the more modern record media referenced in the Records Disposal Act[(34)] into its definition of the term.[(35)] With more recent technological advances, at least one court has included computer software in its definition of "record."[(36)] The Electronic Freedom of Information Act Amendments of 1996[(37)] define the term "record" as simply "includ[ing] any

information that would be an agency record . . . when maintained by an agency in any format, including an electronic format."[38]

FOIA Requesters

A FOIA request can be made by "any person," a broad term that encompasses individuals (including foreign citizens), partnerships, corporations, associations, and foreign or domestic governments;[39] requests may also be made through an attorney or other representative on behalf of "any person."[40] Although the statute specifically excludes federal agencies from the definition of a "person,"[41] states and state agencies can make FOIA requests.[42] The only apparent exception of any significance to this broad "any person" standard is for those who flout the law, such as fugitives from justice, who may be denied judicial relief by the courts if the requested records relate to the requester's fugitive status.[43] This holds true also when the FOIA plaintiff is an agent acting on behalf of a fugitive.[44]

FOIA requests can be made for any reason whatsoever; because the purpose for which records are sought has no bearing upon the merits of the request, FOIA requesters do not have to explain or justify their requests.[45] As a result, and despite repeated Supreme Court admonitions for restraint,[46] requesters have invoked the FOIA successfully as a substitute for, or a supplement to, document discovery in the contexts of both civil[47] and criminal[48] litigation.

At the same time, as the Supreme Court has stated, a FOIA requester's basic rights to access are neither increased nor decreased because he or she has a greater interest in the records than an average member of the general public.[49] Such considerations, however, bear on certain procedural areas of the FOIA -- such as expedited access, assessment or waiver of fees, and the award of attorney fees and costs to a successful FOIA plaintiff -- in which it is appropriate to examine a requester's need or purpose in seeking records. Moreover, as the Supreme Court has observed, a requester's identity can be significant in one substantive respect: "The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating [an exemption] differently as to one class of those who make requests than as to another class."[50] In short, this means that an agency should not invoke a FOIA exemption to protect a requester from himself.[51]

Lastly, the Court of Appeals for the District of Columbia Circuit has held that under some circumstances a FOIA claim in litigation may survive even if the FOIA requester dies before the case is put to rest.[52]

Proper FOIA Requests

The FOIA specifies only two requirements for an access request: It must "reasonably describe" the records sought[53] and it must be made in accordance with the agency's published FOIA regulations.[54] Because "a person need not title a request for government records a 'FOIA request,'"[55] agencies should use sound administrative discretion when determining the nature of an access request.[56] For example, a first-party access request that cites only the Privacy Act of 1974[57] should be processed under both that statute and the FOIA.[58]

The legislative history of the 1974 FOIA amendments indicates that a description of a requested record that enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort" is sufficient.(59) Courts have explained that "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters,"(60) or to allow requesters to conduct "fishing expeditions" through agency files.(61) Accordingly, one FOIA request was held invalid because it required an agency's FOIA staff either to have "clairvoyant capabilities" to discern the requester's needs or to spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks."(62)

However, the fact that a FOIA request is very broad or "burdensome" in its magnitude does not, in and of itself, entitle an agency to deny that request on the basis that it does not "reasonably describe" the records sought.(63) The key factor is the ability of an agency's staff to reasonably ascertain exactly which records are being requested and locate them.(64) The courts have held only that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records.(65)

By the same token, an agency also "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester."(66) In interpreting the scope of a FOIA request,(67) agencies should "handle requests for information in a customer-friendly manner"(68) and "carefully consider" the nature of each request.(69) Specifically, agencies should be careful to undertake any "scoping" of documents found in response to a request only with full communication with the FOIA requester.(70)

Toward that end, an agency must inform the requester of the "cut-off" date used to determine the temporal scope of a request and thus the universe of responsive records.(71) Generally speaking, an agency should use as its "cut-off" date the date that its search for records begins.(72) Notice of an agency's "cut-off" policy may be given to requesters constructively through a published regulation(73) or in an agency's FOIA reference guide.(74) Alternatively, an agency may give actual notice of its "cut-off" policy in its correspondence to each FOIA requester.(75) (For further discussions of search requirements, see Procedural Requirements, Searching for Responsive Records, below, and Litigation Considerations, Adequacy of Search, below.)

When determining the scope of a FOIA request, however, agencies should remember that they are not required to create records in order to respond to FOIA requests,(76) nor are they required to answer questions posedas FOIA requests.(77) Similarly, agencies cannot be required by FOIA requesters to seek the return of records over which they retain no "control"(78) (even records that were wrongfully removed from their possession);(79) to recreate records properly disposed of;(80) or to seek the delivery of records held by private entities.(81) Requesters also cannot use the FOIA as an "enforcement mechanism" to compel agencies to perform their missions.(82) Nor may requesters compel agencies to make automatic releases of records as they are created,(83) which means that requests cannot properly be made for "future" records not yet created.(84)

In addition to reasonably describing the records sought, a FOIA requester must follow an agency's regulations in making a request.(85) Each federal agency must publish in the Federal Register its procedural regulations governing access to its records under the FOIA.(86) These

regulations must inform the public of where and how to address requests; its schedule of fees for search, review, and duplication; its fee waiver criteria; and its administrative appeal procedures.[87] The Electronic Freedom of Information Act Amendments of 1996[88] affected several procedural aspects of FOIA administration[89] (including matters concerning the timing of processing FOIA requests, which are discussed below).[90] Each federal agency is required to have implementing regulations published in the Federal Register that address these matters as well.[91]

Although an agency occasionally may waive some of its published procedures for reasons of public interest, speed, or simplicity, all agencies should remember that any "unnecessary bureaucratic hurdle has no place in [the Act's] implementation."[92] Accordingly, an agency may not impose any additional requirements on a requester beyond those prescribed in its regulations.[93] Of course, agencies should adhere strictly to their own regulations, especially when doing so would benefit the FOIA requester.[94] Conversely, a requester's failure to comply with an agency's procedural regulations governing access to records -- such as those concerning properly addressed requests,[95] fees and fee waivers,[96] proof of identity,[97] and administrative appeals[98] -- may be held to constitute a failure to properly exhaust administrative remedies. (For a further discussion of exhaustion of administrative remedies, see Litigation Considerations, Exhaustion of Administrative Remedies, below.)

Time Limits

Until an agency (or the proper component of that agency) receives a FOIA request, it is not obligated to search for responsive records, meet time deadlines, or release any records.[99] Requests not filed in accordance with published regulations are not deemed to have been received until they are identified as proper FOIA requests by agency personnel.[100] For example, under Department of Justice regulations,[101] a request is not considered received until the requester has promised to pay fees (above a minimum amount) or the receiving component has decided to waive all fees.[102] Moreover, if a requester agrees to pay properly assessed search, review, and/or duplication fees but later fails to pay those fees, an agency may refuse to process that requester's subsequent requests until the amount owed is paid.[103] (For a discussion of the assessment of fees, see Fees and Fee Waivers, below.)

Once an agency properly receives a FOIA request,[104] it has twenty working days in which make a determination on the request.[105] Previously, once an agency was in receipt of a proper FOIA request, it was required to inform the requester of its decision to grant or deny access to the requested records within ten working days, but the Electronic Freedom of Information Act Amendments of 1996 increased the Act's basic time limit for agency responses, lengthening it from ten to twenty working days.[106] Agencies are not necessarily required to release the records within the statutory time limit, but access to releasable records should, at a minimum, be granted promptly thereafter.[107]

In "unusual circumstances," an agency can extend the twenty-day time limit for processing a FOIA request if it tells the requester in writing why it needs the extension and when it will make a determination on the request.[108] The FOIA defines "unusual circumstances" as: (1) the need to search for and collect records from separate offices; (2) the need to examine a voluminous

amount of records required by the request; and (3) the need to consult with another agency or agency component.[109] If the required extension exceeds ten days, the agency must allow the requester an opportunity to modify his or her request, or to arrange for an alternative time frame for completion of the agency's processing.[110]

In many instances, though, agencies cannot meet these time limits for a variety of reasons, including the limitations on their resources.[111] Agencies therefore have adopted the court-sanctioned practice of generally handling backlogged FOIA requests on a "first-in, first-out" basis.[112] The Electronic FOIA amendments expressly authorized agencies to promulgate regulations providing for "multitrack processing" of their FOIA requests -- which allows agencies to process requests on a first-in, first-out basis within each track, but also permits them to respond to relatively simple requests more quickly than requests involving complex and/or voluminous records.[113] (For a further discussion of these points, see Litigation Considerations, "Open America" Stays of Proceedings, below.)

In the past, FOIA request could have received "expedited" treatment and be processed out of sequence if the requester could show an "exceptional need or urgency."[114] Courts granted expedited access when exceptional circumstances surrounding a request, such as jeopardy to life or personal safety,[115] or a threatened loss of substantial due process rights,[116] warranted such treatment.

Now, the Electronic FOIA amendments require agencies to promulgate regulations providing for expedited processing of requests if the requester demonstrates a "compelling need" (as defined by the amended statute), or in any other case the agency deems appropriate under its regulations.[117] Under the amended statute, a requester can show "compelling need" in one of two ways: by establishing that his or her failure to obtain the records quickly "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;" or, if the requester is a "person primarily engaged in disseminating information,"[118] by demonstrating that an "urgency to inform the public concerning actual or alleged Federal Government activity" exists.[119] At their discretion, agencies may grant expedited treatment under additional circumstances as well.[120] Agencies must determine whether to grant a request for expedited access within ten calendar days of its receipt by the proper FOIA office.[121] (For a further discussion of expedited access, see Litigation Considerations, "Open America" Stays of Proceedings, below.)

An agency's failure to comply with the time limits for either an initial request or an administrative appeal may be treated as a "constructive exhaustion" of administrative remedies.[122] A requester may immediately thereafter seek judicial review if he or she wishes to do so.[123] However, the D.C. Circuit has interpreted this rule of constructive exhaustion by requiring that once the agency responds to the FOIA request -- after the statutory time limit but before the requester has filed suit -- the requester must administratively appeal the denial before proceeding to court.[124] (For a discussion of this aspect of FOIA litigation, see Litigation Considerations, Exhaustion of Administrative Remedies, below.)

Under the law existing prior to the enactment of the Electronic FOIA amendments, an agency sued for not responding to a FOIA request could receive additional time to process that request if

it could show that its failure to meet the statutory time limits resulted from "exceptional circumstances" and that it was applying "due diligence" in processing the request.[125] Previously, the need to process an extremely large volume of requests constituted "exceptional circumstances," and the commitment of large amounts of resources to process requests on a first-come, first-served basis was considered "due diligence."[126] The Electronic FOIA amendments, however, explicitly excluded "a predictable agency workload" of FOIA requests as "exceptional circumstances . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."[127] Nevertheless, a requester's refusal "to reasonably modify the scope of a request or arrange for an alternative time frame for processing the request," may be used as evidence of "exceptional circumstances."[128] (For a discussion of the litigation aspects of the Act's "exceptional circumstances" provision, see Litigation Considerations, "Open America" Stays of Proceedings, below.)

Searching for Records

The adequacy of an agency's search under the FOIA is determined by a test of "reasonableness," which may vary from case to case.[129] As a general rule, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents."[130] The reasonableness of an agency's search depends, in part, on how the agency conducted its search in light of the scope of the request[131] and the requester's description of the records sought[132] -- particularly if the description includes specific details about the circumstances surrounding the agency's creation or maintenance of the records.[133] The reasonableness of a search also depends on the standards the agency used in determining where responsive records were likely to be found,[134] especially if the agency fails to locate records it has reason to know might exist,[135] or if the search requires agency employees to distinguish "personal" records from "agency" records.[136] Nevertheless, an agency's inability to locate every single responsive record does not undermine an otherwise reasonable search.[137]

Prior to the enactment of the Electronic FOIA amendments, several courts held that agencies do not have to organize or reorganize file systems in order to respond to particular FOIA requests,[138] to write new computer programs to search for "electronic" data not already compiled for agency purposes,[139] or to aggregate computerized data files so as to effectively create new, releasable records.[140] More than one court ruled, though, that agencies may be required to perform relatively simple computer searches to locate requested records, or to demonstrate why such searches are unreasonable in a given case.[141]

Consistent with these latter cases, and to promote electronic database searches, the Electronic FOIA amendments now require agencies to make "reasonable efforts" to search for requested records in electronic form or format "except when such efforts would significantly interfere with the operation of the agency's automated information system."[142] The Electronic FOIA amendments now expressly define the term "search" as meaning "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."[143] (For a discussion of the litigation aspects of adequacy of search, see Litigation Considerations, Adequacy of Search, below.)

"Reasonably Segregable" Obligation

The FOIA requires that "any reasonably segregable portion of a record" must be released after appropriate application of the Act's nine exemptions.[144] Agencies should pay particularly close attention to this "reasonably segregable" requirement because courts may closely examine the propriety of agency segregability determinations,[145] even if the requester does not raise the issue of segregability at the administrative level or before the court.[146] Accordingly, an agency must adequately demonstrate to the court that all reasonably segregable, nonexempt information -- perhaps even including individual numbers contained within multiple-digit codes[147] -- was disclosed.[148]

If, however, an agency determines that nonexempt material is so "inextricably intertwined" that disclosure of it would "leave only essentially meaningless words and phrases," the entire record may be withheld.[149] In cases involving a large amount of records or an unreasonably high-cost "line-by-line" review, agencies may withhold small segments of nonexempt data "if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing by the courts would impose an inordinate burden."[150] Agencies nonetheless may make discretionary disclosures of exempt information, but should do so only upon "full and deliberate consideration of the . . . interests that could be implicated by disclosure of the information.[151] (For a discussion of discretionary disclosure, see Discretionary Disclosure and Waiver, below; for a further discussion of segregability, see Litigation Considerations, "Reasonably Segregable" Requirements, below.)

Referrals and Consultations

When an agency locates records responsive to a FOIA request, it should determine whether any of those records, or information contained in those records, originated with another agency or agency component.[152] As a matter of sound administrative practice, an agency should consult with any other agency or other agency component whose information appears in the responsive records, especially if that other agency or component is better able to determine whether the information is exempt from disclosure.[153] An agency may also consult with any other agency that holds an equity in, or special expertise or knowledge concerning, a particular type of information.[154] If the response to the consultation is delayed, the agency or component in receipt of the FOIA request should notify the requester that a supplemental response will follow when the consultation is completed.[155]

If an agency or component locates entire records originating with another agency or component, it should refer those records to their originator for its direct response to the requester.[156] The referring agency or component ordinarily should advise the requester of the referral and of the name of the agency FOIA office to which it was made.[157] Some agencies have streamlined their practices of continually referring certain routine records or classes of records to other agencies or components by establishing standard processing protocols and agreements between them.[158]

All agencies should remember, however, that even after they make such record referrals in response to FOIA requests, they retain the responsibility of defending any agency action taken on those records if the matter proceeds to litigation.[159] Additionally, agencies receiving referrals should handle them on a "first-in, first-out" basis among their other FOIA requests -- but they should be sure to do so according to the date of the request's initial receipt at the referring

agency, lest FOIA requesters be placed at an unfair timing disadvantage through agency referral practices.(160)

Finally, it should be noted that if an agency determines that it does not maintain any record responsive to a particular FOIA request, that agency is under no obligation to refer that request to any other agency where such records might be located.(161) As a matter of administrative discretion, though, the agency may advise the requester of the name and address of such other agency.(162)

Responding to FOIA Requests

The FOIA provides that each agency "shall make [its disclosable] records promptly available" upon request.(163) Although the D.C. Circuit has suggested that an agency is not required to make requested records available by mailing copies of them to a FOIA requester if the agency prefers to make the "responsive records available in one central location for [the requester's] perusal," such as in a "reading room,"(164) the Department of Justice strongly advises agencies to decline to follow such a practice unless the requester prefers it as well.(165) However, agencies certainly may require re-questers to pay any fees owed before releasing the processed records; otherwise, agencies "would effectively be bankrolling search and review, and duplicating expenses because there would never be any assurance whatsoever that payment would ever be made once the requesters had the documents in their hands."(166)

Both agencies and requesters alike should remember to distinguish between the records that are made available in agency reading rooms (both conventional and "electronic") under subsection (a)(2) of the Act(167) and records that are sought through FOIA requests.(168) Agencies are not required to provide requesters with records that fall within subsection (a)(2) and are already available for "reading room" inspection and copying.(169) (For a discussion of "reading room" records, see FOIA Reading Rooms, above.)

The FOIA does not provide for limited disclosure; rather, it "speaks in terms of disclosure and nondisclosure [and] ordinarily does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents."(170) Moreover, providing exempt information to a requester and limiting his or her ability to further disclose it through a protective order is "not authorized by [the] FOIA."(171)

An agency must "provide the [requested] record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format" and "make reasonable efforts to maintain its records in forms or formats that are reproducible" for such purposes.(172) Together, these two provisions require agencies to honor a requester's specific choice among existing forms of a requested record (assuming no exceptional difficulty in reproducing an existing record form)(173) and to make "reasonable efforts" to disclose a record in a different form or format when that is requested, if the record is "readily reproducible" in that new form or format.(174)

Given "that computer-stored records, whether stored in the central processing unit, on magnetic tape, or in some other form, are records for the purposes of the FOIA,"(175) agencies should

endeavor to use advanced technology to satisfy existing or potential FOIA demands most efficiently -- including through "affirmative" electronic disclosures.(176) To do so, and also to meet their "electronic reading room" obligations under the Electronic FOIA amendments as well,(177) all federal agencies must pay increasing attention to the design and development of their sites on the World Wide Web for purposes of FOIA administration.(178) (For a discussion of "electronic reading rooms," see FOIA Reading Rooms, above.)

When an agency denies an initial request in full or in part, it must provide the requester with certain specific information about the action taken on the request -- including an estimate of the amount of denied information, unless doing so would undermine the protection provided by an exemption.(179) Additionally, the Electronic FOIA amendments require agencies to indicate the amount of information excised at the point in the record where the excision was made, wherever it is "technically feasible" to do so.(180)

While "[t]here is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation,"(181) a decision to deny an initial request must inform the requester of the reasons for denial; of the right to appeal; and of the name and title of each person responsible for the denial.(182) Agencies also must include administrative appeal notifications in all of their "no record" responses to FOIA requesters.(183)

Notifications to requesters should also contain other pertinent information: when and where records will be made available; what fees, if any, must be paid prior to the granting of access; what records are or are not responsive to the request; the date of receipt of the request or appeal; and the nature of the request or appeal and, when appropriate, the agency's interpretation of it.(184) Furthermore, because an agency is obligated to provide a FOIA requester with the "best copy available" of a record,(185) an agency should address in its correspondence any problem with the quality of its photocopy of a disclosed record.(186)

Finally, a requester has the right to administratively appeal any adverse determination an agency makes on his or her FOIA request.(187) Under Department of Justice regulations, for example, adverse determinations include: denials of records in full or in part; "no records" responses; denials of requests for fee waivers; and denials of requests for expedited treatment.(188) An agency must make a determination on an administrative appeal within twenty working days after its receipt.(189) If an agency upholds a denial, it must inform the requester of the its reasons for upholding the denial and of the name and title of each person responsible for that administrative appeal decision.(190) An administrative appeal decision upholding an adverse determination must also inform the requester of the provisions for judicial review of that determination in the federal courts.(191) (For discussions of the various aspects of judicial review of agency action under the FOIA, see Litigation Considerations, below.)

1. 5 U.S.C. § 552(a)(3)(A) (2000).

2. Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (Attorney General FOIA policy memorandum encouraging all federal agencies to make "careful[] . . . disclosure

determinations under the FOIA" and to "consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise").

3. Presidential Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in FOIA Update, Vol. XIV, No. 3, at 3.

4. 5 U.S.C. § 552(f)(1).

5. H.R. Rep. No. 93-1380, at 14 (1974), reprinted in House Comm. on Gov't Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents at 231-32 (1975); see Forsham v. Harris, 445 U.S. 169, 179-80 (1980) (holding that private grantee of federal agency is not itself subject to FOIA); Pub. Citizen Health Research Group v. HEW, 668 F.2d 537, 543-44 (D.C. Cir. 1981) (stating that medical peer review committees are not agencies under FOIA); Irwin Mem'l Blood Bank v. Am. Nat'l Red Cross, 640 F.2d 1051, 1057 (9th Cir. 1981) (determining that American National Red Cross is not an agency under FOIA); Gilmore v. United States Dep't of Energy, 4 F. Supp. 2d 912, 919-20 (N.D. Cal. 1998) (finding that privately owned laboratory that developed electronic conferencing software, for which government owned nonexclusive license for its use, is not "a government-controlled corporation" as it is not subject to day-to-day supervision by federal government, nor are its employees or management considered government employees); Leytman v. N.Y. Stock Exch., No. 95 CV 902, 1995 WL 761843, at *2 (E.D.N.Y. Dec. 6, 1995) (relying on Indep. Investor Protective League v. N.Y. Stock Exch., 367 F. Supp. 1376, 1377 (S.D.N.Y. 1973), finding that although "[t]he Exchange is subject to significant federal regulation . . . it is not an agency of the federal government"); Rogers v. United States Nat'l Reconnaissance Office, No. 94-B-2934, slip op. at 7 (N.D. Ala. Sept. 13, 1995) (determining that "[t]he degree of government involvement and control over [private organizations which contracted with government to construct office facility is] insufficient to establish companies as federal agencies for purposes of the FOIA"); see also FOIA Update, Vol. XIX, No. 4, at 2 (noting FOIA's applicability to certain research data generated by private grantees of federal agencies, pursuant to the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998), as implemented by OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (1999)). But see Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992) (holding that the Smithsonian Institution is an agency under the FOIA on basis that it "performs governmental functions as a center of scholarship and national museum responsible for the safe-keeping and maintenance of national treasures"), holding questioned on appeal of award of attorney fees sub nom. Cotton v. Heyman, 63 F.3d 1115, 1123 (D.C. Cir. 1995) (noting that the Smithsonian Institution could "reasonably interpret our precedent to support its position that it is not an agency under FOIA"); Ass'n of Cmty. Orgs. for Reform Now v. Barclay, No. 3-89-409T, slip op. at 8 (N.D. Tex. June 9, 1989) (holding that federal home loan banks are agencies under FOIA); cf. Dong v. Smithsonian Inst., 125 F.3d 877, 879 (D.C. Cir. 1997) (holding that the Smithsonian Institution is not an agency for purposes of the Privacy Act of 1974, 5 U.S.C. § 552a (1996), as it is neither an "establishment of the executive branch" nor a "government-controlled corporation").

6. See, e.g., Lau v. Sullivan County Dist. Att'y, No. 99-7341, 1999 WL 1069966, at *2 (2d Cir. Nov. 12, 1999), cert. denied, 528 U.S. 1192 (2000); Martinson v. DEA, No. 96-5262, 1997 WL 634559, at *1 (D.C. Cir. July 3, 1997); Ortez v. Wash. County, 88 F.3d 804, 811 (9th Cir. 1996); Davidson v. Georgia, 622 F.2d 895, 897 (5th Cir. 1980); see also Daniel v. Safir, 175 F. Supp. 2d 474, 481 (E.D.N.Y. 2001) ("[T]here is no right of action under FOIA against state actors or officials."); McClain v. United States Dep't of Justice, No. 97-C-0385, 1999 WL 759505, at *2 (N.D. Ill. Sept. 1, 1999) (dismissing FOIA claims against state attorney general because "[p]laintiff may assert Privacy Act and Freedom of Information Act claims against . . . federal defendants only"), aff'd, 17 Fed. Appx. 471 (7th Cir. 2001); Beard v. Dep't of Justice, 917 F. Supp. 61, 63 (D.D.C. 1996) (holding District of Columbia Police Department to be "local" law enforcement agency not subject to FOIA); Gillard v. United States Marshals Serv., No. 87-0689, 1987 WL 11218, at *1 (D.D.C. May 11, 1987) (holding that District of Columbia Government records are not covered by FOIA).

7. See Lau, 1999 WL 1069966, at *2 (affirming dismissal of FOIA claims against county officials); Essily v. Giuliani, No. 00-5271, 2000 WL 1154313, at *1 (S.D.N.Y. Aug. 14, 2000) ("FOIA does not apply to city agencies."), aff'd, 22 Fed. Appx. 77 (2d Cir. 2001); McClain, 1999 WL 759505, at *2 (dismissing plaintiff's FOIA claims against county attorney); Rankel v. Town of Greensburgh, 117 F.R.D. 50, 54 (S.D.N.Y. 1987).

8. See, e.g., United States v. Alcorn, 6 Fed. Appx. 315, 317 (6th Cir. 2001) (holding that "the federal courts are specifically excluded from FOIA's definition of 'agency'") (non-FOIA case); Gaydos v. Mansmann, No. 98-5002, 1998 WL 389104, at *1 (D.C. Cir. June 24, 1998) (per curiam); Warth v. Dep't of Justice, 595 F.2d 521, 523 (9th Cir. 1979); United States v. Spain, No. 82-60-N, slip op. at 1 (E.D. Va. June 19, 1998) ("The courts of the United States are not agencies for the purposes of the Freedom of Information Act."), aff'd, 172 F.3d 865 (4th Cir. 1999) (unpublished table decision); see also Andrade v. United States Sentencing Comm'n, 989 F.2d 308, 309-10 (9th Cir. 1993) (Sentencing Commission, as independent body within judicial branch, is not subject to FOIA); United States v. Ford, No. 96-00271-01, 1998 U.S. Dist. LEXIS 16438, at *1 (E.D. Pa. Oct. 21, 1998) ("The Clerk of Court, as part of the judicial branch, is not an agency as defined by FOIA."); Butler v. United States Prob., No. 95-1705, 1996 U.S. Dist. LEXIS 5241, at *2 (D.D.C. Apr. 22, 1996) (U.S. Probation Office is not agency within meaning of FOIA); cf. Callwood v. Dep't of Prob., 982 F. Supp. 341, 342 (D.V.I. 1997) ("[T]he Office of Probation is an administrative unit of [the] Court . . . [and] is not subject to the terms of the Privacy Act.").

9. See, e.g., Smith v. United States Cong., No. 95-5281, 1996 WL 523800, at *1 (D.C. Cir. Aug. 28, 1996) (stating that FOIA does not apply to records held by Congress); Dow Jones & Co. v. Dep't of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990) (holding that Congress is not an agency for any purpose under FOIA); see also Mayo v. United States Gov't Printing Office, 9 F.3d 1450, 1451 (9th Cir. 1994) (deciding that Government Printing Office is part of congressional branch and therefore is not subject to FOIA); Owens v. Warner, No. 93-2195, slip op. at 1 (D.D.C. Nov. 24, 1993) (ruling that office of Senator John Warner is not subject to FOIA), summary affirmance granted, No. 93-5415 (D.C. Cir. May 25, 1994).

10. See, e.g., In re Olsen, BAP No. UT-98-088, 1999 Bankr. LEXIS 791, at *11 (B.A.P. 10th Cir. June 24, 1999) (holding that chapter seven bankruptcy trustee is not an agency under FOIA); Buemi v. Lewis, No. 94-4156, 1995 WL 149107, at *2 (6th Cir. Apr. 4, 1995) (concluding that the FOIA applies only to federal agencies and not to private individuals); Allnutt v. United States Dep't of Justice, 99 F. Supp. 2d 673, 678 (D. Md. 2000) (holding that records possessed by private trustee acting as agent of United States Trustee are not "agency records" subject to FOIA), aff'd sub nom. Allnut v. Handler, 8 Fed. Appx. 225 (4th Cir. 2001) Germosen v. Cox, No. 98 Civ. 1294, 1999 WL 1021559, at *20 (S.D.N.Y. Nov. 9, 1999) (noting that "there is no authority in the FOIA or Privacy Act obligating . . . private individuals to maintain or make available documents to the public"); Allnutt v. United States Trustee, Region Four, No. 97-02414, slip op. at 6 (D.D.C. July 31, 1999) (holding private trustee of bankruptcy estates is not subject to FOIA even though trustee "cooperates [with] and submits regular reports to the United States Trustee," who is subject to FOIA), appeal dismissed for lack of juris., No. 99-5410 (D.C. Cir. Feb. 2, 2000).

11. See Ill. Inst. for Continuing Legal Educ. v. United States Dep't of Labor, 545 F. Supp. 1229, 1231-33 (N.D. Ill. 1982); see also FOIA Update, Vol. IX, No. 4, at 3-4 ("FOIA Counselor: Transition Team FOIA Issues"); cf. Wolfe v. HHS, 711 F.2d 1077, 1079 (D.C. Cir. 1983) (treating presidential transition team as not agency subject to FOIA and citing with approval Ill. Inst., 545 F. Supp. at 1231-33) (dicta).

12. S. Conf. Rep. No. 93-1200, at 14 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6293; see, e.g., Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985) (ruling that Council of Economic Advisers is not an agency under FOIA); Nation Co. v. Archivist of the United States, No. 88-1939, slip op. at 5-6 (D.D.C. July 24, 1990) (finding that Tower Commission is not an agency under FOIA); Nat'l Sec. Archive v. Executive Office of the President, 688 F. Supp. 29, 31 (D.D.C. 1988) (concluding that Office of Counsel to President is not an agency under FOIA), aff'd sub nom. Nat'l Sec. Archive v. Archivist of the United States, 909 F.2d 541 (D.C. Cir. 1990); see also FOIA Update, Vol. XIV, No. 3, at 6-8 (Department of Justice memorandum specifying consultation process for agencies possessing

White House-originated records or White House-originated information located in response to FOIA requests).

13. See McDonnell v. Clinton, No. 97-1535, 1997 WL 33321085, at *1 (D.D.C. July 3, 1997) (holding that "Office of the President, including its personal staff . . . whose sole function is to advise and assist the President, does not fall within the definition of agency" (citing Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150-55 (1980))), aff'd, 132 F.3d 1481 (D.C. Cir. 1997) (unpublished table decision); Sweetland v. Walters, 60 F.3d 852, 855-56 (D.C. Cir. 1995) (finding that the Executive Residence staff, which is "exclusively dedicated to assisting the President in maintaining his home and carrying out his various ceremonial duties," is not an agency under the FOIA).

14. Meyer v. Bush, 981 F.2d 1288, 1294 (D.C. Cir. 1993); cf. Judicial Watch, Inc. v. Clinton, 76 F.3d 1232, 1234 (D.C. Cir. 1996) (holding that trust established to assist President Clinton with personal legal expenses is not subject to Federal Advisory Committee Act, 5 U.S.C. app. 2 (2000), because "[a]dvice on the legal or ethical implications of presidential fund-raising for personal purposes . . . does not involve 'policy'"); Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 911 (D.C. Cir. 1993) (declaring that President's Task Force on National Health Care Reform, composed of cabinet officials and chaired by First Lady, was not subject to Federal Advisory Committee Act).

15. See Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971); see also Ryan v. Dep't of Justice, 617 F.2d 781, 784-89 (D.C. Cir. 1980).

16. Pac. Legal Found. v. Council on Envtl. Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (holding that Council on Environmental Quality is an agency under FOIA); cf. Energy Research Found. v. Def. Nuclear Facilities Safety Bd., 917 F.2d 581, 584-85 (D.C. Cir. 1990) (determining that Defense Nuclear Facilities Safety Board is an agency because of its multiple functions).

17. Armstrong v. Executive Office of the President, 90 F.3d 553, 559-65 (D.C. Cir. 1996).

18. United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (holding that court opinions in agency files are agency records).

19. See, e.g., Int'l Bhd. of Teamsters v. Nat'l Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (determining that submission of gummed-label mailing list as required by court order not sufficient to give "control" over record to agency); McErlean v. United States Dep't of Justice, No. 97-7831, 1999 WL 791680, at *11 (S.D.N.Y. Sept. 30, 1999) (finding that agency had no "control" over requested records because it assented to dissemination and use restrictions requested by confidential source who provided them); KDKA v. Thornburgh, No. 90-1536, 1992 U.S. Dist. LEXIS 22438, at **16-17 (D.D.C. Sept. 30, 1992) (concluding that Canadian Safety Board report of aircrash, although possessed by National Transportation Safety Board, is not under agency "control," because of restrictions imposed by Convention on International Civil Aviation); Teich v. FDA, 751 F. Supp. 243, 248-49 (D.D.C. 1990) (holding that documents submitted to FDA in "'legitimate conduct of its official duties'" are agency records notwithstanding FDA's presubmission review regulation allowing submitters to withdraw their documents from agency's files (quoting Tax Analysts, 492 U.S. at 145)); Rush v. Dep't of State, 716 F. Supp. 598, 600 (S.D. Fla. 1989) (finding that correspondence between former ambassador and Henry Kissinger (then Assistant to the President) were agency records of Department of State as it exercised control over them); McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,194, at 80,494 (D.D.C. July 28, 1980) (concluding that reports transmitted to agency by state regulatory authorities were agency records because "it is questionable whether [state authorities] retained control" over them); see also FOIA Update, Vol. XIII, No. 3, at 5 (advising that records subject to "protective order" issued by administrative law judge remain within agency control and are subject to FOIA).

20. See Tax Analysts v. United States Dep't of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988) (citing Lindsey v. Bureau of Prisons, 736 F.2d 1462, 1465 (11th Cir. 1984)), aff'd, 492 U.S. 136 (1989); see, e.g.,

Katz v. NARA, 68 F.3d 1438, 1442 (D.C. Cir. 1995) (holding that autopsy x-rays and photographs of President Kennedy, created and handled as personal property of Kennedy estate, are presidential papers, not records of any agency); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (determining that agency "use" of internal report submitted in connection with licensing proceedings renders report an agency record); Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (holding that transition team records, although physically maintained within "four walls" of agency, were not agency records under FOIA); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11-12 (D.D.C. 1995) (following Wash. Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991), to find that transcript of congressional testimony provided "solely for editing purposes," with cover sheet restricting dissemination, is not an agency record), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (declaring that records created outside federal government which "agency in question obtained without legal authority" are not agency records), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987); Ctr. for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) (holding that agency report, prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy, is not an agency record); see also Holy Spirit Ass'n v. CIA, 636 F.2d 838, 841 (D.C. Cir. 1980) (warning that non-"agency record" status "can be lost" if record is "not designated" as such prior to agency's receipt of FOIA request); cf. SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by National Library of Medicine Act); Baizer v. United States Dep't of the Air Force, 887 F. Supp. 225, 228-29 (N.D. Cal. 1995) (holding that database of Supreme Court decisions, used for reference purposes or as research tool, is not an agency record); Waters v. Pan. Canal Comm'n, No. 85-2029, slip op. at 5-6 (D.D.C. Nov. 26, 1985) (finding that Internal Revenue Code is not an agency record); FOIA Update, Vol. XI, No. 3, at 7-8 n.32.

21. See Hercules, Inc. v. Marsh, 839 F.2d 1027, 1029 (4th Cir. 1988) (holding that army ammunition plant telephone directory prepared by contractor at government expense, bearing "property of the U.S." legend, is an agency record); Gilmore v. United States Dep't of Energy, 4 F. Supp. 2d 912, 922 (N.D. Cal. 1998) (finding that video conferencing software created by privately owned laboratory is not an agency record); Tax Analysts v. United States Dep't of Justice, 913 F. Supp. 599, 607 (D.D.C. 1996) (finding that electronic legal research database contracted by agency is not an agency record because licensing provisions specifically precluded agency control), aff'd, 107 F.3d 923 (D.C. Cir. 1997) (unpublished table decision); Lewisburg Prison Project, Inc. v. Fed. Bureau of Prisons, No. 86-1339, slip op. at 4-5 (M.D. Pa. Dec. 16, 1986) (holding that training videotape provided by contractor is not an agency record).

22. See, e.g., Burka, 87 F.3d at 515 (finding data tapes created and possessed by contractor to be agency records because of extensive supervision exercised by agency, which evidenced "constructive control"); Los Alamos Study Group v. Dep't of Energy, No. 97-1412, slip op. at 4 (D.N.M. July 22, 1998) (determining that records created by contractor are agency records within meaning of FOIA because government contract "establishes [agency] intent to retain control over the records and to use or dispose of them as they see fit" and agency regulation "reinforces the conclusion that [the agency] intends to exercise control over the material"); Chi. Tribune Co. v. HHS, No. 95-C-3917, 1997 U.S. Dist. LEXIS 2308, at *33 (N.D. Ill. Feb. 26, 1997) (magistrate's recommendation) (finding that notes and audit analysis file created by independent contractor are agency records because they were created on behalf of (and at request of) agency and agency maintained "effective control" over them), adopted (N.D. Ill. Mar. 28, 1997); Rush Franklin Publ'g, Inc. v. NASA, No. 90-CV-2855, slip op. at 10 (E.D.N.Y. Apr. 13, 1993) (finding that computer tape maintained by contractor is not an agency record in absence of agency control); see also Sangre de Cristo Animal Prot., Inc. v. United States Dep't of Energy, No. 96-1059, slip op. at 3-6 (D.N.M. Mar. 10, 1998) (holding that records that agency neither possessed nor controlled and that were created by entity under contract with agency, although not agency records, are accessible under agency regulation (10 C.F.R. § 1004.3 (1998)) that specifically provided for public availability of contractor records).

23. See, e.g., Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1488-96 (D.C. Cir. 1984) (holding that uncirculated appointment calendars and telephone message slips of agency official were not agency records); Spannaus v. United States Dep't of Justice, 942 F. Supp. 656, 658 (D.D.C. 1996) (finding that "'personal' files" of attorney no longer employed with agency were "beyond the reach of FOIA" if they were not turned over to agency at end of employment); Forman v. Chapotan, No. 88-1151,

slip op. at 14 (W.D. Okla. Dec. 12, 1988) (rejecting contention that materials distributed to agency officials at privately sponsored seminar are agency records), aff'd, No. 89-6035 (10th Cir. Oct. 31, 1989); see also FOIA Update, Vol. IX, No. 4, at 3-4 (discussing circumstances under which presidential transition team documents can be regarded as "personal records" when brought into federal agency); FOIA Update, Vol. V, No. 4, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'").

24. Bureau of Nat'l Affairs, 742 F.2d at 1492.

25. See id. at 1492-93; FOIA Update, Vol. V, No. 4, at 3-4; see, e.g., Gallant v. NLRB, 26 F.3d 168, 171-72 (D.C. Cir. 1994) (stating that letters written on agency time on agency equipment by board member seeking renomination, which had been reviewed by other agency employees but not integrated into agency record system and over which author had not relinquished control, are not agency records); Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., No. 98-4608, 1998 U.S. Dist. LEXIS 15333, at *17 (S.D.N.Y. Sept. 30, 1998) (ruling that handwritten notes neither shared with other agency employees nor placed in agency files were not "agency records" even though they may have furthered their author's performance of his agency duties), aff'd, 182 F.3d 900 (2d Cir. 1999) (unpublished table decision); Clarkson v. Greenspan, No. 97-2035, slip op. at 14 (D.D.C. June 30, 1998) (holding that notes taken by Federal Reserve Banks' employees are "personal" because they were maintained by authors for their own use, were not intended to be shared with other employees, and were not made part of Banks' filing systems), summary affirmance granted, No. 98-5349, 1999 WL 229017 (D.C. Cir. Mar. 2, 1999); Judicial Watch, 880 F. Supp. at 11 (concluding that "telephone logs, calendar markings, [and] personal staff notes" not incorporated into agency recordkeeping system are not agency records); Dow Jones & Co. v. GSA, 714 F. Supp. 35, 39 (D.D.C. 1989) (determining that agency head's recusal list, shared only with personal secretary and chief of staff, is not an agency record); AFGE v. United States Dep't of Commerce, 632 F. Supp. 1272, 1277 (D.D.C. 1986) (finding that employee logs created voluntarily to facilitate work are not agency records even though containing substantive information), aff'd, 907 F.2d 203 (D.C. Cir. 1990). But cf. Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999) (rejecting agency affidavit concerning "personal" records as insufficient and remanding case for further development through affidavits by records' authors explaining their intended use of records in question); Ethyl Corp. v. EPA, 25 F.3d 1241, 1247-48 (4th Cir. 1994) (finding record search inadequate because employees were "not properly instructed on how to distinguish personal records from agency records").

26. Pub. L. No. 105-277, 112 Stat. 2681 (1998).

27. 445 U.S. 169 (1980).

28. See FOIA Update, Vol. XIX, No. 4, at 2 (describing legislative change).

29. 445 U.S. at 178-81.

30. Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

31. See OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (1999); see also FOIA Update, Vol. XIX, No. 4, at 2 (discussing grantee records subject to FOIA under Circular A-110's definition of "research data").

32. See Matthews v. United States Postal Serv., No. 92-1208, slip op. at 4 n.3 (W.D. Mo. Apr. 14, 1994) (holding that computer hardware is not "record"); Nichols v. United States, 325 F. Supp. 130, 135-36 (D. Kan. 1971) (holding that archival exhibits consisting of guns, bullets, and clothing pertaining to assassination of President Kennedy are not "records"), aff'd on other grounds, 460 F.2d 671 (10th Cir. 1972); see also FOIA Update, Vol. XIV, No. 1, at 1 (discussing implementation of President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 note (2000)); cf. FOIA Update,

Vol. XIX, No. 4, at 2 (discussing provisions of "somewhat akin" FOIA-related statute, Nazi War Crimes Disclosure Act, 5 U.S.C.A. § 552 note (West Supp. 2002)).

33. See DiViaio v. Kelley, 571 F.2d 538, 542 (10th Cir. 1978) ("[R]eliance may be placed on the dictionary meaning . . . as that which is written or transcribed to perpetuate knowledge."); Nichols, 325 F. Supp. at 135 (stating that reliance "placed on a dictionary of respected ancestry [(i.e., Webster's)]").

34. 44 U.S.C. § 3301 (2000).

35. See Forsham, 445 U.S. at 183 (treating "record" as including "'machine readable materials . . . regardless of physical form or characteristics'" (quoting Records Disposal Act)); see also N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (holding that audiotape of Challenger astronauts is "record," as "FOIA makes no distinction between information in lexical and . . . non-lexical form"); Save the Dolphins v. United States Dep't of Commerce, 404 F. Supp. 407, 410-11 (N.D. Cal. 1975) (finding that motion picture film is "record" for purposes of FOIA).

36. Cleary, Gottlieb, Steen & Hamilton v. HHS, 844 F. Supp. 770, 782 (D.D.C. 1993) ("These [computer] programs preserve information and 'perpetuate knowledge.'" (quoting DiViaio, 571 F.2d at 542)); see also FOIA Update, Vol. XV, No. 4, at 4-5 (proposed electronic record FOIA principles); Department of Justice "Electronic Record" Report, reprinted in abridged form in FOIA Update, Vol. XI, No. 3, at 6-12 (discussing issue of "record" status of computer software). But see Gilmore, 4 F. Supp. 2d at 919-20 (holding alternatively that video conferencing software developed by privately owned laboratory may not be regarded as "record" on basis that such software "does not illuminate the structure, operation, or decisionmaking structure" of agency); Essential Info., Inc. v. USIA, 134 F.3d 1165, 1166 n.3 (D.C. Cir. 1998) (dictum) (suggesting, without authority, that Internet addresses "seem to be" not records, but "simply 'a means to access' records").

37. Pub. L. No. 104-231, § 3, 110 Stat. 3048, 3049 (codified as amended at 5 U.S.C. § 552(f)(2) (2000)).

38. Id.; see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing statutory amendment).

39. 5 U.S.C. § 551(2) (2000); cf. Judicial Watch v. United States Dep't of Justice, 102 F. Supp. 2d 6, 10 (D.D.C. 2000) (holding that because two related organizations "are separate corporations, . . . each is entitled to request documents under FOIA in its own right").

40. See, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 840 n.2 (6th Cir. 1988) (recognizing standing of attorney to request documents on behalf of client). But cf. Burka v. HHS, 142 F.3d 1286, 1290 (D.C. Cir. 1998) (holding that when an attorney makes a request in his own name without disclosing that he is acting on behalf of a client, he may not later seek attorney fees for his legal work); McDonnell v. United States, 4 F.3d 1227, 1237-38 (3d Cir. 1993) (holding that person whose name does not appear on request does not have standing); Archibald v. Roche, No. 01-1492, slip op. at 1-2 (D.D.C. Mar. 29, 2002) (concluding that the request "appears to [have been] filed on behalf of the attorney" who signed the request, rather than on behalf of the client, because "nowhere in [the request] does [the attorney] ever state that he [was] filing this request on behalf of" the client); MAXXAM, Inc. v. FDIC, No. 98-0989, slip op. at 5-6 (D.D.C. Jan. 21, 1999) (finding that a corporate plaintiff whose name did not appear on a FOIA request made by its attorney "'has not administratively asserted a right to receive [the requested records] in the first place'" (quoting McDonnell, 4 F.3d at 1237)). See generally Doherty v. United States Dep't of Justice, 596 F. Supp. 423, 427 n.4 (S.D.N.Y. 1984) (reviewing legislative history), aff'd on other grounds, 775 F.2d 49 (2d Cir. 1985).

41. 5 U.S.C. § 551(2); see also FOIA Update, Vol. VI, No. 1, at 6 (advising that information requests from agencies within executive branch of federal government cannot be considered FOIA requests).

42. See, e.g., Texas v. ICC, 935 F.2d 728, 728 (5th Cir. 1991); Massachusetts v. HHS, 727 F. Supp. 35, 35 (D. Mass. 1989).

43. See Doyle v. United States Dep't of Justice, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981) (holding that fugitive is not entitled to enforcement of FOIA's access provisions because he cannot expect judicial aid in obtaining government records related to sentence that he was evading); Meddah v. Reno, No. 98-1444, slip op. at 2 (E.D. Pa. Dec. 3, 1998) (dismissing escapee's FOIA claim because escapee "request[ed] documents which were used to determine that he should be detained"). But cf. O'Rourke v. United States Dep't of Justice, 684 F. Supp. 716, 718 (D.D.C. 1988) (holding that convicted criminal, fugitive from his home country and undergoing U.S. deportation proceedings, qualified as "any person" for purpose of making FOIA request); Doherty, 596 F. Supp. at 424-29 (same).

44. See Javelin Int'l, Ltd. v. United States Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,141, at 82,479 (D.D.C. Dec. 9, 1981).

45. See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989); see also North v. Walsh, 881 F.2d 1088, 1096 (D.C. Cir. 1989) (rejecting requester's identity and intended use as factors for determining access rights under FOIA); Durns v. Bureau of Prisons, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access to agency records."), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988); Forsham v. Califano, 587 F.2d 1128, 1134 (D.C. Cir. 1978) (reasoning that while factors such as need, interest, or public interest may bear on agency's determination of order of processing, they have no bearing on individuals' rights of access under FOIA); FOIA Update, Vol. X, No. 2, at 5; FOIA Update, Vol. VI, No. 3, at 5.

46. See United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984); Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974).

47. See, e.g., Jackson v. First Fed. Sav., 709 F. Supp. 887, 889 (E.D. Ark. 1989); see also FOIA Update, Vol. III, No. 1, at 10. But see Comer v. IRS, No. 97-76329, 2000 WL 1566279, at *2 (E.D. Mich. Aug. 17, 2000) (noting that "while documents obtained through FOIA requests may ultimately prove helpful in litigation by permitting a citizen to more precisely target his discovery requests, FOIA is not intended to be a substitute for discovery"); Envtl. Crimes Project v. EPA, 928 F. Supp. 1, 2 (D.D.C. 1995) (ordering stay of FOIA case "pending the resolution of the discovery disputes" in parties' related lawsuit to foreclose requester's attempt to "end run" or interfere with discovery); cf. Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419 (N.D. Cal. 1986) (holding that FOIA cannot be used to circumvent nonreviewable decision to impound requested documents); Morrison-Knudsen Co. v. Dep't of the Army of the United States, 595 F. Supp. 352, 356 (D.D.C. 1984) ("[T]he use of FOIA to unsettle well established procedures governed by a comprehensive regulatory scheme must be . . . viewed not only 'with caution' but with concern."), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision).

48. See, e.g., North, 881 F.2d at 1096. But cf. Jones v. FBI, 41 F.3d 238, 250 (6th Cir. 1994) ("FOIA's scheme of exemptions does not curtail a plaintiff's right to discovery in related non-FOIA litigation; but neither does that right entitle a FOIA plaintiff to circumvent the rules limiting release of documents under FOIA."); United States v. United States Dist. Court, Cent. Dist. of Cal., 717 F.2d 478, 480 (9th Cir. 1983) (holding that FOIA does not expand scope of criminal discovery permitted under Rule 16 of Federal Rules of Criminal Procedure); United States v. Agunbiade, No. 90-CR-610, 1995 WL 351058, at *7 (E.D.N.Y. May 10, 1995) (stating that FOIA requester "cannot employ the statute as a means to enlarge his right to discovery"); Johnson v. United States Dep't of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991) ("Resort to Brady v. Maryland as grounds for waiving confidentiality is . . . outside the proper role of FOIA."); Stimac v. United States Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985) ("Brady v. Maryland . . . provides no authority for releasing material under FOIA.").

49. Sears, 421 U.S. at 143 n.10; see EPA v. Mink, 410 U.S. 73, 86 (1973) (declaring that the FOIA "is largely indifferent to the intensity of a particular requester's need"); Lynch v. Dep't of the Treasury, No. 98-56368, 2000 WL 123236, at *4 (9th Cir. Jan. 28, 2000) (upholding district court's decision to not consider identity of requester in determining whether records were properly withheld under Exemption 7(A)), cert. denied, 530 U.S. 1215 (2000); Parsons v. Freedom of Info. Act Officer, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) (holding that plaintiff's argument of "legitimate need for the documents superior to that of the general public or the press" fails because identity of requester is irrelevant to determination of whether exemption applies); see also United Techs. v. FAA, 102 F.3d 688, 692 (2d Cir. 1996) ("'Congress [thus] created a scheme of categorical exclusion; it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis.'" (quoting FBI v. Abramson, 456 U.S. 615, 631 (1982))); cf. Calder v. IRS, 890 F.2d 781, 783 (5th Cir. 1989) (holding that historian denied access under FOIA also has no "constitutional right of access" to Al Capone's tax records); Leach v. RTC, 860 F. Supp. 868, 871, 878-79 & n.13 (D.D.C. 1994) (individual Members of Congress are granted no greater access to agency records than are other FOIA requesters by virtue of their position; issue held nonjusticiable), appeal dismissed per stipulation, No. 94-5279 (D.C. Cir. Dec. 22, 1994).

50. United States Dep't of Justice v. Julian, 486 U.S. 1, 14 (1988); accord Reporters Comm., 489 U.S. at 771 (recognizing single exception to general FOIA-disclosure rule in case of "first-party" requester).

51. See FOIA Update, Vol. X, No. 2, at 5 (advising agencies to treat first-party FOIA requesters in accordance with protectible interests that requesters can have in their own information, such as personal privacy information, and to treat third-party FOIA requesters differently).

52. See Sinito v. United States Dep't of Justice, 176 F.3d 512, 513 (D.C. Cir. 1999) (holding that FOIA claim can survive death of original requester and remanding case for determination regarding who could properly be substituted for decedent); see also D'Aleo v. Dep't of the Navy, No. 89-2347, 1991 U.S. Dist. LEXIS 3884, at *4 (D.D.C. Mar. 21, 1991) (allowing decedent's executrix to be substituted as plaintiff). But see Hayles v. United States Dep't of Justice, No. H-79-1599, slip op. at 3 (S.D. Tex. Nov. 2, 1982) (dismissing case upon death of plaintiff when no timely motion for substitution was filed).

53. 5 U.S.C. § 552(a)(3)(A) (2000).

54. Id. § 552(a)(3)(A)(ii); see, e.g., Borden v. FBI, No. 94-1029, slip op. at 2 (1st Cir. June 28, 1994) (per curiam) (affirming dismissal of case because requester failed to comply with agency's published regulations); McDonnell v. United States, 4 F.3d 1227, 1236-37 (3d Cir. 1993) ("[A] person whose name does not appear on [FOIA] request [as required by agency regulations] . . . has not made a formal request for documents within the meaning of the statute [and therefore] has no right to [the documents or to] sue in district court when the agency refuses to release requested documents."); Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986) (stating that requesters must follow "the statutory command that requests be made in accordance with published rules"). But see Summers v. United States Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (holding that 28 U.S.C. § 1746 (2000) -- which requires that unsworn declarations be treated with "like force and effect" as sworn declarations -- can be used in place of notarized-signature requirement of agency regulation for verification of FOIA privacy waivers).

55. Newman v. Legal Servs. Corp., 628 F. Supp. 535, 543 (D.D.C. 1986). But see Blackwell v. EEOC, No. 2:98-38, 1999 U.S. Dist. LEXIS 3708, at *5 (E.D.N.C. Feb. 12, 1999) (finding request not properly made because plaintiff failed to follow agency regulation requiring that request be denominated explicitly as request for information under FOIA).

56. See FOIA Update, Vol. VII, No. 1, at 6 (advising that "agencies are expected to honor a requester's obvious intent").

57. 5 U.S.C. § 552a (2000).

58. See FOIA Update, Vol. VII, No. 1, at 6 (advising that it is "good policy for agencies to treat all first-party access requests as FOIA requests" regardless of whether FOIA is cited by requester).

59. H.R. Rep. No. 93-876, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271; see, e.g., Brumley v. United States Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985); Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978); Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978).

60. Assassination Archives & Research Ctr. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414 (D.C. Cir. Aug. 13, 1990); see Frank v. United States Dep't of Justice, 941 F. Supp. 4, 5 (D.D.C. 1996); Blakey v. Dep't of Justice, 549 F. Supp. 362, 366-67 (D.D.C. 1982), aff'd, 720 F.2d 215 (D.C. Cir. 1983) (unpublished table decision); see also Trenerry v. Dep't of the Treasury, No. 92-5053, 1993 WL 26813, at *3 (10th Cir. Feb. 5, 1993) (holding that agency not required to provide personal services such as legal research); Davis v. United States Dep't of Justice, 968 F.2d 1276, 1280-82 (D.C. Cir. 1992) (stating that burden is on requester, not agency, to show prior disclosure of otherwise exempt records); Lamb v. IRS, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (finding requests outside scope of FOIA when they require legal research, are unspecific, or seek answers to interrogatories).

61. Immanuel v. Secretary of the Treasury, No. 94-884, 1995 WL 464141, at *1 (D. Md. Apr. 4, 1995), aff'd, 81 F.3d 150 (4th Cir. 1996) (unpublished table decision); see also Freeman v. United States Dep't of Justice, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish.").

62. Devine v. Marsh, 2 Gov't Disclosure Serv. (P-H) ¶ 82,022, at 82,186 (E.D. Va. Aug. 27, 1981); see also Goldgar v. Office of Admin., 26 F.3d 32, 35 (5th Cir. 1994) (holding that agency not required to produce information sought by requester -- "the identity of the government agency that is reading his mind" -- that does not exist in record form); Malak v. Tenet, No. 01-3996, 2001 WL 664451, at *1 (N.D. Ill. June 12, 2001) (concluding that request's "discursive narrative doesn't even begin to approach the necessary job to permit performance of [agency's] FOIA responsibilities"); Judicial Watch v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 27-28 (D.D.C. 2000) (ruling that a request did not reasonably describe the records sought because the plaintiff "fail[ed] to state its request with sufficient particularity, [and] it also declined [the agency's] repeated attempts to clarify the request"); Keenan v. United States Dep't of Justice, No. 94-1909, slip op. at 1 (D.D.C. Nov. 12. 1996) ("Plaintiff can not [sic] place a request for one search and then, when nothing is found, convert that request into a different search."); Graphics of Key W. v. United States, 1996 WL 167861, at *7 (D. Nev. 1996) (finding plaintiff's request letters to be "more arguments than clear requests for information"); Kubany v. Bd. of Governors of the Fed. Reserve Sys., No. 93-1428, slip op. at 6-8 (D.D.C. July 19, 1994) (holding that request relying on exhibits containing "multiple, unexplained references to hundreds of accounts, and various flowcharts, and schematics" is "entirely unreasonable"). But cf. Doolittle v. United States Dep't of Justice, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (concluding that so long as description of records sought is otherwise reasonable, agency cannot refuse to search for records simply because requester did not also identify them by the date on which they were created).

63. See Ruotolo v. Dep't of Justice, 53 F.3d 4, 10 (2d Cir. 1995) (finding that request that required 803 files to be searched was not "unreasonably burdensome"); Pub. Citizen v. FDA, No. 94-0018, slip op. at 2 (D.D.C. Feb. 9, 1996); see also FOIA Update, Vol. IV, No. 3, at 5. But see Domingues v. FBI, No. 98-74612, slip op. at 11 (E.D. Mich. July 24, 1999) (magistrate's recommendation) (determining that "a request directed to an agency's headquarters which does not request a search of its field offices, or which requests a blanket search of all field offices without specifying which offices should be searched, does not 'reasonably describe' any records which may be in those field offices, and an agency's search of just the headquarters records complies with the FOIA"), adopted (E.D. Mich. July 29, 1999), aff'd, 229 F.3d 1151 (6th Cir. 2000) (unpublished table decision); Massachusetts v. HHS, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989) (holding that a request for all records "relating to" a particular subject is overbroad, "thus unfairly plac[ing] the onus of non-production on the recipient of the request and not where it belongs -- upon the person who drafted such a sloppy request").

64. See Yeager v. DEA, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding request encompassing over 1,000,000 computerized records to be valid because "[t]he linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested'" (quoting legislative history)).

65. See Nation Magazine v. United States Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that search which would require review of twenty-three years of unindexed files would be unreasonably burdensome, but disagreeing that search through chronologically indexed agency files for dated memorandum would be burdensome); Van Strum v. EPA, Nos. 91-35404, 91-35404, 1992 WL 197660, at *1 (9th Cir. Aug. 17, 1992) (accepting agency justification in denying or seeking clarification of overly broad requests which would place inordinate search burden on agency resources); AFGE v. United States Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (holding that a request that would require an agency "to locate, review, redact, and arrange for inspection a vast quantity of material" is "so broad as to impose an unreasonable burden upon the agency" (citing Goland, 607 F.2d at 353)); Marks, 578 F.2d at 263 (ruling that FBI is not required to search every one of its field offices); Burns v. United States Dep't of Justice, No. 99-3173, slip op. at 2 (D.D.C. Feb. 5, 2001) (concluding that "given the capacity of the reels and the absence of any index," a request for specific telephone conversations recorded on reel-to-reel tapes was "unreasonably burdensome" because "it would take an inordinate [amount of] time to listen to the reels in order to locate any requested conversations that might exist"); Blackman v. United States Dep't of Justice, No. 00-3004, slip op. at 5 (D.D.C. July 5, 2001) (declaring request that would require a manual search through 37 million pages to be "unreasonable in light of the resources needed" to process it) (appeal pending); Gilbert v. United States Parole Comm'n, No. 97-2629, slip. op. at 7 (D.D.C. Mar. 23, 1999) ("Forcing the [agency] to search through over hundreds of thousands of files would impose an unreasonable burden on the agency."); O'Harvey v. Office of Workers' Comp. Programs, No. 95-0187, slip op. at 3 (E.D. Wash. Dec. 29, 1997) (finding request to be unreasonably burdensome because search would require agency "to review all of the case files maintained by the agency" and "would entail review of millions of pages of hard copies"), aff'd sub nom. O'Harvey v. Comp. Programs Workers, 188 F.3d 514 (9th Cir. 1999) (unpublished table decision); Spannaus v. United States Dep't of Justice, No. 92-372, slip op. at 6 (D.D.C. June 20, 1995) (finding that agency is not required to determine all persons having ties to associations targeted in bankruptcy proceedings "and then search any and all civil or criminal files relating to those persons"), summary affirmance granted in pertinent part, No. 95-5267 (D.C. Cir. Aug. 16, 1996); see also Nolen v. Rumsfeld, 535 F.2d 890, 891-92 (5th Cir. 1976) ("[Plaintiff] is here seeking production of missing records, which is not within the purview of the Freedom of Information Act."). But see Ruotolo, 53 F.3d at 9 (finding that request that required 803 files to be searched was not "unreasonably burdensome"); Truitt v. Dep't of State, 897 F.2d 540, 544-46 (D.C. Cir. 1990) (requiring that subsequent search be conducted for responsive records that agency knew were removed from file); Peyton v. Reno, No. 98-1457, 1999 U.S. Dist. LEXIS 12125, at **4-5 (D.D.C. July 19, 1999) (finding that request for all records indexed under subject's name reasonably described records sought because agency failed to demonstrate that name search would be unduly burdensome).

66. Hemenway v. Hughes, 601 F. Supp. 1002, 1005 (D.D.C. 1985); see also Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984) (emphasizing that agency required to read FOIA request as drafted, "not as either [an] agency official or [the requester] might wish it was drafted"); Ferri v. Bell, 645 F.2d 1213, 1220 (3d Cir. 1981) (declaring that request "inartfully presented in the form of questions" cannot be dismissed, in toto, as too burdensome); Landes v. Yost, No. 89-6338, slip op. at 4-5 (E.D. Pa. Apr. 11, 1990) (finding that request was "reasonably descriptive" when it relied on agency's own outdated identification code), aff'd, 922 F.2d 832 (3d Cir. 1990) (unpublished table decision); FOIA Update, Vol. IV, No. 3, at 5.

67. See FOIA Update, Vol. XVI, No. 3, at 3 (advising agencies to interpret terms of FOIA requests liberally (citing Nation Magazine v. United States Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995))).

68. Presidential Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in FOIA Update, Vol. XIV, No. 3, at 3; see also Horsehead Indus. v. EPA, No. 94-1299, slip op. at 4 n.2 (D.D.C. Jan. 3, 1997) (ruling that "[b]y construing the FOIA request narrowly, [agency] seeks to avoid disclosing information"); FOIA Update, Vol. XIX, No. 1, at 6 (encouraging agencies to consider providing records in multiple forms if

requested to do so, as a matter of "'customer-friendly' treatment of the requester"); cf. De Luca v. INS, No. 95-6240, 1996 U.S. Dist. LEXIS 2696, at *2 (E.D. Pa. Mar. 7, 1996) (noting that agency offered -- as matter of administrative discretion -- to create certification that it had no record that requester was naturalized citizen).

69. Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01).

70. See FOIA Update, Vol. XVI, No. 3, at 3-5 ("OIP Guidance: Determining the Scope of a FOIA Request") (advising of procedures and underlying considerations for document "scoping"); see also Halpern v. FBI, 181 F.3d 279, 289 (2d Cir. 1999) (holding cross-referenced files to be beyond scope of a request because once the agency "had requested clarification [about the requester's interest in receiving such records], it could then in good faith ignore the cross-referenced files until it received an affirmative response" from the requester); Hamilton Sec. Group v. HUD, 106 F. Supp. 2d 23, 27 (D.D.C. 2000) ("Given the exchange of correspondence between counsel and the agency relating to the scope of the request, there is no basis for plaintiff's claim that defendant should have understood that the request for a [single, specific record] was meant to include additional [records]."), aff'd per curiam, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001).

71. See McGehee v. CIA, 697 F.2d 1095, 1105 (D.C. Cir.) (expressing doubt that agency could establish that "it may 'reasonably' use any 'cut-off' date without so informing the requester"), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983); see also FOIA Update, Vol. IV, No. 4, at 14 (advising that "agencies should give requesters notice of the cut-off dates they use").

72. See Pub. Citizen v. Dep't of State, 276 F.3d 634, 641 (D.C. Cir. 2002) (favoring a "date-of-search cut-off" because it results "in a much fuller search and disclosure" than a "date-of-request cut-off," which may be used "on a particular request" only if the agency has a "compelling justification" for doing so); McGehee v. CIA, 697 F.2d at 1104-05 (hypothesizing that even for an agency "experiencing inordinate delays in processing FOIA requests," a "cut-off" based on the date that a search was "task[ed]" would not be "unduly burdensome, expensive, or productive of 'administrative chaos,'" but also recognizing that an earlier "cut-off" date "might be more suitable for an agency that responds to requests on a relatively current basis"); see also, e.g., 28 C.F.R. § 16.4(a) (Department of Justice FOIA regulation establishing "cut-off" date as date on which search begins). But cf. Blazy v. Tenet, 979 F. Supp. 10, 17 (D.D.C. 1997) (finding prior to Public Citizen that agency use of date of receipt as "cut-off" date was reasonable), summary affirmance granted, No. 97-5330 (D.C. Cir. May 12, 1998); Judicial Watch, 880 F. Supp. at 10 (observing prior to Public Citizen that although agency provided plaintiff with document created after date of request letter, agency was not required to do so because date of request could serve as "cut-off" under FOIA); Church of Scientology v. IRS, 816 F. Supp. 1138, 1148 (W.D. Tex. 1993) (holding that documents generated subsequent to date of request are outside of scope of request and need not be disclosed).

73. See, e.g., 28 C.F.R. § 16.4(a) (Department of Justice FOIA regulation notifying requesters of its "cut-off" date); see also FOIA Update, Vol. IV, No. 4, at 14 (advising that "notice can be given by promulgating a specific regulation addressing this point"). But cf. Pub. Citizen, 276 F.3d at 641 (holding that agency's "cut-off policy represents a prototypical procedural rule properly promulgated without notice and comment"); FOIA Update, Vol. XIX, No. 1, at 5 (advising agencies to implement new statutory provisions of Electronic FOIA amendments "without any disadvantage to FOIA requesters," regardless of status of implementing regulations).

74. See 5 U.S.C. § 552(g) (requiring each agency to prepare and make publicly available certain reference material or a guide for requesting records from the agency under the FOIA); see also FOIA Update, Vol. XVIII, No. 2, at 1 (describing utility of FOIA reference guides, especially when made available in "electronic form").

75. See Pub. Citizen, 276 F.3d at 634 (noting that agency's acknowledgment letter to requesters included notice of "cut-off" policy that applied to all requests); cf. McGehee, 697 F.2d at 1105 (implying that actual notice of agency's "cut-off" policy may be given where such notice "would involve an insignificant expenditure of time and effort on the part of the agency").

76. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) (holding that agency is not required to create explanatory materials); Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (rejecting plaintiff's argument that "even if the agencies do not want to disclose the photographs in their present state, they should produce new photographs at a different resolution in order to mask the [classified] capabilities of the reconnaissance systems that took them"); Poll v. United States Office of Special Counsel, No. 99-4021, 2000 WL 14422, at *5 n.2 (10th Cir. Jan. 10, 2000) (recognizing that "'FOIA neither requires an agency to answer questions disguised as a FOIA request, [nor] to create documents or opinions in response to an individual's request for information'" (quoting Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985))); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at *1 (6th Cir. Feb. 6, 1998) (advising that agency is not required to compile document that "contain[s] a full, legible signature"); Goldgar, 26 F.3d at 35 (stating that agency not required to produce information sought by requester that simply does not exist in record form); Krohn v. Dep't of Justice, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (finding that agency "cannot be compelled to create the [intermediary records] necessary to produce" the information sought); Jones v. Runyon, 32 F. Supp. 2d 873, 875 (N.D. W. Va. 1998) (concluding that "because the FOIA does not obligate to create records or to make explanations, [the agency] acted properly by providing access to those documents already created"), aff'd, 173 F.3d 850 (4th Cir. 1999) (unpublished table decision); Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *2 (D.D.C. May 1, 1998) (declaring that "an agency need not add explanatory material to a document to make it more understandable in light of the redactions"); Bartlett v. United States Dep't of Justice, 867 F. Supp. 314, 316 (E.D. Pa. 1994) (ruling that agency is not required to create handwriting analysis); Gabel v. Comm'r, 879 F. Supp. 1037, 1039 (N.D. Cal. 1994) (noting that FOIA does not require agency "to revamp documents or generate exegeses so as to make them comprehensible to a particular requestor"); Matthews, No. 92-1208, slip op. at 4 n.3 (W.D. Mo. Apr. 14, 1994) (declaring that agency is not required to create "photocopy" of computer hardware); Cleary, 844 F. Supp. at 779 (holding that agency is not required to recreate original database sought by requester); see also FOIA Update, Vol. V, No. 1, at 5; cf. Essential Info., Inc. v. USIA, 134 F.3d 1165, 1172 (D.C. Cir. 1998) (Tatel, J., dissenting) (observing that "FOIA contains no . . . translation requirement"). But cf. McDonnell, 4 F.3d at 1261 n.21 (suggesting, in dictum, that agency might be compelled to create translation of any disclosable encoded information); Schladetsch v. HUD, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) ("Because [the agency] has conceded that it possesses in its databases the discrete pieces of information which [plaintiff] seeks, extracting and compiling that data does not amount to the creation of a new record."), appeal dismissed voluntarily, No. 00-5220 (D.C. Cir. Oct. 12, 2000); Jones v. OSHA, No. 94-3225, slip op. at 6 (W.D. Mo. June 6, 1995) (stating that agency must "retype," not withhold in full, documents required to be released by its own regulation, in order to delete FOIA-exempt information); Int'l Diatomite Producers, 1993 WL 137286, at *5 (N.D. Cal. Apr. 28, 1993) (giving agency choice of compiling responsive list or redacting existing lists containing responsive information) FOIA Update, Vol. XVIII, No. 1, at 5-6 (advising of statutory obligations regarding electronic record searches and format of disclosure).

77. See, e.g., Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985); DiViaio v. Kelley, 571 F.2d 538, 542-43 (10th Cir. 1978); Carnessale v. Reno, No. 95-0279, slip op. at 2 (C.D. Cal. May 2, 1995) (finding request not proper under FOIA where it seeks answers to "a series of legal questions, some of them amounting to the rendition of a legal opinion"); Gillin v. Dep't of the Army, No. 92-325, slip op. at 10 (D.N.H. May 28, 1993) ("FOIA creates only a right of access to records, not a right to require an agency to disclose its collective reasoning behind agency actions, nor does FOIA provide a mechanism to challenge the wisdom of substantive agency decisions."); Patton v. United States R.R. Ret. Bd., No. ST-C-91-04, slip op. at 3 (W.D.N.C. Apr. 26, 1991) (stating that the FOIA "provides a means for access to existing documents and is not a way to interrogate an agency"), aff'd, 940 F.2d 652 (4th Cir. 1991) (unpublished table decision); Hudgins, 620 F. Supp. at 21 ("[The] FOIA creates only a right of access to records, not a right to personal services."); see also FOIA Update, Vol. V, No. 1, at 5.

78. See Steinberg v. United States Dep't of Justice, 801 F. Supp. 800, 802 (D.D.C. 1992) (holding that agency is not obligated to retrieve law enforcement records transferred for use in criminal prosecutions to Commonwealth of Virginia).

79. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150-55 (1980); cf. Spannaus v. United States Dep't of Justice, 942 F. Supp. 656, 658 (D.D.C. 1996) (finding that "personal files" of attorney no longer employed with agency were "beyond the reach of FOIA" if they were not turned over to agency at end of employment).

80. See, e.g., Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994); see also Laughlin v. Comm'r, 103 F. Supp. 2d 1219, 1224-25 (S.D. Cal. 1999) (refusing to order agency to recreate properly discarded document); Jones, 32 F. Supp. 2d at 875-76 (finding that agency did not improperly withhold requested report that was discarded in accordance with agency policies and practices); Rothschild v. Dep't of Energy, 6 F. Supp. 2d 38, 40 (D.D.C. 1998) (agreeing that because agency "is under no duty to disclose documents not in its possession," agency did not violate the FOIA by failing to provide discarded drafts of responsive documents); Green v. NARA, 992 F. Supp. 811, 817 (E.D. Va. 1998) (finding that agency met its FOIA obligation when it provided reasonable access to records sought by plaintiff prior to disposal of records under Records Disposal Act, 44 U.S.C. § 3301 (2000), and noting that "FOIA . . . does not obligate agencies to retain all records [in its possession], nor does it establish specified procedures designed to guide disposal determinations"); cf. Folstad v. Bd. of Governors of the Fed. Reserve Sys., No. 1:99-124, 1999 U.S. Dist. LEXIS 17852, at *5 (W.D. Mich. Nov. 16, 1999) (recognizing that "[e]ven if the agency failed to keep documents that it should have kept, that failure would create neither responsibility under the FOIA to reconstruct those documents nor liability for the lapse"), aff'd, 234 F.3d 1268 (6th Cir. 2000) (unpublished table decision); FOIA Update, Vol. XVIII, No. 1, at 5-6 (advising that FOIA does not govern agency records-disposition practices). But cf. Schrecker v. United States Dep't of Justice, 254 F.3d 162, 165 (D.C. Cir. 2001) (holding that absent proof that requested records were destroyed, agency cannot refuse to search for such records simply because they were type of records not required to be retained); Valencia-Lucena v. United States Coast Guard, 180 F.3d 321, 328 (D.C. Cir. 1999) (rejecting agency's claim that it failed to locate requested records because they were type routinely destroyed, and declaring that "generalized claims of destruction or non-preservation cannot sustain summary judgment").

81. See Folstad, 1999 U.S. Dist. LEXIS 17852, at *8 (finding that if agency "is no longer in possession of the documents, nothing in the FOIA requires the agency to obtain those documents from the private [banking] institution"); Rush Franklin Publ'g, Inc. v. NASA, No. 90-CV-2855, slip op. at 9-10 (E.D.N.Y. Apr. 13, 1993) (mailing list generated and held by federal contractor); Conservation Law Found. v. Dep't of the Air Force, No. 85-4377, 1986 U.S. Dist. LEXIS 24515, at *10 (D. Mass. June 6, 1986) (computer program generated and held by federal contractor); cf. United States v. Napper, 887 F.2d 1528, 1530 (11th Cir. 1989) (concluding that FBI was entitled to return of documents loaned to city law enforcement officials, notwithstanding fact that copies of some documents had been disclosed) (non-FOIA case). But see Chi. Tribune Co. v. HHS, No. 95 C 3917, 1999 WL 299875, at *3 (N.D. Ill. May 4, 1999) (ordering nonparty government contractor to disclose audit data because "the government whole-handedly controls and blatantly influences [the contractor's] action with respect to disclosure of the documents"), emergency stay denied, No. 99-2162 (7th Cir. June 9, 1999); Cal-Almond, Inc. v. USDA, No. 89-574, slip op. at 3-4 (E.D. Cal. Mar. 17, 1993) (ordering agency to reacquire records that mistakenly were returned to submitter upon closing of administrative appeal), appeal dismissed per stipulation, No. 93-16727 (9th Cir. Oct. 26, 1994). But see also FOIA Update, Vol. XIX, No. 4, at 2 (discussing private grantee records that are uniquely made subject to FOIA under OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (1999)).

82. See, e.g., Niagara Mohawk Power Corp. v. United States Dep't of Energy, No. 95-0952, transcript at 10 (D.D.C. Feb. 23, 1996) (bench order) (admonishing that FOIA is not to be used to force agency to obtain information from another agency), vacated & remanded on other grounds, 169 F.3d 16 (D.C. Cir. 1999); Gillin, No. 92-325, slip op. at 5 (D.N.H. May 28, 1993) (The "[r]equest focused primarily upon the decisions made by the [agency] in granting [the administrative permit], rather than the documentation upon

which the [agency] relied."). But cf. Nat'l Ass'n of Criminal Def. Lawyers v. United States Dep't of Justice, No. 97-372, slip op. at 8-10 (D.D.C. June 26, 1998) (concluding that plaintiff's FOIA suit caused agency to issue revised criminal prosecution policy and awarding interim attorney fees partly on such basis), interlocutory appeal dismissed for lack of juris., 182 F.3d 981 (D.C. Cir. 1999).

83. See Mandel Grunfeld & Herrick v. United States Customs Serv., 709 F.2d 41, 43 (11th Cir. 1983) (determining that plaintiff not entitled to automatic mailing of materials as they are updated); Howard v. Sec'y of the Air Force, No. SA-89-CA-1008, slip op. at 6 (W.D. Tex. Oct. 2, 1991) (concluding that plaintiff's request for records on continuing basis would "create an enormous burden, both in time and taxpayers' money"); see also FOIA Update, Vol. VI, No. 2, at 6.

84. See, e.g., Tuchinsky v. Selective Serv. Sys., 418 F.2d 155, 158 (7th Cir. 1969) (ordering that no automatic release required of material relating to occupational deferments until request in hand; "otherwise, [agency] would be required to 'run . . . loose-leaf service' for every draft counselor in the country"); Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *4 (D.D.C. May 1, 1998) (recognizing that court could not order relief concerning documents not yet created and "for which a request for release has not even been made and for which administrative remedies have not been exhausted"); Lybarger v. Cardwell, 438 F. Supp. 1075, 1077 (D. Mass. 1977) (holding that "open-ended procedure" advanced by requester whereby records automatically disclosed not required by FOIA and "will not be forced" upon agency); cf. FOIA Update, Vol. XVI, No. 1, at 1 (citing OMB Circular A-130, "Management of Federal Information Resources," 59 Fed. Reg. 37,905 (1994) (prescribing policies to encourage agencies to affirmatively disseminate government information independent of FOIA context)). But cf. Nat'l Ass'n of Criminal Def. Lawyers, No. 97-372, slip op. at 17 (D.D.C. June 26, 1998) (granting interim attorney fees based in part upon novel finding that plaintiff prevailed when, during litigation, agency released report which was not yet in existence at time of plaintiff's request).

85. 5 U.S.C. § 552(a)(3)(A); see, e.g., Blackwell v. EEOC, No. 2:98-38, 1999 U.S. Dist. LEXIS 3708, at *5 (E.D.N.C. Feb. 12, 1999) (finding request not properly made because plaintiff failed to follow specific agency regulation requiring that request be denominated explicitly as request for information under FOIA).

86. See 5 U.S.C. § 552(a)(4)(A), (a)(6)(A), (a)(6)(D), (a)(6)(E); see also id. § 552(g) (requiring agencies to make available "reference material or a guide for requesting records or information from the agency"); FOIA Update, Vol. XIX, No. 3, at 3 (discussing availability of agency FOIA reference guides through agency FOIA sites on World Wide Web); FOIA Update, Vol. XVIII, No. 2, at 1 (discussing electronic availability of Justice Department's FOIA Reference Guide).

87. See, e.g., Department of Justice FOIA Regulations, 28 C.F.R. pt. 16 (2001).

88. Pub. L. No. 104-231, 110 Stat. 3048 (codified as amended at 5 U.S.C. § 552 (2000)).

89. See FOIA Update, Vol. XIX, No. 1, at 3-5 ("OIP Guidance: Electronic FOIA Amendments Implementation Guidance Outline").

90. See FOIA Update, Vol. XVII, No. 4, at 1-2, 10-11 (discussing statutory changes).

91. 5 U.S.C. § 552(a)(6)(D), (a)(6)(E); see, e.g., 28 C.F.R. pt. 16; see also *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 03/23/01) (reminding agencies of their electronic access obligations for regulations) ; FOIA Update, Vol. XIX, No. 3, at 4 (discussing availability of agency regulations, including proposed regulations, through agency FOIA Web sites).

92. Presidential FOIA Memorandum, reprinted in FOIA Update, Vol. XIV, No. 3, at 3; see, e.g., FOIA Update, Vol. XV, No. 3, at 6 (cautioning against practices that would cause unwarranted disadvantages to requesters in record-referral processes).

93. See Zemansky, 767 F.2d at 574; see also FOIA Update, Vol. X, No. 3, at 5 (addressing submission of FOIA requests by "fax" in relation to agency regulation); cf. *FOIA Post*, "Anthrax Mail Emergency Delays FOIA Correspondence" (posted 11/30/01) (noting that agencies can mitigate the effects of anthrax-related mail disruption by "allow[ing] FOIA requesters to submit new requests by fax, or even electronically if they have established that capability"); FOIA Update, Vol. XIX, No. 1, at 6 (encouraging agencies to consider as matter of administrative discretion establishing capability to receive FOIA requests via Internet).

94. See, e.g., Ruotolo, 53 F.3d at 10 (charging that agency failed to comply with its own regulation requiring it to assist requesters in reformulating requests determined not to reasonably describe records sought); Pub. Citizen v. FDA, No. 94-0018, slip op. at 2 (D.D.C. Feb. 9, 1996) (criticizing agency for asserting that request did not reasonably describe "records which could be located in the FDA's record keeping system without an unduly burdensome search," and ignoring plaintiff's concession to limit scope of request, concluding that agency violated its own regulatory requirement to seek more specific information and to narrow scope of request); cf. FOIA Update, Vol. XIX, No. 1, at 5 (advising agencies to implement statutory provisions of Electronic FOIA amendments "without any disadvantage to FOIA requesters," regardless of status of implementing regulations).

95. Stanley v. DOD, No. 93-4247, slip op. at 10 (S.D. Ill. July 28, 1998) (holding that a request was not properly received when the agency returned -- unopened -- an improperly addressed request); Smith, 1996 U.S. Dist. LEXIS 5594, at *9 (N.D. Cal. Apr. 23, 1996) (stating that "National Records Administration is not a HUD information center," and holding that by directing FOIA request to wrong agency plaintiff failed to exhaust administrative remedies); Sands v. United States, No. 94-0537, 1995 U.S. Dist. LEXIS 9252, at **10-12 (S.D. Fla. June 16, 1995) (noting, in light of agency's clear rules and reasonable treatment of misdirected request, that plaintiff failed to exhaust administrative remedies by not directing request to appropriate office); United States v. Agunbiade, No. 90-CR-610, 1995 WL 351058, at *6 (E.D.N.Y. May 10, 1995) (ruling that plaintiff who did not direct request to "appropriate parties and agencies" in accordance with agency-specific rules failed to exhaust administrative remedies), aff'd sub nom. United States v. Osinowo, 100 F.3d 942 (2d Cir. 1996) (unpublished table decision). But see Coolman v. IRS, No. 98-6149, 1999 WL 675319, at *4 (W.D. Mo. July 12, 1999) (finding administrative remedies exhausted because "it cannot be said . . . that plaintiff's failure to use the address provided in [agency's] regulations prevented his request from arriving at the correct destination"), summary affirmance granted, 1999 WL 1419039 (8th Cir. Dec. 6, 1999); Raulerson v. Reno, No. 96-120, slip op. at 5 (D.D.C. Feb. 26, 1999) (finding search inadequate -- notwithstanding agency regulations requiring that requests be addressed to individual offices maintaining records sought -- because not all offices likely to contain responsive records were searched), summary affirmance granted, No. 99-5257, 1999 WL 1215968 (D.C. Cir. Nov. 23, 1999), cert. denied, 529 U.S. 1102 (2000).

96. See Pollack v. Dep't of Justice, 49 F.3d 115, 119 (4th Cir. 1995) (concluding that plaintiff's refusal to pay anticipated fees constitutes failure to exhaust administrative remedies); Judicial Watch v. FBI, 190 F. Supp. 2d 29, 33 (D.D.C. 2002) ("The D.C. Circuit has held that failure to pay FOIA fees constitutes a failure to exhaust administrative remedies."); Schwarz v. United States Dep't of Treasury, 131 F. Supp. 2d 142, 148 (D.D.C. 2000) ("Exhaustion of administrative remedies . . . includes payment of required fees or an appeal within the agency from a decision refusing to waive fees."); Grecco v. Dep't of Justice, No. 97-0419, slip op. at 5 (D.D.C. Apr. 1, 1999) (recognizing that requester's failure to pay fees or ask for fee waiver constitutes failure to exhaust administrative remedies); Smith v. IRS, No. 2:94-989, 1999 WL 357935, at *1 (D. Utah Mar. 24, 1999) (finding that plaintiff "failed to exhaust his administrative remedies in that he failed to pay the fees and costs in order to process his claims"); Patterson v. United States Dep't of Justice, No. 96-0095, slip op. at 1 (D.D.C. Mar. 23, 1999) (dismissing case because plaintiff failed to exhaust administrative remedies by not paying duplication fees); Stanley, No. 93-4247, slip op. at 9 (S.D. Ill. July 28, 1998) (finding request not properly received also because requester failed to follow agency regulations requiring agreement to pay fees).

97. See Schwarz v. FBI, 31 F. Supp. 2d 540, 542 (N.D. W. Va. 1998) (recognizing that first-party requester's failure to follow agency regulations requiring her to submit fingerprints for positive

identification constituted failure to exhaust administrative remedies), aff'd, 166 F.3d 334 (4th Cir. 1998) (unpublished table decision); cf. Martin v. United States Dep't of Justice, No. 96-2866, slip op. at 7-8 (D.D.C. Dec. 16, 1999) (ruling that requester who seeks law enforcement information about living third party and fails to provide subject's written authorization permitting disclosure of records has not failed to exhaust administrative remedies because agency regulations stated only that such authorization "will help the processing of [the] request"), rev'd & remanded in part on other grounds, No. 00-5389 (D.C. Cir. Apr. 23, 2002). But cf. Pusa v. FBI, No. 99-04603, slip op. at 5 (C.D. Cal. Aug. 3, 1999) (holding that plaintiff who failed to submit third party's privacy waiver "has failed to exhaust administrative remedies under the FOIA by failing to comply with the agency's published procedures for obtaining third-party information").

98. See, e.g., Lumarse v. HHS, No. 98-55880, 1999 WL 644355, at *5 (9th Cir. Aug. 24, 1999) (affirming dismissal of plaintiff's FOIA claim for failure to exhaust administrative remedies because plaintiff "does not allege that it [administratively] appealed the denials of its FOIA requests"); Teplitsky v. Dep't of Justice, No. 96-36208, 1997 WL 665705, at *1 (9th Cir. Oct. 24, 1997) (holding plaintiff had not exhausted administrative remedies when he did not administratively appeal denial of FOIA request even though agency notified him of procedure); RNR Enters. v. SEC, 122 F.3d 93, 98 (2d Cir. 1997) (ruling plaintiff had not exhausted his administrative remedies when he failed to appeal agency denial even though he was advised of his right to appeal and denial was issued during requisite time period); Coates v. Department of Labor, 138 F. Supp. 2d 663, 668 (E.D. Pa. 2001) (deeming administrative remedies not exhausted due to plaintiff's failure to "engage in [the administrative appeal] process, regardless of how frivolous he may have believed [that process] to be"); Hamilton Sec. Group v. HUD, 106 F. Supp. 2d 23, 29 (D.D.C. 2000) (holding that plaintiff failed to exhaust administrative remedies because it filed its administrative appeal one day after regulatory deadline for filing such appeals had passed), aff'd per curiam, No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001); Comer v. IRS, No. 97-76329, 1999 U.S. Dist. LEXIS 16268, at *11 (E.D. Mich. Sept. 30, 1999) (finding that although plaintiff previously appealed agency's failure to promptly respond to his request, "[u]pon receiving the documents and the bill, and prior to filing suit, plaintiff was [again] obliged to administratively appeal whatever dissatisfactions he may have had with that result"); Patterson, No. 96-0095, slip op. at 1 (D.D.C. Mar. 23, 1999) (dismissing case because plaintiff failed to exhaust administrative remedies by not administratively appealing denial of fee waiver request); Thomas v. Office of United States Attorney, 171 F.R.D. 53, 54 (E.D.N.Y. 1997) (ruling that administrative remedies were not exhausted when plaintiff made further request for documents in appeal of agency's denial of plaintiff's initial request).

99. See Brumley v. United States Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985) (determining that agency complied with "FOIA's response time provisions" after advising plaintiff that routing of his request to appropriate office within agency would result in short delay "before the ten working day response period would begin running"); Blackwell v. EEOC, No. 2:98-38, 1999 U.S. Dist. LEXIS 3708, at *6 (E.D.N.C. Feb. 12, 1999) ("The time period for responding to a FOIA request . . . does not begin to run until the request is received by the appropriate office and officer in the agency, as set forth in the agency's published regulations."); see also Judicial Watch, Inc. v. United States Dep't of Justice, No. 97-2089, slip op. at 10-11 (D.D.C. July 14, 1998) (finding that the court was without jurisdiction when plaintiff filed complaint prior to lapse of statutory time limit); cf. Soghomonian v. United States, 82 F. Supp. 2d 1134, 1138 (E.D. Cal. 1999) (holding that twenty-day time period for responding to administrative appeal begins when agency receives appeal, not when requester mails it).

100. See, e.g., Lykins v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,092, at 83,637 (D.D.C. Feb. 28, 1983).

101. 28 C.F.R. § 16.11(e) (2001).

102. See Irons v. FBI, 571 F. Supp. 1241, 1243 (D. Mass. 1983), rev'd on other grounds, 811 F.2d 681 (1987); see also Pollack v. Dep't of Justice, 49 F.3d 115, 120 (4th Cir. 1995); cf. Oglesby v. United States Dep't of the Army, 920 F.2d 57, 66 (D.C. Cir. 1990); Loomis v. Dep't of Energy, No. 96-149, slip op. at 9-10 (N.D.N.Y. Mar. 9, 1999) (finding plaintiff's request properly received when he agreed to pay estimated fee that agency later revised upward), aff'd, 21 Fed. Appx. 80 (2d Cir. 2001).

103. See Trenerry v. IRS, No. 95-5150, 1996 WL 88459, at *2 (10th Cir. Mar. 1, 1996); Atkin v. EEOC, No. 92-3275, slip op. at 5 (D.N.J. June 24, 1993); Crooker v. United States Secret Serv., 577 F. Supp. 1218, 1219-20 (D.D.C. 1983); FOIA Update, Vol. VII, No. 2, at 2; see also 5 U.S.C. § 552(a)(4)(A)(v).

104. See *FOIA Post*, "Anthrax Mail Emergency Delays FOIA Correspondence" (posted 11/30/01) (noting that "[t]he processing of a FOIA request, with all applicable statutory deadlines, is triggered by an agency's 'receipt of . . . such request'" (quoting 5 U.S.C. § 552(a)(6)(A)(i) (2000))).

105. 5 U.S.C. § 552(a)(6)(A)(i); see FOIA Update, Vol. XVII, No. 4, at 2, 10 (discussing Electronic FOIA amendments' modifications to FOIA's time-limit provisions); FOIA Update, Vol. XII, No. 3, at 5 (advising that merely acknowledging request within statutory time period is simply insufficient); cf. Judicial Watch, 880 F. Supp. at 10 (rejecting requester's preposterous claim that response in less than ten working days is evidence of "bad faith").

106. Pub. L. No. 104-231, § 8(b), 110 Stat. 3048, 3052 (codified as amended at 5 U.S.C. § 552(a)(6)(A)(i)).

107. See 5 U.S.C. § 552(a)(6)(C)(i) (requiring that records be made available "promptly"); see also Larson v. IRS, No. 85-3076, slip op. at 2-3 (D.D.C. Dec. 11, 1985) (finding that the FOIA "does not require that the person requesting records be informed of the agency's decision within ten days, it only demands that the government make [and mail] its decision within that time"). But see Manos v. United States Dep't of the Air Force, No. C-92-3986, 1993 U.S. Dist. LEXIS 1501, at **14-15 (N.D. Cal. Feb. 10, 1993) (ruling aberrationally that even mailing response within ten-day period was not sufficient and that requester must actually receive response within ten-day period).

108. 5 U.S.C. § 552(a)(6)(B)(i).

109. Id. § 552(a)(6)(B)(iii); see also Al-Fayed v. CIA, No. 00-2092, slip op. at 5 (D.D.C. Jan. 16, 2001) (recognizing that circumstances "such as an agency's effort to reduce the number of pending requests, the amount of classified material, the size and complexity of other requests processed by the agency, the resources being devoted to the declassification of classified material of public interest, and the number of requests for records by courts or administrative tribunals are relevant to the Courts' determination as to whether [unusual] circumstances exist"), aff'd, 254 F.3d 300 (D.C. Cir. 2001).

110. 5 U.S.C. § 552(a)(6)(B)(ii); see, e.g., 28 C.F.R. § 16.5(c) (Department of Justice FOIA regulation); cf. Al-Fayed, No. 00-2092, slip op. at 6 (D.D.C. Jan. 16, 2001) (noting that the Act "places the onus of modification [of a request's scope] squarely upon the requester, and does not indicate that an equal burden rests with the agency to 'negotiate' an agreeable 'deadline'").

111. See, e.g., Zuckerman v. FBI, No. 94-6315, slip op. at 8 (D.N.J. Dec. 6, 1995) (noting effects of resource limitations on complying with statutory time limits); see also FOIA Update, Vol. XV, No. 2, at 2; FOIA Update, Vol. XIV, No. 3, at 5, 8-9; FOIA Update, Vol. XIII, No. 2, at 8-10; FOIA Update, Vol. XI, No. 1, at 1-2; cf. FOIA Update, Vol. XVI, No. 1, at 1-2 (promoting practice of making agency records "affirmatively" available to public, rather than providing them only in response to particular FOIA requests, in order to benefit overall process of FOIA administration).

112. See Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 614-16 (D.C. Cir. 1976) (citing 5 U.S.C. § 552(a)(6)(C)). But cf. Al-Fayed, No. 00-2092, slip op. at 9 n.5 (D.D.C. Jan. 16, 2001) (noting that "even if the [agency] did not adhere strictly to first-in, first-out processing, there is little support that Open America requires such a system" so long as the agency's processing system is fair overall); Summers v. CIA, No. 98-1682, slip op. at 4 (D.D.C. July 26, 1999) (recognizing that agency need not adhere strictly to "first-in, first-out process[ing]" so long as "it is proceeding in a manner designed to be fair and expeditious").

113. Pub. L. No. 104-231, § 7(a), 110 Stat. 3048, 3050 (codified as amended at 5 U.S.C. § 552(a)(6)(D) (2000)); see, e.g., 28 C.F.R. § 16.5(b) (Department of Justice implementing regulation); see also FOIA Update, Vol. XVIII, No. 1, at 6 (discussing multitrack processing for agencies with decentralized FOIA operations); FOIA Update, Vol. XVII, No. 4, at 10 (discussing implementing regulations); cf. *FOIA Post*, "Supplemental Guidance on Annual FOIA Reports" (posted 08/13/01) (noting that agencies' annual FOIA reports must include "the number of requests that were accorded expedited processing . . . [and] should to the extent practicable also report the number of requests for expedited processing that are received each year"); FOIA Update, Vol. XVIII, No. 3, at 3-7 (advising agencies regarding reporting of multitrack-processing information in annual FOIA reports).

114. Open Am., 547 F.2d at 616 (D.C. Cir. 1976) (citing 5 U.S.C. § 552(a)(6)(C) (1976)); see also Whitehurst v. FBI, No. 96-572, slip op. at 5 (D.D.C. Feb. 5, 1997) (finding that expedited process is warranted where plaintiff's allegations regarding FBI crime laboratory potentially impact upon other criminal matters, where more than three years have elapsed, and where the agency has failed to release numerous documents it has already received and cleared for release to others); Schweihs v. FBI, 933 F. Supp. 719, 723 (N.D. Ill. 1996) (finding "no legal precedent or statutory or regulatory authority for prioritizing FOIA applicants by age or health status"); Gilmore v. FBI, No. 93-2117, slip op. at 3 (N.D. Cal. July 27, 1994) (ordering that request for information concerning government's key encryption and digital telephony initiative be expedited because material sought will "become less valuable if the FBI processes . . . on a first in-first out basis"); FOIA Update, Vol. IV, No. 3, at 3 ("OIP Guidance: When to Expedite FOIA Requests"); see also FOIA Update, Vol. XII, No. 3, at 5 (emphasizing need to promptly determine whether to expedite processing of request); cf. Fox v. United States Dep't of Justice, No. 94-4622, 1994 WL 923072, at *3 (C.D. Cal. Dec. 16, 1994) (ruling that agency is not required to disrupt its administrative routine unless requester has shown strong justification for obtaining documents in expedited manner), appeal dismissed, No. 94-56788 (9th Cir. Feb. 21, 1995).

115. See, e.g., Exner v. FBI, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978) (holding that plaintiff was entitled to expedited access after leak of information exposed her to harm from organized crime figures), aff'd, 612 F.2d 1202 (9th Cir. 1980); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (determining that exceptional circumstances existed when plaintiff faced multiple criminal charges carrying possible death penalty in state court).

116. See, e.g., Neely v. FBI, No. 7:97-0786, slip op. at 9 (W.D. Va. July 27, 1998) (granting expedited processing of FOIA request for plaintiff who had motion for new criminal trial pending and had made specific allegations related to agency documents); Ferguson v. FBI, 722 F. Supp. 1137, 1141-43 (S.D.N.Y. 1989) (noting that "due process interest must be substantial," and holding that plaintiff's request for information regarding his particular postconviction proceeding required expedition); cf. Fiduccia v. United States Dep't of Justice, 185 F.3d 1035, 1041 (9th Cir. 1999) (rejecting argument that "requesters who sue agencies under the FOIA should have their requests handled before requesters who do not file lawsuits"); Ruiz v. United States Dep't of Justice, No. 00-0105, slip op. at 3 (D.D.C. Sept. 27, 2001) ("To the extent that [the requested] records are intended for use in an attack on plaintiff's criminal conviction, this situation does not constitute an exceptional need."); Raulerson v. Reno, 95-cv-2053, slip op. at 4-6 (D.D.C. Mar. 30, 1998) (denying FBI's motion to stay proceedings for nearly three years when plaintiff had asserted he had only two years to appeal criminal conviction and requested documents may aid in preparation of appeal), plaintiff's appeal dismissed, No. 98-5112 (D.C. Cir. May 5, 1998); Edmond v. United States Attorney, 959 F. Supp. 1, 6 (D.D.C. 1997) ("In the absence of some other urgency, Plaintiff cannot meet his burden by merely making a naked assertion that the Government is withholding Brady material in order to accelerate his FOIA processing.").

117. Pub. L. No. 104-231, § 8(a), 110 Stat. 3048, 3051-52 (codified as amended at 5 U.S.C. § 552(a)(6)(E) (2000)); see also FOIA Update, Vol. XIX, No. 1, at 5 (discussing significance of implementing regulations); FOIA Update, Vol. XVII, No. 4, at 10 (discussing new statutory provision).

118. See, e.g., Tripp v. DOD, 193 F. Supp. 2d 229, 241 (D.D.C. 2002) ("To be sure, plaintiff has been the object of media attention and has at times provided information to the media, but there is no evidence . . . that she is 'primarily' engaged in such efforts.").

119. 5 U.S.C. § 552(a)(6)(E)(v); see, e.g., 28 C.F.R. § 16.5(d)(ii) (Department of Justice implementing regulation); see also Al-Fayed v. CIA, 254 F.3d at 310 (holding that to determine if "urgency to inform" exists, court must consider whether the request concerns "matter of current exigency to American public," whether consequences of delaying response would "compromise significant recognized interest," whether request concerns "federal government activity," and "credibility of [the] requester"); Tripp, 193 F. Supp. 2d at 241 (holding that plaintiff's "job application to the Marshall Center and the resulting alleged Privacy Act violations by DOD are not the subject of any breaking news story"); FOIA Update, Vol. XIX, No. 4, at 2 (discussing Nazi War Crimes Disclosure Act, 5 U.S.C. § 552 note (2000), which does not directly amend the FOIA, but which does "impact[] directly on the FOIA [in that it provides] that any person who was persecuted by the Nazi government of Germany or its allies 'shall be deemed to have a compelling need' under 'section 552(a)(6)(E) of title 5, United States Code'" in making requests for access to classified Nazi war-criminal records (quoting 5 U.S.C. § 552 note, § 4)).

120. See, e.g., 22 C.F.R. § 171.12(c)(4) (2002) (Department of State regulation under which expedited processing may be granted if "[s]ubstantial humanitarian concerns would be harmed by the [agency's] failure to process [the requested records] immediately").

121. 5 U.S.C. § 552(a)(6)(C)(i); see, e.g., 28 C.F.R. § 16.5(d)(ii)(4) (Department of Justice implementing regulation).

122. See 5 U.S.C. § 552(a)(6)(C). But cf. Judicial Watch v. United States Naval Observatory, 160 F. Supp. 2d 111, 113 (D.D.C. 2001) (concluding that agency's "failure to timely respond to [a] request for expedited processing is not equivalent to constructive exhaustion of administrative remedies as to the request for documents").

123. See, e.g., Spannaus v. United States Dep't of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987); Perdue Farms v. NLRB, 927 F. Supp. 897, 904 (E.D.N.C. 1996), vacated on other grounds, 108 F.3d 519 (4th Cir. 1997); see also McCall v. United States Marshals Serv., 36 F. Supp. 2d 3, 5 (D.D.C. 1999) (finding that plaintiff constructively exhausted his administrative remedies when court "provisionally filed" his FOIA complaint and application to proceed in forma pauperis before agency responded to his request, even though agency responded before court granted plaintiff's motion to proceed in forma pauperis); Info. Acquisition Corp. v. Dep't of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978) (concluding that administrative remedies were exhausted when agency failed to respond to request within statutory time limit); FOIA Update, Vol. IV, No. 1, at 6 (superseded in part). But see Pollack, 49 F.3d at 119 (holding that constructive exhaustion provision does not relieve requester of statutory obligation to pay fees which agency is authorized to collect); Teplitsky v. Dep't of Justice, No. 96-36208, 1997 WL 665705, at *1 (9th Cir. Oct. 24, 1997) (holding that plaintiff had not exhausted administrative remedies when he did not appeal denial of FOIA request even though agency notified him of procedure); RNR Enters. v. SEC, 122 F.3d 93, 98 (2d Cir. 1997) (ruling that plaintiff had not exhausted his administrative remedies when he failed to appeal agency denial even though he was advised of his right to appeal and denial was issued during requisite time period).

124. See Oglesby, 920 F.2d at 61-65; accord Ruotolo v. Dep't of Justice, 53 F.3d 4, 9 (2d Cir. 1995) (finding administrative remedies exhausted when agency did not include notification of right to appeal its determination that request not reasonably described); Taylor v. Appleton, 30 F.3d 1365, 1370 (11th Cir. 1994) (stating that once party has waited for response from agency, actual exhaustion must occur before court has jurisdiction to review challenges); McDonnell v. United States, 4 F.3d 1227, 1240 (3d Cir. 1993) (upholding dismissal of claim as proper when plaintiff filed suit before filing appeal of denial received after exhaustion of statutory response period); see also Lowry v. Soc. Sec. Admin., No. 00-1616, slip op. at 9-10 (D. Or. Aug. 29, 2001) (holding that requester had not constructively exhausted administrative remedies when he filed suit on day after agency mailed its denial letter, despite fact that he did not receive letter until

several days thereafter); Bryce v. Overseas Private Inv. Corp., No. A-96-595, slip op. at 12 (W.D. Tex. Sept. 28, 1998) (recognizing that although agency's failure to respond within statutory time limit constitutes constructive exhaustion, "if the agency responds with a determination prior to the requester filing suit, then the requirement to exhaust administrative review is revived"), appeal voluntarily dismissed, No. 99-50893 (5th Cir. Oct. 11, 1999); FOIA Update, Vol. XII, No. 2, at 3-4 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision"). But see Mieras v. United States Forest Serv., No. 93-CV-74552, slip op. at 3 (E.D. Mich. Feb. 14, 1995) (misapplying D.C. Circuit rules on constructive exhaustion in declaring that plaintiff had not exhausted administrative remedies as he failed to file administrative appeal after agency response, even though he initiated lawsuit before agency response was made).

125. See 5 U.S.C. § 552(a)(6)(C); see also FOIA Update, Vol. IX, No. 4, at 5.

126. See Open Am., 547 F.2d at 615-16; see also Gilmore v. NSA, No. 94-16165, 1995 WL 792079, at *1 (9th Cir. Dec. 11, 1995) (noting that even after agency's recent internal review of its FOIA operations to identify and correct deficiencies resulted in staff increase and implementation of "first-in/first-out" procedure, court determined it "unlikely that [agency] could process requests more quickly given that it must undertake a painstaking review of voluminous sensitive documents before disclosing requested information"); Jimenez v. FBI, 938 F. Supp. 21, 31 (D.D.C. 1996) ("In view of [the agency's] two-track system and the large volume of documents expected to be responsive to plaintiff's request, the Court finds that [the agency] has met the due diligence requirements for a stay."); Gilmore v. United States Dep't of State, No. 95-1098, slip op. at 27 (N.D. Cal. Feb. 9, 1996) (finding that in addition to other factors, "the recent and prolonged government shutdown provides a sufficient showing of exceptional circumstances"). See generally FOIA Update, Vol. XIV, No. 3, at 8-9 (discussing possible solutions to backlog problem); FOIA Update, Vol. XII, No. 2 , at 8-10 (discussing agency difficulties with FOIA time limits and administrative backlogs); FOIA Update, Vol. XI, No. 1, at 1-2 (discussing effects of budgetary constraints upon agency FOIA operations). But see Matlack, Inc. v. EPA, 868 F. Supp. 627, 633 (D. Del. 1994) (deciding that agency's response that it has a "'large docket of Freedom of Information Act appeals and [is] working as quickly as possible to resolve them,' without more, is simply insufficient to demonstrate 'exceptional circumstances'").

127. Pub. L. No. 104-231, § 7(c), 110 Stat. 3048, 3051 (codified as amended at 5 U.S.C. § 552(a)(6)(C)(ii) (2000)); see, e.g., Fiduccia, 185 F.3d at 1042 (finding no exceptional circumstances when only "a slight upward creep in the caseload" caused backlog that agency claimed resulted from employee cutbacks and rejection of its budget requests); Emerson v. CIA, No. 99-0274, 1999 U.S. Dist. LEXIS 19511, at *3 (D.D.C. Dec. 16, 1999) (finding that agency was exercising due diligence in reducing backlog through use of new FOIA task force, new databases, and new document-scanning mechanisms); Judicial Watch of Fla., Inc. v. United States Dep't of Justice, No. 97-cv-2869, slip op. at 6 (D.D.C. Aug. 25, 1998) (granting three-year stay of proceedings in light of agency's processing of FOIA requests on a "first-in/first out" basis, hiring of additional employees to handle requests, and reduction of backlog by twenty-five percent); Narducci v. FBI, No. 98-0130, slip op. at 1 (D.D.C. July 17, 1998) (observing that agency is "deluged with a volume of requests for information vastly in excess of that anticipated by Congress," and noting agency's "reasonable progress in reducing its backlog" of pending requests; granting agency request to stay proceedings for thirty-four months); see also FOIA Update, Vol. XVIII, No. 3, at 3-7 (advising agencies regarding reporting of backlog-related information in annual FOIA reports, beginning with annual report for Fiscal Year 1998).

128. 5 U.S.C. § 552(a)(6)(C)(iii); see also H.R. Rep. No. 104-795, at 24-25 (1996) (elaborating on circumstances).

129. See Zemansky v. EPA, 767 F.2d 569, 571-73 (9th Cir. 1985) (observing that reasonableness of agency search depends upon facts of each case (citing Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983))).

130. Weisberg, 705 F.2d at 1351; see, e.g., Mendoza v. Sec'y of the Army, No. 98-5454, 1999 WL 515478, at *1 (D.C. Cir. June 23, 1999) (finding that "the government demonstrated that it had conducted a search

reasonably calculated to uncover all relevant documents"); Schleeper v. Dep't of Justice, 1999 WL 325515, at *1 (D.C. Cir. Apr. 30, 1999) (granting government summary affirmance because agency affidavit established that "search was reasonably calculated to lead to the discovery of the documents sought"); Johnston v. United States Dep't of Justice, No. 97-2173, 1998 WL 518529, at *1 (8th Cir. Aug. 10, 1998) (concluding that agency demonstrated that it conducted search reasonably calculated to uncover all responsive documents); Campbell v. United States Dep't of Justice, 164 F.3d 20, 27 (D.C. Cir. 1998) (noting that an agency must search "'using methods which can be reasonably expected to produce the information requested'" (quoting Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990))); Miller v. United States Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (recognizing that search must be "'reasonably calculated to uncover all relevant documents'" (quoting Weisberg, 705 F.2d at 1351)); cf. Comer v. IRS, No. 97-76329, 2000 WL 1566279, at *2 (E.D. Mich. Aug. 17, 2000) ("[T]he government is not required to expend the same efforts under FOIA that it would in response to a litigation-specific document request.").

131. See, e.g., Coalition on Political Assassinations v. DOD, 12 Fed. Appx. 13, 14 (D.C. Cir. 2001) (recognizing that search conducted using terms derived from "appellant's limited request" obviously would not have produced records that lacked any "apparent connection" to such narrowly defined request); Voinche v. FBI, No. 96-5304, 1997 U.S. App. LEXIS 19089, at *3 (D.C. Cir. June 19, 1997) (ruling agency was not obliged to "search for records beyond the scope of the request"); Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) (finding that agency search was properly limited to scope of FOIA request, with no requirement that secondary references or variant spellings be checked); Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request."); Malone v. Freeh, No. 97-3043, slip op. at 4 (D.D.C. Mar. 30, 1999) (rejecting argument that agency conducted inadequate search for records on third parties because requester sought information only about himself); Adams v. FBI, No. 97-2861, slip op. at 7 (D.D.C. Mar. 3, 1999) (finding that requester cannot object to agency's failure to search under aliases not mentioned in request); Rothschild v. Dep't of Energy, 6 F. Supp. 2d 38, 39 (D.D.C. 1998) (declaring that agency is not required to search for records that "do not mention or specifically discuss" subject of request); cf. Russell v. Barr, No. 92-2546, slip op. at 4 (D.D.C. Aug. 28, 1998) (determining that agency searched "all reasonable terms" and "exceeded the call of duty" when "out of an abundance of caution" it searched using subject's maiden name, which was not provided in request). But see Summers v. United States Dep't of Justice, 934 F. Supp. 458, 461 (D.D.C. 1996) (notwithstanding fact that plaintiff's request specifically sought access to former FBI Director J. Edgar Hoover's "commitment calendars," finding agency's search inadequate, as agency did not use additional search terms such as "appointment" or "diary" to locate responsive records); cf. Canning v. United States Dep't of Justice, 919 F. Supp. 451, 460-61 (D.D.C. 1994) (indicating that when agency was aware that subject of request used two names, it should have conducted search under both names).

132. See 5 U.S.C. § 552(a)(3)(A) (2000) (statutory provision requiring that a FOIA request "reasonably describe[]" the records sought); see also, e.g., Domingues v. FBI, No. 98-74612, slip op. at 11 (E.D. Mich. July 24, 1999) (magistrate's recommendation) (determining that "a request directed to an agency's headquarters which does not request a search of its field offices, or which requests a blanket search of all field offices without specifying which offices should be searched, does not 'reasonably describe' any records which may be in those field offices, and an agency's search of just the headquarters records complies with the FOIA"), adopted (E.D. Mich. July 29, 1999), aff'd, 229 F.3d 1151 (6th Cir. 2000) (unpublished table decision); Murphy v. IRS, 79 F. Supp. 2d 1180, 1185-86 (D. Haw. 1999) (holding that the agency "conducted a reasonable search in light of the fact that Plaintiff gave no indication as to what types of files could possibly contain documents responsive to this request or where they might be located"); Bricker v. FBI, No. 97-2742, slip op. at 7 (D.D.C. Mar. 26, 1999) (approving agency search of "files where responsive information would likely be located," given limited information that requester provided about subject of request); Greenberg v. Dep't of Treasury, 10 F. Supp. 2d 3, 13 (D.D.C. 1998) (excusing agency's inability to locate materials "as written" in request because agency records systems "are not indexed in a manner such that responsive records could have been located"); see also Citizens Against UFO Secrecy v. DOD, 21 Fed. Appx. 774, 776 (9th Cir. 2001) (rejecting plaintiff's contention that search using additional terms not found within request was inadequate because agency's use of "extra terms [made] it more likely

that responsive documents [would] be located" (emphasis in original)); cf. Truitt v. Dep't of State, 897 F.2d 540, 544-46 (D.C. Cir. 1990) (stating that when request was "reasonably clear as to the materials desired," agency failed to conduct adequate search as it did not include file likely to contain responsive records); Davidson v. EPA, 121 F. Supp. 2d 38, 39 (D.D.C. 2000) ("Because plaintiff is searching for a specific [record], defendant must, at minimum, explain its procedure for issuing and retaining [such records] and by what reasonable methods it used to locate the one requested by plaintiff."); cf. Kowalczyk v. Dep't of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996) (finding search limited to agency headquarters files reasonable because plaintiff directed his request there).

133. Valencia-Lucena v. United States Coast Guard, 180 F.3d 321, 328 (D.C. Cir. 1999) (finding that because requester provided agency with name of agency employee who possessed requested records during requester's criminal trial, "[w]hen all other sources fail to provide leads to the missing records, agency personnel should be contacted if there is a close nexus, as here, between the person and the particular record"); Hardy v. DOD, No. 99-523, slip op. at 8 (D. Ariz. Aug. 27, 2001) (requiring the agency "to locate the presumably few witnesses who were responsible for operating the closed circuit television system, the robots, and any other video sources" that might have created the requested tapes); Comer v. IRS, No. 97-76329, 1999 U.S. Dist. LEXIS 16268, at *3 (E.D. Mich. Sept. 30, 1999) (rejecting agency's assertion that it conducted reasonable search when plaintiff "listed a small number of specific persons who might have knowledge of [the requested documents] and specific places where they might be found" and agency did not indicate that it searched there); see also Rugerio v. United States Dep't of Justice, 257 F.3d 534, 547-48 (6th Cir. 2001) (rejecting plaintiff's contention that the "agent [who] testified against him at trial" must have records about him because agency established that employee who testified had no such records), cert. denied, 122 S. Ct. 1077 (2002); Vigneau v. O'Brien, No. 99-37ML, slip op. at 5 (D.R.I. Aug. 3, 1999) (magistrate's recommendation) (finding search adequate when agency employee who plaintiff alleged wrote requested records provided affidavit stating that no such records ever existed), adopted (D.R.I. Sept. 9, 1999); cf. Doolittle v. United States Dep't of Justice, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (concluding that so long as description of records sought is otherwise reasonable, agency cannot refuse to search for records simply because requester did not also identify them by the date on which they were created). But cf. Blanton v. United States Dep't of Justice, 182 F. Supp. 2d 81, 85 (D.D.C. 2002) ("[T]he FOIA does not impose an obligation on defendant to contact former employees to determine whether they know of the whereabouts of records that might be responsive to a FOIA request.").

134. See Juda v. United States Customs Serv., No. 00-5399, 2000 U.S. App. LEXIS 17985, at **2-3 (D.C. Cir. June 19, 2000) (concluding that the agency improperly limited its search to a single database when "the agency itself has identified at least one other record system . . . that is likely to produce the information [plaintiff] requests"); Oglesby 920 F.2d at 68 (holding agency may not limit search to one record system if others are likely to contain responsive records); Blanton v. United States Dep't of Justice, 63 F. Supp. 2d 35, 41 (D.D.C. 1999) (noting that even though agency did not search individual informant files for references to requester, any responsive information in such files would have been identified by agency's "cross-reference" search using requester's name); Hall v. United States Dep't of Justice, 63 F. Supp. 2d 14, 17-18 (D.D.C. 1999) (finding that agency need not search for records concerning subject's husband even though such records may have also included references to subject); Iacoe v. IRS, No. 98-C-0466, 1999 U.S. Dist. LEXIS 12809, at *11 (E.D. Wis. July 23, 1999) (recognizing that the agency "diligently searched for the records requested in those places where [the agency] expected they could be located"); Nation Magazine v. United States Customs Serv., No. 94-00808, slip op. at 8, 13-14 (D.D.C. Feb. 14, 1997) (stating that reasonable search did not require agency to search individual's personnel file in effort to locate substantive document drafted by him); cf. Bennett v. DEA, 55 F. Supp. 2d 36, 39-40 (D.D.C. 1999) (holding search inadequate when agency failed to search investigatory files for cases in which subject of request acted as informant, even though agency did not track informant activity by case name, number, or judicial district), appeal dismissed voluntarily, No. 99-5300 (D.C. Cir. Dec. 23, 1999).

135. Campbell, 164 F.3d at 27 (concluding that search limited to agency's central records system was unreasonable because during search agency "discovered information suggesting the existence of documents that it could not locate without expanding the scope of its search"); Tarullo v. DOD, 170 F. Supp. 2d 271, 275 (D. Conn. 2001) (declaring the agency's search inadequate because "[w]hile hypothetical assertions as

to the existence of unproduced responsive documents are insufficient to create a dispute of material fact as to the reasonableness of the search, plaintiff here has [himself provided a copy of an agency record] which appears to be responsive to the request"); Loomis v. Dep't of Energy, No. 96-149, slip op. at 11-12 (N.D.N.Y. Mar. 9, 1999) (determining search inadequate in light of agency's admission that additional responsive records may exist in location not searched), aff'd, 199 F.3d 1322 (2d Cir. 1999) (unpublished table decision); Kronberg v. United States Dep't of Justice, 875 F. Supp. 861, 870-71 (D.D.C. 1995) (holding that search was inadequate when agency did not find records required to be maintained and plaintiff produced documents obtained by other FOIA requesters demonstrating that agency possessed files which may contain records sought); cf. Grace v. Dep't of the Navy, No. 99-4306, 2001 WL 940908, at *5 (N.D. Cal. Aug. 13, 2001) (concluding that although the agency apparently had misplaced the records requested under FOIA, "[d]efendants have discharged their burden [by] making a good faith attempt to locate the missing files").

136. See Ethyl Corp. v. EPA, 25 F.3d 1241, 1247-48 (4th Cir. 1994) (citing agency's failure to follow Department of Justice guidance concerning "personal record" considerations that was published in FOIA Update, Vol. V, No. 4, at 3-4); see also Kempker-Cloyd v. United States Dep't of Justice, No. 5:97-253, 1999 U.S. Dist. LEXIS 4813, at **12-13 (W.D. Mich. Mar. 12, 1999) (determining that agency acted in bad faith because it failed to review responsive records that agency official asserted were "personal"); cf. Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999) (rejecting agency affidavit concerning "personal" records as insufficient, and remanding case for further development through affidavits by records' authors explaining their intended use of records in question).

137. See Grand Cent. P'ship, 166 F.3d at 489 (declaring that fact that "some documents were not discovered until a second, more exhaustive, search was conducted does not warrant overturning the district court's ruling" that agency conducted reasonable search); Schwarz v. FBI, No. 98-4036, 1998 WL 667643, at *2 (10th Cir. Nov. 5, 1998) (concluding that "the fact that the [agency's] search failed to turn up three documents is not sufficient to contradict the reasonableness of the FBI's search without evidence of bad faith"); Campbell, 164 F.3d at 28 n.6 (holding that "the inadvertent omission of three documents does not render a search inadequate when the search produced hundreds of pages that had been buried in archives for decades"); Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (determining that search was adequate when agency spent 140 hours reviewing relevant files, notwithstanding fact that agency was unable to locate 137 of 1000 volumes of records); cf. W. Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 10 (D.D.C. 2000) (concluding that agency conducted reasonable search and acted in good faith by locating and releasing additional responsive records mistakenly omitted from its initial response, because "it is unreasonable to expect even the most exhaustive search to uncover every responsive file; what is expected of a law-abiding agency is that the agency admit and correct error when error is revealed"), aff'd, 22 Fed. Appx. 14 (D.C. Cir. 2001). But see Oglesby v. United States Dep't of the Army, 79 F.3d 1172, 1185 (D.C. Cir. 1996) (acknowledging plaintiff's assertion that search was inadequate because of previous FOIA requester's claim that agency provided her with "well over a thousand documents," and holding that claim raises enough doubt to preclude summary judgment in absence of agency affidavit further describing its search); Accuracy in Media v. FBI, No. 97-2107, slip op. at 12 (D.D.C. Mar. 31, 1999) (directing agency to conduct further search for two unaccounted-for documents referenced in documents located by agency's otherwise reasonable search).

138. See, e.g., Church of Scientology v. IRS, 792 F.2d 146, 150-51 (D.C. Cir. 1986); Miller v. United States Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1986); Neff v. IRS, No. 85-816, slip op. at 8 (S.D. Fla. Nov. 24, 1986); Auchterlonie v. Hodel, No. 83-C-6724, 1984 U.S. Dist. LEXIS 10911, at **5-6 (N.D. Ill. May 7, 1984).

139. See Burlington N. R.R. v. EPA, No. 91-1636, slip op. at 4 (D.D.C. June 15, 1992); Clarke v. United States Dep't of the Treasury, No. 84-1873, 1986 WL 1234, at *1 (E.D. Pa. Jan. 24, 1986); see also FOIA Update, Vol. XIII, No. 2, at 3-7 (congressional testimony discussing "electronic record" FOIA issues).

140. See Yeager v. DEA, 678 F.2d 315, 324 (D.C. Cir. 1982); see also "Department of Justice Report on 'Electronic Record' FOIA Issues" [hereinafter Department of Justice "Electronic Record" Report], reprinted

in abridged form in FOIA Update, Vol. XI, No. 2, at 8-21 (discussing use of "computer programming" for FOIA search and processing purposes). But cf. Int'l Diatomite Producers Ass'n v. United States Soc. Sec. Admin., No. 92-1634, 1993 WL 137286, at *5 (N.D. Cal. Apr. 28, 1993) (ordering agency to respond to request for specific information, portions of which were maintained in four separate computerized listings, by either compiling new list or redacting existing lists), appeal dismissed, No. 93-16723 (9th Cir. Nov. 1, 1993).

141. See Thompson Publ'g Group, Inc. v. Health Care Fin. Admin., No. 92-2431, 1994 WL 116141, at *1 (D.D.C. Mar. 15, 1994) (finding that relatively simple computer searches and computer queries are reasonable for data that do not exist "in a single computer 'document' or 'file'"); Belvy v. United States Dep't of Justice, No. 94-923, slip op. at 7-9 (S.D. Fla. Dec. 15, 1994) (magistrate's recommendation) (rejecting agency's claim that it did not have to undertake computer search because it failed "to establish that the creation of such a [computer] program would be unreasonable"), adopted (S.D. Fla. Jan. 27, 1995); see also Department of Justice "Electronic Record" Report, reprinted in abridged form in FOIA Update, Vol. XI, No. 2, at 8-17 (discussing issue of computer programming for search purposes).

142. Pub. L. No. 104-231, § 5, 110 Stat. 3048, 3050 (codified as amended at 5 U.S.C. § 552(a)(3)(C) (2000)); see Schladetsch v. HUD, No. 99-0175, 2000 WL 33372125, at *5 (D.D.C. Apr. 4, 2000) (rejecting as insufficient agency affidavit that failed to show how creation and use of computer program to perform electronic database search for responsive information would require "unreasonable efforts" or would "substantially interfere" with agency's computer system), appeal dismissed voluntarily, No. 00-5220 (D.C. Cir. Oct. 12, 2000); see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing current electronic search requirements); cf. Hoffman v. United States Dep't of Justice, No. 98-1733-A, slip op. at 10-11 (W.D. Okla. Dec. 15, 1999) (finding that an agency is not required to conduct a physical search of records "if other computer-assisted search procedures available to [the] agency are more efficient and serve the same practical purpose of reviewing hard copies of documents"); cf. Burns v. United States Dep't of Justice, No. 99-3173, slip op. at 2 (D.D.C. Feb. 5, 2001) (concluding that an agency need not search through reel-to-reel audiotapes containing requested recorded conversations, because "the equipment on which these reels could be played has broken and [has been] replaced with other, incompatible equipment," and the agency is "not required to obtain new equipment to process [p]laintiff's FOIA request").

143. Pub. L. No. 104-231, § 5, 110 Stat. 3048, 3050 (codified as amended at 5 U.S.C. § 552(a)(3)(D) (2000)); see Dayton Newspapers, Inc. v. Dep't of the Air Force, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1998) (preliminary ruling without entry of judgment) (concluding that an estimated fifty-one hours required to "assemble" requested information from an agency database "is a small price to pay" in light of the FOIA's presumption favoring disclosure); see also Schladetsch, No. 99-0175, 2000 WL 33372125, at *5 (D.D.C. Apr. 4, 2000) ("The programming necessary to conduct the [electronic database] search is a search tool and not the creation of a new record."); FOIA Update, Vol. XVIII, No. 1, at 6 (advising that search provisions of Electronic FOIA amendments do not involve record "creation" in Congress's eyes). But cf. Lepelletier v. FDIC, No. 96-1363, transcript at 8 (D.D.C. Mar. 3, 2000) (refusing to require agency to undertake "an enormous effort that may not even work to try to convert [obsolete] computer files that nobody knows how to read now to provide information that [plaintiff] would like to have"), appeal dismissed as moot, 23 Fed. Appx. 4 (D.C. Cir. 2001).

144. 5 U.S.C. § 552(b) (2000) (sentence immediately following exemptions).

145. See, e.g., Patterson v. IRS, 56 F.3d 832, 840 (7th Cir. 1995) (finding that an agency is certainly not entitled to withhold an entire document if only "portions" contain exempt information); Wightman v. ATF, 755 F.2d 979, 983 (1st Cir. 1985) (holding that detailed "process of segregation" is not unreasonable for request involving thirty-six document pages); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970) (stating that the "statutory scheme does not permit a bare claim of confidentiality to immunize agency [records] from scrutiny" in their entireties); see also FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation" (citing, e.g., Schiller v. NLRB, 964 F.2d 1205 (D.C. Cir 1992))).

146. See, e.g., Trans-Pac. Policing Agreement v. United States Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. 1999) (indicating that district court had affirmative duty to consider reasonable segregability even though requester never sought segregability finding administratively or before district court); Isley v. Executive Office for United States Attorneys, No. 98-5098, 1999 WL 1021934, at *7 (D.C. Cir. Oct. 21, 1999) (remanding case to district court for segregability finding even though neither party raised segregability issue in district court); see also Kimberlin v. Dep't of Justice, 139 F.3d 944, 951 (D.C. Cir. 1998) (affirming application of exemption but nevertheless remanding case to district court for finding on segregability); Krikorian v. Dep't of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (affirming general application of exemption but nevertheless remanding to district court for finding as to segregability); Schreibman v. United States Dep't of Commerce, 785 F. Supp. 164, 166 (D.D.C. 1991) (holding that segregation required for computer vulnerability assessment withheld under Exemption 2). But see Nicolaus v. FBI, No. 00-17067, 2001 WL 1646871, at *1 (9th Cir. 2001) (concluding that plaintiff's "argument that the district court failed to make adequate factual findings concerning the segregability of documents is waived for failure to present it in his opening brief").

147. See Trans-Pac., 177 F.3d at 1027-28 (going so far as to remand case to district court for determination of releasability of "four or six digits" of ten-digit numbers withheld in full). But cf. Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (declaring that an agency is not obligated to segregate and release images from classified photographs by "produc[ing] new photographs at a different resolution in order to mask the [classified] capabilities of the reconnaissance systems that took them"); Ho v. Dir., Executive Office for United States Attorneys, No. 00-1759, slip op. at 2 (D.D.C. Sept. 17, 2001) (concluding that it was not reasonable to segregate and release to first-party requester any portion of privacy-protected records that did not mention him); Emerson v. CIA, No. 99-0274, slip op. at 13-14 (D.D.C. May 8, 2000) ("Plaintiff's request [for records about three individuals] is not one for which redacted responses would adequately protect th[ose] individuals' privacy."); Schrecker v. United States Dep't of Justice, 74 F. Supp. 2d 26, 32 (D.D.C. 1999) (finding that confidential informant "source codes and symbols are assigned in such a specific manner that no portion of the code is reasonably segregable"), rev'd & remanded in part on other grounds, 254 F.3d 162 (D.C. Cir. 2001); Rockwell Int'l Corp. v. United States Dep't of Justice, No. 98-761, slip op. at 15-16 (D.D.C. Mar. 24, 1999) (rejecting plaintiff's unsupported assertion that documents withheld by defendant agency in full "must" contain segregable information, because "the documents at issue here are not of the type that are likely to contain" such information), aff'd, 235 F.3d 598 (D.C. Cir. 2001).

148. See Davin v. United States Dep't of Justice, 60 F.3d 1043, 1052 (3d Cir. 1995) ("The statements regarding segregability are wholly conclusory, providing no information that would enable [plaintiff] to evaluate the FBI's decisions to withhold."); Schiller v. NLRB, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992) (noting that agency's affidavit referred to withholding of "documents, not information," and remanding for specific finding as to segregability); Neely v. FBI, No. 7:97-0786, Order at 1 (W.D. Va. Jan. 25, 1999) (finding that agency applied exemptions "in a wholesale fashion" and without adequate explanation), vacated & remanded on other grounds, 208 F.3d 461 (4th Cir. 2000); Carlton v. Dep't of the Interior, No. 97-2105, slip op. at 12 (D.D.C. Sept. 3, 1998) (requiring defendant agencies to provide further explanation of exemptions applied because agencies made "only a general statement that the withheld documents do not contain segregable portions"), appeal voluntarily dismissed, No. 98-5518 (D.C. Cir. Nov. 18, 1998); Church of Scientology v. IRS, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) ("The burden is on the agency to prove the document cannot be segregated for partial release."); cf. Anderson v. CIA, 63 F. Supp. 2d 28, 30 (D.D.C. 1999) (declining, "especially in the highly classified context of this case," to "infer from the absence of the word 'segregable' [in the agency's affidavit] that segregability was possible").

149. Neufeld v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981); see, e.g., Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988); Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977); see also Yeager v. DEA, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982) (concluding that it was appropriate to consider "intelligibility" of document and burden imposed by editing and segregation of nonexempt matters); Warren v. Soc. Sec. Admin., No. 98-0116, 2000 WL 1209383, at *5 (W.D.N.Y. Aug. 22, 2000) (refusing to order segregation of standard forms containing personal information because "if the [agency] were to redact the requested documents in a manner that would

remove all exempted . . . information, the resulting materials would be little more than templates"), aff'd in pertinent part, 10 Fed. Appx. 20 (2d Cir. 2001); Eagle Horse v. FBI, No. 92-2357, slip op. at 5-6 (D.D.C. July 28, 1995) (finding disclosure of polygraph examination -- after protecting sensitive structure, pattern, and sequence of questions -- was not feasible without reducing product to "unintelligible gibberish").

150. Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979); see, e.g., Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (finding that because agency would require eight work-years to identify all nonexempt documents in millions of pages of files, the very small percentage of documents that could be released were not "reasonably segregable"); Doherty v. United States Dep't of Justice, 775 F.2d 49, 53 (2d Cir. 1985) ("The fact that there may be some nonexempt matter in documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing approximately 300 pages of documents, line-by-line."); Neufeld, 646 F.2d at 666 (holding that segregation is not required when it "would impose significant costs on the agency and produce an edited document of little informational value"); Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 9 (D.D.C. Oct. 24, 2001) (declining to order the agency to segregate nonexempt information from documents withheld in full, because "[t]he necessary redaction would require the agency to commit significant time and resources to a task that would yield a product with little, if any, informational value"); Journal of Commerce v. United States Dep't of the Treasury, No. 86-1075, 1988 U.S. Dist. LEXIS 17610, at *21 (D.D.C. Mar. 30, 1988) (finding that segregation was "neither useful, feasible nor desirable" when it would compel the agency "to pour through [literally millions of pages of documents] to segregate nonexempt material [and] would impose an immense administrative burden . . . that would in the end produce little in the way of useful nonexempt material").

151. Attorney General's Memorandum for Heads of All Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01).

152. Accord 5 U.S.C. § 552(a)(6)(B)(iii) (2000).

153. See, e.g., 28 C.F.R. § 16.4(c)(1) (2001) (Department of Justice regulation concerning consultations).

154. See, e.g., White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002), reprinted in *FOIA Post* (posted 3/21/02) (directing agencies, in accordance with accompanying memorandum from the Information Security Oversight Office and the Office of Information and Privacy, to "consult with . . . the Department of Energy's Office of Security if the [requested] information concerns nuclear or radiological weapons").

155. See FOIA Update, Vol. XII, No. 3, at 3-4 ("OIP Guidance: Referral and Consultation Procedures"); see also FOIA Update, Vol. XIV, No. 3, at 6-8 (Department of Justice memorandum setting forth White House consultation process in which agency retains responsibility for responding to requester regarding White House-originated records or White House-originated information located within scope of FOIA request that agency has received).

156. See FOIA Update, Vol. XII, No. 3, at 3-4; FOIA Update, Vol. IV, No. 3, at 5; see also, e.g., Rzeslawski v. United States Dep't of Justice, No. 97-1156, slip op. at 6 (D.D.C. July 23, 1998) (observing that an agency's "referral procedure is generally faster than attempting to make an independent determination regarding disclosure" and that "by placing the request in the hands of the originating agency, discretionary disclosure is more likely"), aff'd, No. 00-5029, 2000 WL 621299 (D.C. Cir. Apr. 4, 2000); Stone v. Def. Investigative Serv., No. 91-2013, 1992 WL 52560, at *1 (D.D.C. Feb. 24, 1992) (recognizing that agencies may refer responsive records to originating agencies in responding to FOIA requests), aff'd, 978 F.2d 744 (D.C. Cir. 1992) (unpublished table decision); 28 C.F.R. § 16.4(c)(2) (Department of Justice regulation containing referral and consultation procedures).

157. See FOIA Update, Vol. XII, No. 2, at 6. But see id. (warning agencies not to notify requesters of identities of other agencies to which record referrals are made, in any exceptional case in which so doing would reveal sensitive abstract fact about record's existence).

158. See, e.g., 28 C.F.R. § 16.4(h) (Department of Justice regulation authorizing its components to make agreements with other components or agencies to eliminate need for consultations or referrals for particular types of records).

159. See, e.g., Peralta v. United States Attorney's Office, 136 F.3d 169, 175 (D.C. Cir. 1998) (remanding case for further consideration of whether referral of FBI documents to FBI resulted in "improper withholding" of documents), on remand, 69 F. Supp. 2d 21, 29 (D.D.C. 1999) (holding that Executive Office for United States Attorneys' referral of documents to FBI was not improper); Williams v. FBI, No. 92-5176, 1993 WL 157679, at *1 (D.C. Cir. May 7, 1993) (illustrating that in litigation referring agency is nevertheless required to justify withholding of record that was referred to another agency); Hronek v. DEA, 16 F. Supp. 2d 1260, 1272 (D. Or. 1998) (noting that with respect to records referred to nonparty agencies "the ultimate responsibility for a full response lies with the [referring] agencies"), aff'd, 7 Fed. Appx. 591 (9th Cir. 2001); see also FOIA Update, Vol. XV, No. 3, at 6 (advising on proper litigation practice for defending referrals of records to other agencies); cf. Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at *14 (D.D.C. July 29, 1999) (magistrate's recommendation) (requiring referring agency to ask agency receiving referral to provide court with its position concerning releasability of records referred); Grove v. Dep't of Justice, 802 F. Supp. 506, 518 (D.D.C. 1992) (declaring that agency may not use "'consultation' as its reason for a deletion, without asserting a valid exemption").

160. See FOIA Update, Vol. XV, No. 3, at 6 (observing that a requester should "receive her rightful place in line as of the date upon which her request was received," and advising likewise regarding "consultation" practices (citing Freeman v. Dep't of Justice, 822 F. Supp. 1064, 1067 (S.D.N.Y. 1993))); cf. Boyd v. United States Marshals Serv., No. 99-2712, slip op. at 5-6 (D.D.C. Mar. 30, 2001) (approving agency's referral of records to originating agencies, because that referral "was done in accordance with agency regulation . . . and does not appear to have impaired plaintiff's ability to gain access to these records"), appeal dismissed for lack of juris., No. 01-5306, 2001 WL 1488181 (D.C. Cir. Oct. 10, 2001); Williams v. United States, 932 F. Supp. 354, 357 & n.7 (D.D.C. 1996) (urging the agency to set up an "express lane" for referred records so as to not "tie up other agencies by taking an inordinate period of time to review referred records [and] unnecessarily inhibit the smooth functioning of the [other] agencies' well[-] oiled FOIA processing systems").

161. See Hardy v. DOD, No. 99-523, slip op. at 16 (D. Ariz. Aug. 27, 2001) (holding that an agency was not obligated to refer to OPM a FOIA request for personnel records that the agency did not maintain itself).

162. Accord Presidential Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993) [hereinafter Presidential FOIA Memorandum], reprinted in FOIA Update, Vol. XIV, No. 3, at 3 ("[A]gencies should handle requests for information in a customer-friendly manner."); cf. Conteh v. FBI, No. 01-1330, slip op. at 4-5 (D.D.C. Apr. 1, 2002) (concluding that the response of an agency whose regulations require a requester to send separate requests to each individual field office that is believed to maintain responsive records was inadequate because the agency could have informed the requester of the existence and location of records maintained by two of its field offices "so that [the] plaintiff could direct his request to [those] offices pursuant to the [agency's] regulations"). But see also FOIA Update, Vol. XII, No. 2, at 6 (advising that in undertaking such requester communications agencies must take care not to compromise special secrecy concerns held by law enforcement and intelligence agencies).

163. 5 U.S.C. § 552(a)(3)(A) (2000).

164. Oglesby v. United States Dep't of the Army, 920 F.2d 57, 70 (D.C. Cir. 1990); cf. Chamberlain v. United States Dep't of Justice, 957 F. Supp. 292, 296 (D.D.C.) (holding that FBI's offer to make "visicorder

charts" available to requester for review at FBI Headquarters met FOIA requirements due to exceptional fact that charts could be damaged if photocopied), summary affirmance granted, 124 F.3d 1309 (D.C. Cir. 1997) (unpublished table decision).

165. See FOIA Update, Vol. XII, No. 2, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (recognizing that "the effective administration of the FOIA relies quite heavily upon agency transmittal of disclosable record copies to FOIA requesters by mail"); see also Comer v. IRS, No. 97-76329, 1999 U.S. Dist. LEXIS 16268, at *3 (E.D. Mich. Sept. 30, 1999) (observing that although "FOIA does not require agencies to provide members of the public with information they can access themselves . . . [t]he Court is perplexed . . . why [defendant] refuses to simply copy this information and send it to plaintiff so long as he is willing to pay for the copies"); accord Presidential FOIA Memorandum, reprinted in FOIA Update, Vol. XIV, No. 3, at 3 ("[A]gencies should handle requests for information . . . [with no] unnecessary bureaucratic hurdles.").

166. Strout v. United States Parole Comm'n, 842 F. Supp. 948, 951 (E.D. Mich.), aff'd, 40 F.3d 136 (6th Cir. 1994); see also Taylor v. United States Dep't of the Treasury, No. A-96-CA-933, 1996 U.S. Dist. LEXIS 19909, at *5 (W.D. Tex. Dec. 17, 1996); Trueblood v. United States Dep't of the Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996) (recognizing that agency may require payment before sending processed records); Putnam v. United States Dep't of Justice, 880 F. Supp. 40, 42 (D.D.C. 1995) (allowing agency to require payment of current and outstanding fees before releasing records); Crooker v. ATF, 882 F. Supp. 1158, 1162 (D. Mass. 1995) (finding no obligation to provide records until current and past-due fees are paid).

167. 5 U.S.C. § 552(a)(2); see also *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 03/23/01) (outlining categories of records required to be affirmatively disclosed in "electronic" reading rooms); FOIA Update, Vol. XVII, No. 3, at 1-2 (discussing maintenance of both conventional and "electronic" reading rooms under Electronic FOIA amendments).

168. See 5 U.S.C. § 552(a)(3) (generally excluding "reading room" records from Act's basic "FOIA request" provisions).

169. See Schwarz v. United States Patent & Trademark Office, No. 95-5349, 1996 U.S. App. LEXIS 4609, at **2-3 (D.C. Cir. Feb. 22, 1996) (per curiam); Crews v. Internal Revenue, No. 99-8388, 2000 WL 900800, at *6 (C.D. Cal. Apr. 26, 2000) (holding that "documents that are publicly available either in the [agency's FOIA] reading room or on the [I]nternet" are "not subject to production via FOIA requests"); cf. Perales v. DEA, 21 Fed. Appx. 473, 474-75 (7th Cir. 2001) (recognizing that "material already made available through publication in the Federal Register" cannot be requested under subsection (a)(3) of the FOIA). But see also FOIA Update, Vol. XVIII, No. 1, at 3 (advising that Congress made clear that newly established "reading room" category of FOIA-processed records would stand as exception to general rule and be subject to regular FOIA requests as well); FOIA Update, Vol. XVI, No. 1, at 2 (reminding that "an agency cannot convert a subsection (a)(3) record into a subsection (a)(2) record . . . just by voluntarily placing it into its reading room").

170. Julian v. United States Dep't of Justice, 806 F.2d 1411, 1419 n.7 (9th Cir. 1986), aff'd, 486 U.S. 1 (1988); see Berry v. Dep't of Justice, 733 F.2d 1343, 1355 n.19 (9th Cir. 1984); see also Seawell, Dalton, Hughes & Timms v. Exp.-Imp. Bank, No. 84-241-N, slip op. at 2 (E.D. Va. July 27, 1984) (stating that there is no "middle ground between disclosure and nondisclosure").

171. Schiffer v. FBI, 78 F.3d 1405, 1410 (9th Cir. 1996) (reversing district court's conditional disclosure order); see also Maricopa Audobon Soc'y v. United States Forest Serv., 108 F.3d 1082, 1088-89 (9th Cir. 1997) (rejecting plaintiff's offer to receive requested documents under confidentiality agreement because of rule that "FOIA does not permit selective disclosure of information to only certain parties, and that once the information is disclosed to [plaintiff], it must be made available to all members of the public who request it"); Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996) ("Once records are released, nothing in the FOIA

prevents the requester from disclosing the information to anyone else. The statute contains no provisions requiring confidentiality agreements or similar conditions."); cf. Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (refusing to grant protective order that would allow plaintiff's counsel and medical expert to review exempt information, lest anyone think that "even in the process of sustaining an exemption the secrets to which it pertains will be compromised").

172. 5 U.S.C. § 552(a)(3)(B); see also FOIA Update, Vol. XVII, No. 4, at 2 (discussing statutory provisions); cf. Department of Justice "Electronic Record" Report, reprinted in abridged form in FOIA Update, Vol. XI, No. 3, at 3-6 (discussing "choice of format" issues regarding "electronic records").

173. See, e.g., Lepelleier v. FDIC, No. 96-1363, tr. at 9 (D.D.C. Mar. 3, 2000) (refusing, with regard to information "maintained on an [agency] database incapable of being printed," to order agency "to render or attempt to render that database operational"), appeal dismissed as moot, 23 Fed. Appx. 4 (D.C. Cir. 2001); Chamberlain, 957 F. Supp. at 296 ("The substantial expense of reproducing the visicorder charts, as well as the possibility that the visicorder charts might be damaged if photocopied, make the Government's proposed form of disclosure [i.e., inspection] even more compelling.").

174. See FOIA Update, Vol. XVIII, No. 1, at 5 (discussing agency obligations to produce records in requested forms or formats (citing H.R. Rep. No. 104-795, at 18, 21 (1996) (noting that amendments overrule Dismukes v. Dep't of the Interior, 603 F. Supp. 760, 761-63 (D.D.C. 1984), which previously allowed agency to chose format of disclosure if it chose "reasonably"))); see also FOIA Update, Vol. XIX, No. 1, at 6 (encouraging agencies to consider providing records in multiple forms as matter of administrative discretion if requested to do so).

175. Yeager v. DEA, 678 F.2d 315, 321 (D.C. Cir. 1982); see Long v. IRS, 596 F.2d 362, 364-65 (9th Cir. 1979); see also FOIA Update, Vol. XVII, No. 4, at 2 (citing 5 U.S.C. § 552(f), as amended); FOIA Update, Vol. XI, No. 2, at 4 n.1.

176. See FOIA Update, Vol. XIX, No. 3, at 1 (stressing congressional interest in "affirmative disclosures" of government information); id. at 5-6 (Department of Justice congressional testimony emphasizing same); FOIA Update, Vol. XIX, No. 1, at 1 (discussing Department of the Air Force affirmative electronic information disclosure program); FOIA Update, Vol. XVIII, No. 1, at 3 (advising that agencies may choose to meet their "paper" reading room responsibilities through placement of computer terminals in their "conventional" reading rooms); FOIA Update, Vol. XVI, No. 1, at 1-2 (promoting efficient agency disclosure through early Internet activity and other electronic means); FOIA Update, Vol. XV, No. 4, at 3 (proposed electronic record FOIA principles); see also FOIA Update, Vol. XVII, No. 1, at 1-2 (describing use of document imaging in automated FOIA processing).

177. Pub. L. No. 104-231, § 4, 110 Stat. 3048, 3049 (codified as amended at 5 U.S.C. §§ 552(a)(2), (e)(2) (2000)); see also FOIA Update, Vol. XIX, No. 1, at 3-5 ("OIP Guidance: Electronic FOIA Amendments Implementation Guidance Outline").

178. See Presidential FOIA Memorandum, reprinted in FOIA Update, Vol. XIV, No. 3, at 3 (noting that agencies have the responsibility "to enhance public access [to information] through the use of electronic information systems"); FOIA Update, Vol. XIX, No. 3, at 3-4 ("OIP Guidance: Recommendations for FOIA Web Sites"); FOIA Update, Vol. XIX, No. 2, at 2 ("Web Site Watch" discussion of agency FOIA Web sites); FOIA Update, Vol. XIX, No. 1, at 2 (same); FOIA Update, Vol. XVIII, No. 3, at 1-2 (describing early agency development of World Wide Web sites for FOIA purposes); see also *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 03/23/01) ("This [GAO] report provides an excellent basis for all agencies -- whether they were among the agencies examined by GAO as part of its study or not -- to review their current state of compliance with E-FOIA's requirements and to make any and all improvements that are needed."); FOIA Update, Vol. XIX, No. 3, at 2 (advising agencies on proper FOIA Web site treatment for annual FOIA reports, in compliance with newly enacted electronic availability

requirements of 5 U.S.C. § 552(e)(2)-(3), including through agency identification of Uniform Resource Locator (URL) for each report).

179. See 5 U.S.C. § 552(a)(6)(F); see, e.g., 28 C.F.R. § 16.6(c)(3) (2001); see also FOIA Update, Vol. XVIII, No. 2, at 2 (discussing alternative methods of satisfying obligation to estimate volume of deleted or withheld information, including "forms of measurement" to be used); FOIA Update, Vol. XVII, No. 4, at 10-11 (discussing requirements of Electronic FOIA amendments).

180. Pub. L. No. 104-231, § 4, 110 Stat. 3048, 3049 (codified as amended at 5 U.S.C. § 552(b) (2000) (concluding sentences)); see, e.g., 28 C.F.R. § 16.6(c)(3); see also FOIA Update, Vol. XVIII, No. 1, at 6 (discussing use of "electronic markings to show the locations of electronic record deletions"); FOIA Update, Vol. XVII, No. 4, at 10 (advising that statutory obligation "also codifies the sound administrative practice of marking records to show all deletions when records are disclosed in conventional paper form"); cf. Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *2 (D.D.C. May 1, 1998) (declaring that "an agency need not add explanatory material to a document to make it more understandable in light of the redactions").

181. Crooker v. CIA, No. 83-1426, 1984 U.S. Dist. LEXIS 23177, at **3-4 (D.D.C. Sept. 28, 1984); see Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11-12 (D.D.C. 1995) (finding that agencies need not provide Vaughn Index until ordered by court after plaintiff has exhausted administrative process); Schaake v. IRS, No. 91-958, 1991 U.S. Dist. LEXIS 9418, at **9-10 (S.D. Ill. June 3, 1991) (ruling that court "lacks jurisdiction" to require agency to provide Vaughn Index at either initial request or administrative appeal stages); SafeCard Servs. v. SEC, No. 84-3073, 1986 U.S. Dist. LEXIS 26467, at *5 (D.D.C. Apr. 21, 1986) (noting that requester has no right to Vaughn Index during administrative process), aff'd on other grounds, 926 F.2d 1197 (D.C. Cir. 1991); see also FOIA Update, Vol. VII, No. 3, at 6.

182. 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(C)(i); see Stanley v. DOD, No. 93-4247, slip op. at 14-15 (S.D. Ill. July 28, 1998) (finding constructive exhaustion when agency failed to provide requester with notice of administrative appeal rights regarding disputed fee estimate); Mayock v. INS, 714 F. Supp. 1558, 1567 (N.D. Cal. 1989) (denying plaintiff's request for Vaughn Index at administrative level, but suggesting that agency regulations then in effect required "more information than just the number of pages withheld and an unexplained citation to the exemptions"), rev'd & remanded on other grounds sub nom. Mayock v. Nelson, 938 F.2d 1006 (9th Cir. 1991); Hudgins v. IRS, 620 F. Supp. 19, 20-21 (D.D.C. 1985) (suggesting that statements of appellate rights should be provided even when request was interpreted by agency as not reasonably describing records), aff'd, 808 F.2d 137 (D.C. Cir. 1987); see also FOIA Update, Vol. VI, No. 4, at 6 (discussing significance of appraising requesters of their rights to file administrative appeals of adverse FOIA determinations); cf. Kay v. FCC, 884 F. Supp. 1, 2-3 (D.D.C. 1995) (upholding notification that appeals were to be filed with General Counsel even though Commission took final action on them).

183. See Oglesby v. United States Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990) (holding that an agency's "no record" response constitutes an "adverse determination" and therefore requires notification of appeal rights under 5 U.S.C. § 552(a)(6)(A)(i)); see also FOIA Update, Vol. XII, No. 2, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (superseding FOIA Update, Vol. V, No. 3, at 2).

184. See FOIA Update, Vol. XVI, No. 3, at 3-5 ("OIP Guidance: Determining the Scope of a FOIA Request") (emphasizing importance of communication with requester); see, e.g., Astley v. Lawson, No. 89-2806, 1991 WL 7162, at *2 (D.D.C. Jan. 11, 1991) (suggesting that the agency "might have been more helpful" to requester by "explaining why the information he sought would not be provided"); see also *FOIA Post*, "Anthrax Mail Emergency Delays FOIA Correspondence" (posted 11/30/01) (suggesting that agencies inform requesters of the delayed receipt of their FOIA requests due to anthrax-related mail disruptions "by sending acknowledgment letters in response to all delayed FOIA correspondence as promptly as possible upon ultimate receipt, taking pains to specify the length of the delay that was incurred in each case"); FOIA Update, Vol. XV, No. 2, at 1 (describing Department of Justice "FOIA Form Review" as example for other agencies to follow).

185. See McDonnell v. United States, 4 F.3d 1227, 1262 n.21 (3d Cir. 1993) ("Of course, we anticipate that [plaintiff] will receive the best possible reproduction of the documents to which he is entitled."); Giles v. United States Dep't of Justice, No. 00-1497, slip op. at 5 (D.D.C. June 4, 2001) (accepting that agency provided plaintiff with "best copies available" even though plaintiff asserted that they were "unreadable"); see also FOIA Update, Vol. XVI, No. 3, at 5 (advising agencies that "before providing a FOIA requester with a photocopy of a record that is a poor copy or is not entirely legible," they should "make reasonable efforts to check for any better copy of a record that could be used to make a better photocopy for the requester").

186. See FOIA Update, Vol. XVI, No. 3, at 5 (advising of procedures to be used in cases involving poor photocopies of records).

187. 5 U.S.C. § 552(a)(6)(A); see Oglesby, 920 F.2d at 63-71.

188. 28 C.F.R. § 16.6(c).

189. 5 U.S.C. § 552(a)(6)(A)(ii).

190. Id. § 552(a)(6)(A)(ii), (a)(6)(C)(i).

191. Id. § 552(a)(6)(A)(ii).

Go to: Table of Contents