

FOIA MANUAL
(PROCEDURAL PORTION)

TABLE OF CONTENTS FOR FOIA MANUAL (PROCEDURAL PORTION)

CONTENTS:	<u>Page (s)</u>
I. Purpose of Manual	1
II. Intake Issues	2
A. Identifying a Proper FOIA Request	2
B. Reading Room Documents	4
C. Time Limits	5
D. Assumption of Costs by Requester	9
E. Advance Payments	10
F. Estimating Costs	11
III. Processing the FOIA Request	12
A. Assigning the FOIA Request	12
B. The FOIA Docketing System	12
C. The FOIA File	15
1. FOIA Cover Sheet/NLRB Form 4933	15
2. Communications Log and Correspondence	16
3. Time Log	16
4. The FOIA Inventory	17
5. Copy of all Responsive Documents Within the Scope of the Request	18
6. Working Copy of All Responsive Documents	19
7. Copy of All Disclosures (Grease Pencil/White Out Copy)	19
8. Copy of Determination Letter Signed by Regional Director	19
IV. FOIA Searches	21
A. Generally	21
B. Identifying the Scope of the Request (Determining What Records are Responsive)	22
C. The Search for Responsive Records	24
1. How to Conduct a Search	24
2. How to Organize Documents Retrieved During the Search	26
V. Preparing Documents for Release	28
A. Generally	28
B. The FOIA Processor's Working Copy	30
C. The Disclosed Document: Grease Pencil/White Out Copy	30
D. The Final Copy for Release	31
E. Pointers on Redactions	31
VI. Assessing Charges to the Requester	33
VII. FOIA Requests for Information Arguably Covered by Exemption 4	34

TABLE OF CONTENTS CONT'D:

Page (s)

VIII. Agency Release Policies	37
A. General Release Policy.....	37
B. Discretionary Disclosure	38
C. Policies Relating to Affidavits	45

FOIA MANUAL (PROCEDURAL PORTION)

I. Purpose of Manual

This internal procedural manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to authority under Section 3(d) of the National Labor Relations Act. It is intended only to provide procedural and operational guidance for the Agency's staff in the handling of FOIA requests made to the Agency. The manual contains instructions for how to process a FOIA request—including threshold procedural issues, case assignment, creation of a FOIA Docket and File, search procedures, preparation of responsive documents for release and assessment of charges. In addition, because of the possibility of appeal and litigation if a FOIA request is denied in whole or in part, the manual sets forth the Agency's positions, strategies and tactics for FOIA processors to keep in mind while responding to FOIA requests. These guidelines are not Board rulings or directives and are not a form of authority binding on the General Counsel or the Board. They are not intended to be and should not be viewed as binding procedural rules, nor should they be construed as creating any legally enforceable rights on the part of FOIA requesters.

Further, it is recognized that strict compliance in all cases with the FOIA procedures set forth in this Manual, while desirable, is not always necessary or possible. Strict compliance is required in all cases where the FOIA determination might be appealed or litigated. However, where the requester asks for routine material¹ or where there is full disclosure, the Regional Office need only fill out NLRB Form 4933² and keep a copy of the request and its reply, which

¹ Routine requests include, but are not limited to, election results and/or election logs; petitions, unfair labor practice charges, certifications, dismissal letters, and tallies of ballots.

² It is recommended that NLRB Form 4933 be utilized as it sets forth the required information in an easily accessed manner and can be used to record the data required by the EFOIA Amendments for reporting purposes. For a discussion of the information

sets forth in detail what has been disclosed. The documents that are disclosed need not be duplicated and kept in a FOIA file as long as the Regional Office can produce that material should questions later arise. Further, where there is partial disclosure, and the Regional Office is confident that the case will not be appealed,³ again the Regional Offices need only fill out NLRB Form 4933, keep a copy of the request and the Region's detailed response, explaining what has been disclosed and what has not been disclosed, **and** keep copies of materials that have been furnished in their redacted form. There is no need to keep the copies of the original documents in a FOIA file if the Regional Office can later reconstruct what was or was not produced. ***The critical point is that the Regional Offices should have a system in place which permits it to exactly reconstruct what documents were considered responsive and what documents were or were not produced and in what form, should there be an appeal to a FOIA response.*** Accordingly, the level of compliance with the procedures set forth in this Manual will depend on the circumstances surrounding each FOIA request. Any questions regarding compliance with these procedures should be addressed to the Headquarters' FOIA Officer or the Special Litigation Branch.

II. Intake Issues

A. Identifying a Proper FOIA Request.

Under Subsection 102.117(c) of the NLRB Rules and Regulations, a proper FOIA

required to be furnished in FOIA cases pursuant to the EFOIA Amendments, see pages 13-14, *infra*.

³ In determining whether the Regional Office's response will be appealed, the Regional Director should consider the scope of the request, the complexity of the FOIA case, whether similar FOIA requests have been appealed and/or litigated, and the identity of the requester.

request must (1) be in writing;⁴ (2) reasonably describe the records sought in a manner that permits their identification and location;⁵ (3) be clearly marked on the face of the letter and the envelope as a FOIA request⁶; (4) contain a specific statement assuming financial responsibility for the costs of responding to the request;⁷ and (5) be addressed to the office where the records are located.⁸

⁴ Facsimile transmissions of FOIA requests and appeals are permitted (29 C.F.R. 102.117 read with 102.114(f)). **See Proposed FOIA Regulations (102.117(c)(1)), attached to Manual Substantive Portion as Substantive Appendix (“SA”) SA 29.**

⁵ A description of a requested record is sufficient if it enables a professional agency employee familiar with the subject area to locate the record “with a reasonable amount of effort”. H.R. Rep. No. 876, 93 Cong., 2d Sess. 6 (1974). See also, 5 U.S.C. 552(a)(3)(C) (“reasonable efforts to search for records in electronic form. . . .”)

⁶ If a written request is made for Board records without the explicit invocation of the FOIA, 29 C.F.R. § 102.118, or any other statute, rule, or regulation, it ordinarily should be handled as a FOIA request, even if not labeled as such. Further, most FOIA requests, even those that are technically not in compliance with the requirements of 29 C.F.R. 102.117(c)(1) as to form, are immediately identifiable as FOIA requests and should be processed within the appropriate time limits. If necessary, a Region may rely upon the requirements of 102.117(c)(1) to justify a delayed response in the event a request is buried in a document that also has some other purpose, such as in a position statement.

⁷ If a request does not reference payment of fees, it is necessary to contact the requester to advise him that the time limits for processing do not begin to run until an assurance of payment is made. See full discussion of time limits, infra.

⁸ Requests for records in Regional or Subregional offices should be addressed to those offices. Requests for records maintained by the General Counsel’s office in Washington should be addressed to the Freedom of Information Officer. Requests for records maintained by the Board should be made to the Executive Secretary of the Board. **See Proposed FOIA Regulations, SA 29 reflecting the revised procedure for requesting Inspector General records.** Requests made to the wrong office should be forwarded to the appropriate office and the time for processing the request does not commence until is it received by that office.

B. Reading Room Documents

There is a category of documents under the FOIA that are treated differently from routine FOIA requests. Reading Room documents are documents which the FOIA, 5 U.S.C. 552(a)(2), requires an agency to make available for public inspection and copying and, therefore, are not included within those documents which the Agency is required to disclose pursuant to a FOIA request made under 5 U.S.C. § 552(a)(3).⁹ These Reading Room documents include (1) final opinions rendered in the adjudication of cases; (2) Agency policy statements; and (3) administrative staff manuals and instructions to staff that affect the public. 5 U.S.C. § 552(a)(2). Accordingly, a response to a request for Reading Room documents need only direct the requester to the availability of the documents in the Reading Room.

The Electronic Freedom of Information Act Amendments of 1996 (5 U.S.C. 552, West Supp. 1997) (“EFOIA Amendments”) added a fourth category of documents to be made available in the agency’s reading room -- records which have been disclosed in response to a FOIA request and which “the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.” 5 U.S.C. § 552(a)(2)(D).¹⁰ This category of documents is treated differently from other Reading Room documents, however. When a request is made for the new Reading Room category of frequently-requested

⁹ That is, the FOIA requires agencies to disclose documents made pursuant to a valid request, “[e]xcept with respect to the records made available under paragraphs (1) [Federal Register publications] and (2) [Reading Room documents]” 5 U.S.C. 552(a)(3)(A).

¹⁰ At some point, agencies may determine that some such records no longer fall within this Reading Room category.

documents (5 U.S.C. § 552(a)(2)(D)), they must be provided to a requester despite their placement in the Reading Room.¹¹

If a person requests a “true” Reading Room document from the Region, and the Region cannot produce the material, the person should be directed to go to the Reading Room in Washington, D.C. or request, in writing, such Reading Room material from the Headquarters’ FOIA Officer. Alternatively, and preferably, the person can be directed to the Agency’s home page (<http://www.nlr.gov/foia/reading.htm>) which contains most of the Reading Room documents. Access to a computer and the web site does not have to be provided by the Regional office,¹² but access to the Internet is available in most public libraries. The Agency is under no legal obligation to supply documents otherwise available in the Reading Room.

C. Time Limits.

The Region must respond to a FOIA request within 20 working days of its receipt by issuing a Determination Letter granting or denying the request and including notification of any

¹¹ To properly implement this change, if the Regions have consistent requests for items that would be of national interest, those documents, properly sanitized, should be forwarded to the FOIA Officer at Headquarters for consideration for placement in the Agency Reading Room.

¹² Regions may choose to create mini-Reading Rooms (and many do exist) which would meet the FOIA’s requirement for inspection as well as copying mentioned above. Further, as a customer service and to ease the Region’s burden under the fourth category of Reading Room documents, a separate copy of the public documents most frequently requested, such as charges, petitions, complaints, dismissal letters, and certifications could be filed, by date, in separate binders for use by the public in a designated area in the Regional office. In addition, at least one Region has created a web page which could serve a similar function.

charges.¹³ Thereafter, the Region must “promptly” make the documents encompassed by its response available to the requester.¹⁴ Typically, the responsive documents will be sent with the Determination Letter.

The Region may take additional time (10 working days or more if agreed to in writing after communicating with the requester) to issue the Determination Letter based upon certain prescribed “unusual circumstances” “reasonably necessary to the proper processing” of a particular request. These “unusual circumstances” are restricted to the need to search for and collect records from facilities separate from the processing office (including federal records centers); to search for, collect and review a voluminous number of documents, or for consultation between components of the Agency or with other agencies that have a substantial interest in the requested records, which is required to be done “with all practicable speed.”¹⁵

Regions should strictly observe the FOIA’s time limitations. The Region’s failure to comply with the FOIA’s time provisions automatically constitutes exhaustion of administrative remedies by the requester, and confers immediate *de novo* jurisdiction to the federal district

¹³ 5 U.S.C. 552(a)(6)(A)(i). The term “working days” is defined as calendar days, excluding Saturdays, Sundays, and full legal holidays. Accord: 29 C.F.R. 102.117(d)(1)(viii).

¹⁴ 29 C.F.R. 102.117(c)(2)(iii).

¹⁵ 5 U.S.C. 552(a)(6)(B)(iii)(I)-(III); 29 C.F.R. Section 102.117(c)(2)(iii)(A)-(C). Regions may aggregate requests if the Region “reasonably believes” they are actually a single request, which would “otherwise satisfy the unusual circumstances” standards, just mentioned, and involve “clearly related matters.” 5 U.S.C. 552(a)(6)(B)(iv); 29 C.F.R. 102.117(d)(2)(iii)(B). For additional reasons to aggregate requests, see infra.

court over the request.¹⁶ This allows the requester to circumvent the administrative appeals process, if he elects to file a lawsuit. However, the requester loses his right to sue based solely on the expiration of the administrative time limits, if the Region provides a late response to the request prior to the time the requester actually files a lawsuit.¹⁷

Once a lawsuit is filed, if the agency can show that “exceptional circumstances” exist and that it is exercising “due diligence” in responding to the request, the court may retain jurisdiction but allow the agency additional time to review the records.¹⁸ A requester’s “refusal to arrange an alternative time frame for processing the request (or modified request)” is a factor in determining whether or not “exceptional circumstances” exist so that a court may extend the applicable time limits for the agency’s response to the request.¹⁹ “Predictable agency workload” does not constitute “exceptional circumstances . . . unless the Agency demonstrates reasonable progress in reducing its backlog of pending requests.”²⁰

¹⁶ 5 U.S.C. 552 (a)(6). . See, Gilmore v. U.S. DOE, 4 F. Supp. 2d 912, 924-925 (N.D. Ca. 1998) and cases cited therein (Court granted discovery to plaintiff who alleged pattern and practice of unreasonable delay in responding to FOIA requests).

¹⁷ Oglesby v. U.S. Department of the Army, 920 F.2d 57, 63 (D.C. Cir. 1990).

¹⁸ 5 U.S.C. 552(a)(6)(C)(i).

¹⁹ 5 U.S. C. 552(a)(6)(C)(iii) and B(ii).

²⁰ 5 U.S.C. 552 (a)(6)(C)(ii). Some agencies, not the NLRB, have had huge FOIA backlogs. Over the years they have been able to obtain a stay of judicial proceedings on the basis of their FOIA backlog under Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C.Cir. 1976). However, this new section will limit an agency’s ability to obtain such a stay in the future. Further, the EFOIA Amendments provide, for flexibility purposes and to reduce backlogs, that Agencies may establish regulations regarding the “multitrack processing of requests” based on the amount of work and/or time (or both) involved in processing the request. 5 U.S.C. 552(a)(6)(D)(i)-(iii). An agency using multitrack processing may notify the requester who does not qualify for the fastest multitrack processing of the “unusual circumstances,” specify that additional time is required and offer the requester the opportunity “to limit the scope of the request” in order to qualify for faster processing. 5 U.S.C. 552(a)(6)(B)(i)-(iii). There is then an incentive for the requester to narrow the FOIA request. The Agency has determined that because it does not have a backlog it does not need to institute a multitrack processing system. **See Proposed FOIA Regulations (SA 29).**

Finally, the EFOIA Amendments require that agencies promulgate regulations for “expedited processing” of requests in cases of “compelling need” and “as determined by the Agency.”²¹ “Compelling need” exists if the “failure to obtain requested records could reasonably be expected to pose an imminent threat to the life or physical safety of an individual” or in the case of a request by a “person primarily engaged in disseminating information [e.g. a journalist], urgency to inform the public concerning actual or alleged Federal Government activity.”²² A FOIA requester must make a request for expedited processing with a “certification” of “compelling need.”²³ Merely alleging that the public has a right to know is insufficient to meet this standard.²⁴

²¹ 5 U.S.C. 552(a)(6)(E)(i). The Agency has proposed such regulations. **See Proposed FOIA Regulations (SA 29).**

²² 552(a)(6)(E)(v).

²³ 552(a)(6)(E)(vi).

²⁴ Within 10 calendar days after the date of the request the Agency must decide whether to grant the expedited processing and to give the requester notice of the determination. 552(a)(6)(E)(ii)(I). In making this determination, the Agency will have to make factual and credibility findings. If expedited processing is granted, the Agency shall process the requests “as soon as practicable.” 552 (a)(6)(E)(iii). If expedited processing is not granted, the Agency’s regulations “must ensure” “expeditious consideration” of administrative appeals of the denial. 552(a)(6)(E)(ii)(II). **See Proposed FOIA Regulations.** Agency action denying or affirming a denial of a request for expedited processing and Agency failure to timely respond to such a request shall be subject to judicial review based solely on the administrative record (of correspondence). 552(a)(6)(E)(iii). Once a complete response to the request for documents is given to the requester by the Agency, the district courts have no jurisdiction to review an agency denial of expedited processing. 552(a)(6)(E)(iv).

D. Assumption of Costs by Requester.

Before undertaking a search, the FOIA processor must determine whether the requester has agreed to assume the costs of processing the request, and if so, whether he has placed any restrictions on the amount he will pay. Assumption of financial liability is required in all requests. 29 C.F.R. 102.117(d)(2)(vi). In the event that a requester fails to assume full liability or assumes liability in a specific amount insufficient to cover the anticipated charges, the requester is to be notified and given an opportunity to assume full liability in writing. A request is deemed not to be received by the Board, and the 20 working days for response does not begin to run, until there has been a full assumption of liability for fees in writing. Id. Further, under Section 102.117(d)(2)(vi)(A), the FOIA processor still must give separate notice to the requester if, during processing of the request, he becomes aware, for the first time, that the costs are expected to exceed \$250.00, unless this has been made clear to the requester from the outset and he has agreed to accept such costs in writing.

Whenever the Region "reasonably believes" that a requester, or a group of requesters acting together, is attempting to escape fees by submitting a series of individual requests, the Region may, after notification, aggregate such requests, impose the appropriate fees and require the assumption of liability in writing. 29 C.F.R. §102.117(d)(2)(iii)(B). **See revised language in Proposed FOIA Regulations.** The OMB Guidelines (52 Fed. Reg. at 10,019-20) should be consulted for additional guidance on aggregating requests. See SA 15.

E. Advance Payments

Prepayment of charges prior to beginning the search generally is not required unless the requester previously has been delinquent.²⁵ However, a requester who previously has not made a request is required to make an advance payment if the cost of processing the request is anticipated to exceed \$250.00. For requesters with a history of prompt payment, a written assurance of payment is sufficient before beginning the search. 29 C.F.R. §102.117(d)(2)(vi)(A). In addition, no FOIA requests from delinquent requesters should be processed. That is, before a new request from a requester who is overdue in paying charges for a prior request can be processed, the Region should require him or her to pay the outstanding amounts plus interest, as well as the estimated costs in advance of processing the new request. 29 C.F.R. §102.117(d)(2)(vi)(B).²⁶ When prepayment is required in either of these circumstances, the requester should be advised that applicable administrative FOIA time limits for response and appeal begin to run only after such prepayment amounts are received. Id.

²⁵ This restriction on advance payment, however, does not prevent requiring payment before records which have been processed are released. See Strout v. United States Parole Comm'n, 40 F.3d 136, 139 (6th Cir. 1994).

²⁶ The Region may begin to assess interest on unpaid charges on the thirty-first day after the notification of charges was sent. 29 C.F.R. §102.117(d)(2)(v). Interest will accrue from the billing date at a rate prescribed in 31 U.S.C. §3717. The rate changes annually, and the new rate is usually published in the Federal Register. As noted above, a requester becomes delinquent for purposes of payment of fees on the thirty-first day after fees are assessed, despite the filing of an appeal. Requesters should be advised that timely payment of fees must be made, under protest if necessary, to avoid being deemed a delinquent requester required to make advance payment for subsequent requests. In addition to the Headquarters' FOIA Officer, the Division of Operations Management and the Office of Appeals should be advised as to all delinquent requesters.

F. Estimating Costs.

For delinquent requesters (those who have failed to pay FOIA fees within thirty-one days of assessment), Regions shall estimate the fees which will be associated with processing subsequent requests by those requesters. This estimate is calculated by estimating the amount of professional and clerical time and duplication charges, at the rates set forth in the Board's regulations,²⁷ that will be required to process the request. The Region shall transmit this estimate to the requester together with an explanation of the estimate and the requester's delinquent status under the regulations and an assertion that the request will not be processed and the 20-day time limit for response will not begin to run until the estimated costs are paid in full.

To ensure that the Regions are fully informed as to the identity of requesters who have not paid overdue charges, the Regions should submit to the Headquarters' FOIA Officer--who will forward to the Division of Operations Management, the Office of Appeals, and the Finance Branch--the names of those persons or organizations who have been delinquent remitters of FOIA fees. If the Region has any reservations about the requester's good faith in making assurances of payment, the Finance Branch should be contacted for a list of persons who have failed to pay FOIA costs and for whom further FOIA searches will not be undertaken without prepayment. In addition, in the event the Regions are unable to collect moneys due after notification of charges due in the Determination Letter, see *infra.*, a second letter requesting payment should follow. (See Procedural Appendix ("PA") attached hereto, PA 36 for sample letter.) If payment is still not made, the name of the delinquent requester should then be

²⁷ 29 C.F.R. 102.117(d)(2)(i). Note that paralegal time should be billed as professional time. **See Proposed FOIA Regulations, SA 29.**

forwarded to the Headquarters' FOIA Officer and the Division of Operations Management for collection purposes. Consideration will then be given at Headquarters to any further collection efforts, including litigation.

III. Processing the FOIA Request

A. Assigning the FOIA Request.

Because of statutorily imposed deadlines, a FOIA request should be identified as priority correspondence and brought to the immediate attention of the Regional Director for routing to the FOIA supervisor and immediate assignment to a FOIA processor. Further, Special Litigation should be contacted prior to issuance of the Determination Letter if, based on the nature of the issues in the case or past experience with the requester, the Region determines that there is a good chance that the requester will sue.

Notwithstanding the importance of the proper enforcement of the FOIA in fulfilling the Agency's mission, as set forth in the "Purpose" section, supra, it is recognized that strict compliance in all cases with the FOIA procedures set forth in this Manual, while desirable, is not always necessary or possible. Strict compliance is, however, critical in certain cases. Any questions regarding compliance with these procedures should be addressed to the Headquarters' FOIA Officer or the Special Litigation Branch.

B. The FOIA Docketing System

Each Region should create a FOIA docketing system—comparable to its general casehandling system—to track the processing of all FOIA requests. This is because under the FOIA, the burden is on the Agency to show what records were searched, by whom, and through what process, and to justify its refusal to disclose responsive documents within the

scope of a request.²⁸ The use of a FOIA Docketing System also is essential in light of the stringent reporting requirements regarding FOIA processing promulgated by the EFOIA Amendments. Thus, starting with fiscal year 1998 (October 1, 1997) the Regions must submit to the Division of Operations Management data on the following basic required elements for annual FOIA reports:

1. The number of requests for records pending before the Region as of the end of the previous fiscal year.
2. The number of requests for records received by the Region during the current fiscal year.
3. The number of requests that the Region processed during the current fiscal year.
4. The median number of days taken by the Region to process these requests.
5. The number of requests from parties to proceedings before the Region for documents concerning the proceeding to which they were a party.
6. The number of requests that were pending before the Region as of the end of the current fiscal year.
7. The median number of days that such requests were pending before the Region as of the end of the current fiscal year.
8. The number of requests that were granted in full; that were granted in part; and that were denied in full.
9. The total number of times each FOIA Exemption and any other reason for an adverse determination was relied upon during the current fiscal year.²⁹

²⁸ 5 U.S.C. 552(a)(4)(B).

²⁹ In addition to the application of the FOIA Exemptions, reasons for non disclosure include that: the requested records do not exist or are not reasonably described; the request is not a proper FOIA request; the request is not for an "agency record"; the request has been referred to another agency or agency component; the request is a duplicate request or has been withdrawn; the requester refuses to pay assessed fees; and "other".

10. A complete list of all statutes that the Region relied upon to withhold information under Subsection (b)(3).³⁰
11. A description of whether a court has upheld the decision of the Agency to withhold information under each such statute.
12. A concise description of the scope of any information withheld under each such statute.
13. The total amount of fees collected by the Region for processing requests.
14. The number of full-time and part-time clerical, professional through GS-13, and professional Grade GS-14 and above staff devoted to processing requests for records under the Act.³¹

This tracking system begins upon receipt of a FOIA request (which should be time-stamped in the same manner as all other regional office correspondence) through the transmittal of the Regional Director's Determination Letter with the notification of charges and the release of documents, if appropriate. It should include the critical case activity reflected in the required elements for the annual FOIA reports.

³⁰ Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), incorporates the disclosure prohibitions that are contained in various other federal statutes. While the Agency rarely withholds information under this provision, it has relied upon the Inspector General Act of 1978, 5 U.S.C. App. 3 Section 7(b), to authorize withholding of identities of employee complainants. Examples of other statutes that might apply are: the Ethics in Government Act of 1978 (5 U.S.C. app. Section 107 (1994) and Section 6103 of the Internal Revenue Code (26 U.S.C. 6103 (1994) (Tax return information obtained by the Department of Treasury—not information maintained by other agencies which was obtained by means other than through the provisions of the Internal Revenue Code). Note that while the Trade Secrets Act, 18 U.S.C. 1905 (1994) and the Privacy Act of 1974, 5 U.S.C. 552a (1994) (amended 1996, 5 U.S.C.A. 552a (West Supp. 1997), do not qualify as Exemption 3 statutes, there are other significant legal consequences involving these statutes. See, FOIA Manual (Substantive Portion) Introduction referring to the Privacy Act and the Exemption 4 section.

³¹ In addition to the data from the Regions, the Agency must include in its Annual FOIA Report to Congress the following additional facts: the number of appeals made by persons under Subsection 5 U.S.C. 552(a)(6); the result of such appeals; and the total amount (including staff and all resources) expended by the Agency for processing FOIA requests.

C. The FOIA File

It is the FOIA processor's responsibility to maintain a separate Official FOIA File for each FOIA request just as is done for each unfair labor practice or representation case. In addition to improved FOIA casehandling at the Regional level, in the event of an administrative appeal or court litigation, the FOIA file will be available for review by Appeals or the Special Litigation Branch. The file should contain the following:

1. FOIA Cover Sheet/ NLRB Form 4933.

The FOIA processor should staple an NLRB Form 4933 (FOIA Request Control Form), a sample of which is attached hereto as PA 40-41 on the inside left cover of the FOIA file. NLRB Form 4933 includes, inter alia, the following information: date of request; name, address and telephone number of the requester;³² case name and number, if the request is for information from a particular case file or files; category of the requester; due date of the Region's response; a very brief description of the documents sought (e.g., "whole file", "affidavits and witness statements," "position statements" "documentary evidence"); the disposition of the request (grant, grant in part or deny); exemptions claimed or other reasons for nondisclosure; the time spent in processing the request; and the total charges assessed. The NLRB Form 4933 information will be helpful in creating the Region's submission to Operations for the Agency's annual FOIA report to the Attorney General.

³² During the processing of the FOIA request, contact with the requester is encouraged and necessary. Not only is such contact in the interest of customer service, but personal contact can clarify requests and often leads the FOIA requester to alter or narrow his request so that the FOIA processor's load is lightened.

2. Communications Log and Correspondence.

The FOIA processor should keep a log of all his communications with the FOIA requester, other parties and Agency personnel. Similarly, all correspondence to and from the requester, such as all FOIA request letters and responses thereto, and letters regarding the assumption of costs or letters confirming telephonic agreements, should be maintained in the FOIA file.

3. Time Log.

The FOIA processor must keep a Time Log. The log should reflect all time spent working on a FOIA case, including time which may be reimbursable under the FOIA for search and review. This log should be in quarter-hour increments.³³ The necessity of recording accurate information contemporaneously with the actual search and review efforts, which constitute chargeable time (depending on the requester's fee category placement) cannot be overstated.³⁴ The FOIA processor also must keep detailed notes in the FOIA file as to how he conducted his search (*i.e.*, whether manually or by computer, and, in the case of multiple

³³ See § 102.117(d)(2)(i) (Schedule of charges in one-quarter hour increments). The log should accurately reflect the specific hours in a day spent on FOIA work, the total FOIA hours for the day, and a description of activities during the time period. For example: 9:00 am to 10:00 am -- searching for responsive documents; 10:00 am to 10:30 am -- review of documents; 10:45 am to 11:00 am -- redaction of information from responsive documents. Time spent on photocopying is included in the fee for duplication of \$.12 per page and is not charged separately.

³⁴ It is not sufficient to reconstruct a time log of search and review functions after that work has been completed. An accurate contemporaneous account is necessary to enable the FOIA processor to give a detailed affidavit concerning his search and review efforts, if subsequent litigation so requires. Where the Agency can present accurate, timely records by the FOIA processor to support an affidavit, great deference is lent to the Agency's fee calculation. The calculation of fees is separate and apart from the legal issue of category placement/fee waiver, however, which is set forth in the FOIA Manual (Substantive Portion).

requests, whether there were separate searches to respond to each request or whether all requests were dealt with simultaneously in one overall search). See Sample Time Log attached hereto as PA 42-43. The total of the chargeable hours reflected in the time log should be recorded on NLRB Form 4933.

The FOIA processor should keep a running tally from the Time Log of the anticipated fees, based on the fee category placement of the requester, especially if his search and review efforts escalate beyond the original estimates that were anticipated by the requester. Section 102.117(d)(2)(vi)(A), of the Board's Rules and Regulations arguably may be interpreted to excuse the requester from paying fees in excess of \$250.00 without his advance consent after notification by the Agency.³⁵

In light of the Agency's reporting requirements to the Attorney General on FOIA processing, in addition to the chargeable or reimbursable time, the FOIA processor must keep a log of his total FOIA casehandling time. As with the chargeable hours, the total hours recorded in this log should be recorded contemporaneously with the FOIA work and be as accurate as possible. Total casehandling time would include such non-chargeable functions as drafting and proofreading the final letter, researching issues of law, and clarifying certain matters with the requester. In addition to the chargeable hours, the total FOIA casehandling time from the Time Log also should be recorded on NLRB Form 4933 in the FOIA file.

4. The FOIA Inventory.

The FOIA Inventory is the index of the responsive case files and is a critical tool in

³⁵ Please contact the FOIA Officer for further guidance if this issue occurs.

processing a FOIA request. It is the record of the FOIA processor's decisionmaking process in determining the responsiveness of a document and the application of the FOIA exemptions, if any, to the document, in whole or in part. It therefore furnishes the principal basis for reviewing the Region's FOIA decisions. The FOIA Inventory should be tailored to the amount of information requested in the FOIA request. Thus, with an all-encompassing request, all public and non-public documents must be included. All documents listed in the inventory must be clearly identified by, inter alia, title, name, and date. For example, affidavits, supplemental affidavits and attachments thereto must be clearly identified by the name of the affiant and the date of the document and all correspondence by date and the names of the sender and recipient. Similarly, all witness statements and documentary evidence must be identified with a notation as to who provided them to the Agency, or whether they were created by the investigating Board agent. All FIRs, Agenda decisions, and Board agent notes to file also must be identified in the FOIA Inventory. However, where a FOIA requester only asks for a particular document or type of document only those responsive documents need be entered on the FOIA Inventory. See Sample *Updated* FOIA Inventory attached hereto as PA 44-53.

5. Copy of all Responsive Documents Within the Scope of the Request.

The FOIA file should contain an exact duplicate of all original documents that were uncovered in the search and are arguably responsive to the request, without any extraneous markings by the FOIA processor.³⁶ This copy may be used for later reference at the

³⁶ The cost of duplicating only one copy may be charged to the requester. However, the total cost of duplication in the process of responding to the FOIA request should be marked on NLRB Form 4933 for the purposes of the Annual Report.

administrative appeal or district court litigation stage in order to avoid the need for a further duplicative search. For How to Organize Responsive Documents Discovered in a Search, see infra.

6. Working Copy of All Responsive Documents.

This is the copy used by the FOIA processor in preparing responsive documents for release with his markings showing the exemptions and indicating redactions and/or non-responsive portions with highlighter, so that the underlying material can be seen. See, infra, for How to Prepare Documents for Release and Pointers in Redaction.

7. Copy of All Disclosures (Grease Pencil/White Out Copy).

A copy of all released documents, in the exact condition in which they were released and showing the redactions and non-responsive portions, must be placed in the Region's FOIA file. As a practical matter, this is the actual copy that was redacted by the FOIA processor and later photocopied for release to the requester.³⁷

8. Copy of Determination Letter Signed by Regional Director.

All Regional responses to FOIA letters granting a request should notify the requester of that determination and the charges due.³⁸ All notifications of denials of requests, in whole or in part, should state when the FOIA request was received, notify the requester of the charges

³⁷ The purpose of keeping a copy of all disclosures in the FOIA file cannot be overstated. There have been FOIA requests in the past for "copies of all FOIA requests and responses thereto." Further, it is absolutely necessary, in the event of an appeal or lawsuit, that the reviewing office know the precise extent of all disclosures.

³⁸ 29 C.F.R. 102.117(c)(2)(i). **See revised language in Proposed FOIA Regulations, SA 29.**

due,³⁹ reasonably inform the requester of the reasons for denial including citations to any exemptions relied upon, of the right to appeal⁴⁰, and of the name and title of the person responsible for the denial.⁴¹ While, there is no requirement that the Determination Letter specify each document that will be released or withheld,⁴² it should include a sufficient description, including the title and date, so that there is a record of what was released on a particular date. This is particularly important when there is a supplemental disclosure in a case. The letter must, also, indicate the approximate amount of information withheld from disclosure, if applicable.⁴³ Parties are permitted to appeal fee issues and the letters should so indicate, although neither the FOIA nor the Board's Rules specifically provide for appeals of fee

³⁹ Note that there can be charges due even if no responsive documents are found or disclosed. See OMB Fee Guidelines, 52 Fed Reg. at 10,019, attached to the Substantive Portion of the FOIA Manual as SA 15-23.

⁴⁰ 5 U.S.C. 552(a)(6)(A)(i). Responses stating that there are “no records responsive to the request” also should contain a notification of the administrative appeals procedures. Oglesby v. U.S. Department of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990). Absent notification of appeal rights in a denial or a “no records” response, a requester can bypass the administrative appeal procedures and file a complaint directly with the district court seeking the requested records. Id., at 61-65. See discussion in “Time Limits” section, *supra*.

⁴¹ 5 U.S.C. 552(a)(6)(C)(i).

⁴² A “*Vaughn* Index” of documents withheld is not required until the litigation stage of FOIA processing. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir., 1973). This principle reinforces the necessity for a complete FOIA file, including a FOIA Inventory.

⁴³ 5 U.S.C. 552 (a)(6)(F). The requirement to estimate the volume of the denied material is not required when to do so would “harm an interest protected by [an applicable] exemption.” Id.

issues.⁴⁴ **See revised language in Proposed FOIA Regulations, SA 29.**

In the event that the General Counsel or Chairman authorizes a discretionary release of documents which might otherwise be exempt from disclosure under the FOIA, the Determination Letter should specifically state to the requesting party that the documents are being released as an act of discretion. Prior to any such discretionary disclosure, an analysis of the circumstances surrounding a particular request and the consequences resulting from such a disclosure must be made. This is because such a discretionary disclosure will waive the Board's right to protect the identical information in the future.⁴⁵ However, similar documents in other cases, or even in the same case could be protected. See discussion of "Discretionary Disclosure," *infra*, and "Waiver" in the FOIA Manual (Substantive Portion).

IV. FOIA Searches

A. Generally

For purposes of the FOIA, the term search means "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."⁴⁶ FOIA processing in the Regions and throughout the Agency must necessarily be a team effort to assure maximum effectiveness in compliance with the mandates of the FOIA. In

⁴⁴ The FOIA does not specifically require that agencies establish administrative appeals procedures concerning fee issues. Cf., 5 U.S.C. 552(a)(6)(A)(prescribing administrative appeals procedure for agency nondisclosure of documents).

⁴⁵ See, e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 179, 180 (8th Cir. 1978)(Government waived its right to protect information when it had voluntarily surrendered the documents in previous litigation, even where it had expressly reserved its right to assert at a later time that the documents were privileged.)

⁴⁶ 5 U.S.C. 552(a)(3)(D). The Agency's electronic search efforts for documents for a particular FOIA request may result in the creation of another document or documents reflecting the search methodology or program and/or result. This document or documents would not be responsive to the FOIA request for which the search has been undertaken. Such material would only be responsive to a later separate FOIA request for the search methods utilized.

responding to a FOIA request, the Region should do a complete search the first time and locate all documents that are arguably within the scope of the request. As stated before, the Agency must be able to document what records were searched, by whom, and through what process. Search efforts must, above all, “be reasonably calculated” to locate the requested records,⁴⁷ based on the judgment of Agency personnel who are experienced in all aspects of the Agency’s casehandling and recordkeeping systems and who are responsible for keeping the records containing the requested information. However, a FOIA processor is not required to look for a needle in a haystack or to do research for the requester.

B. Identifying the Scope of the Request (Determining What Records are Responsive).

The FOIA processor now must determine the scope of the FOIA request. That is, he must determine the records and information that are responsive to a FOIA request. The precise language of the request will direct the search. With simple requests for particular case files or documents within an identified case file, the scope of the FOIA request is easily identified. In complex requests, the FOIA processor must analyze the request and parse it out to fully understand what information is being sought. If there is any doubt as to what the requester seeks, the FOIA processor should contact the requester by telephone to clarify the request. Some FOIA requesters who lack knowledge of the Agency’s recordkeeping system, phrase the scope of their requests so broadly that almost anything technically could be included, with the result that the request is either unwieldy or virtually meaningless. Such requests should be

⁴⁷ Kowalczyk v. Department of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996); Cf. Oglesby v. United States Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990).

treated in the same manner as ambiguous requests, and the FOIA processor should contact the requester to aid him in tailoring the scope of his request to those documents that he truly wants (and is willing to pay for). Clearly, the volume of the records within the scope will have a direct impact on the fees charged.

Once there is a true understanding of the request - which may require a team effort - as with any other investigation, the FOIA processor must map out a strategy for responding to the request. It can be helpful to consult with other staff members and conduct a “brainstorming” session. This includes determining whether or not the records sought are agency records and whether or not a computer search can and should be done, as well as locating all of the possible records which might be responsive to the request, including those in other Agency offices. As stated above, it is the FOIA processor’s responsibility to do a complete search *the first time*.

Not all records determined to be within the scope of the request are necessarily entirely responsive to the request.⁴⁸ For example, a document may contain multiple subjects, only one of which pertains to the subject of a particular FOIA request. That part of the record that is “outside the scope” of the request would be redacted as non-responsive. Further, a request for all correspondence between the Region and a party would not include correspondence that postdates the date of the receipt of the FOIA request (because FOIA requests are not continuing requests).⁴⁹ Further, a request for correspondence from a party to the Region would not

⁴⁸ The FOIA processor must keep in mind that the inquiry as to what is responsive is entirely separate and apart from the issue of whether the subject records are disclosable.

⁴⁹ See Blazy v. Tenent, 979 F. Supp. 10, 17 (D.D.C. 1997) aff’med 1998 WL 315583 (D.C.Cir. May 12, 1998)(holding that agency’s use of date of receipt of request as cut-off date for search for responsive records was reasonable); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 10 (D.D.C. 1995) aff’d, 76 F.3d 1232 (D.C.Cir. 1996); Church of Scientology v. IRS, 816 F. Supp. 1138 (W.D. Tex. 1993); Mandel, Grunfeld & Herrick v. U.S. Customs Serv., 709 F.2d 41, 43 (11th Cir. 1983) (plaintiff not entitled to automatic mailing of materials as they are updated).

include correspondence from the Region to a party. Moreover, in determining what records are responsive, the FOIA processor must pay precise attention to the requester's terminology in phrasing his request and fairly interpret the request. For example, arguably a request for "the evidence which formed the basis for a decision" is distinguishable from a request for the "basis for the decision." The former could be said to encompass evidentiary materials, such as witness statements and letters, while the latter (without further clarification from the requester) could be said to refer to the Agency's privileged internal deliberations and legal conclusions. Where requests are ambiguous, as just shown, the FOIA processor should call the requester for clarification.

C. The Search for Responsive Records.

1. How to Conduct a Search.

Once a determination is made as to what records are within the scope of the request, then a search for those records must be undertaken. As stated above, in most cases, the search is a relatively simple task, because the requester has identified a particular case file by name and number, so that the FOIA processor knows exactly where the requested information is located and whether it is contained in any Regional Office files.

In many instances, however, the search task is more difficult, either because it involves multiple case files or categories of files, the case file is voluminous, the case currently may be in active litigation, or because the records sought do not pertain to a particular case or cases that are identified by name and case number. Indeed, the FOIA processor sometimes may not

even be aware whether or not the records exist at all, and must investigate the matter by examining the Region's or particular Office's filing system and by consulting with other Regional or Office personnel.

Computers have vastly increased the amount of information that is available for searching.⁵⁰ The EFOIA Amendments apply a general "reasonable efforts" standard to an agency's search obligation in connection with electronic records. They provide that "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C). The Region should contact the Headquarters' FOIA Officer who will contact the Information Technology Branch (ITB), at Headquarters, if there is some doubt that all responsive documents have been retrieved and to determine whether the Agency has the capability of searching for documents in a more extensive manner. That is, the Headquarters' FOIA Officer (as liaison to ITB) should be contacted if the Region or Office believes that requested information might be accessible on an existing computer program or that a computer program can be created or modified to retrieve such information.⁵¹ Further, when processing a FOIA request, the processor should contact all

⁵⁰ If information can be located, it must be retrieved in the most expeditious and cost efficient manner. Thus, if information can be found through CHIPS/CATS in a matter of minutes, a manual search through files that might take many hours would not be justified, and the Region would not be entitled to charge the requester for the manual search.

⁵¹ In the EFOIA Amendments, government agencies are required to provide FOIA requesters with disclosures in the format desired by the requester. 5 U.S.C. 552 (a)(3)(B). To the extent that a FOIA requester requests the Agency's response on computer disk, you should contact the FOIA Officer who will coordinate with ITB whether the requester demand may be satisfied and the costs for reproduction.

employees in the Region and/or in Headquarters who have worked on, or had any involvement with, the subject of the FOIA inquiry and request that they search for any responsive e-mail messages.⁵² As noted above, the FOIA requires that such determinations be made based on a “reasonable efforts” standard.

2. How to Organize Documents Retrieved During the Search.

The FOIA processor should review all relevant files uncovered during the search to cull out all arguably responsive documents. A copy of all original responsive documents that are retrieved in the search must be removed from the file or location where they were found, and three complete copies must be made for the FOIA file.⁵³ The originals should immediately be returned to the case file. One set of the copies should be placed in the FOIA file as the “Responsive Documents.” The second set of copies of these arguably responsive documents

⁵² Employees should be reminded that our e-mail system (Lotus cc: mail) has the capability of searching for messages (under “Tools”), and that messages can be stored in “folders,” which can make it easier to retrieve responsive documents. Likewise, all employees who have had any involvement with the subject of the FOIA inquiry should be contacted to retrieve other responsive electronic records such as records in word processing programs. Again, Microsoft Word and similar programs have search capabilities to assist in locating documents.

⁵³ Non-responsive or exempt whole pages of documents with consecutive pages, such as letters or statements, also should be copied. The reason is to enable the requester to know the length of the responsive document. Rarely is it necessary to disclose a completely blank page, however, because usually at least some portion of the page, such as the page number, is not exempt from disclosure.

then should be separated into piles and tabbed as Disclosable,⁵⁴ Exempt, in whole or in part,⁵⁵ or Uncertain. (The third set of documents will be used to create the grease pencil/white-out copy, see infra.) During this search, the processor also should fill out the FOIA Inventory to index the documents and indicate the FOIA Exemptions claimed. The status of Uncertain documents can be clarified through consultation with the FOIA supervisor, Regional Attorney and Director and with the assistance of the Headquarters FOIA Officer and/or Special Litigation, if litigation is expected. See also, FOIA Manual (Substantive Section) for assistance in the application of the FOIA Exemptions.

A FOIA requester is entitled to a copy of all copies of a requested document which is uncovered in the search if it differs from any other copy in the slightest fashion, *i.e.*, faxed copy or signed original. Rarely, however, do requesters want every copy of a document unless there are substantive differences. Accordingly, the best practice is for the FOIA processor to contact the requester to seek clarification of the request. The processor can suggest that only the clearest copy in the file be supplied in order to shorten the time for response and limit the cost to the requester.⁵⁶

⁵⁴ Notwithstanding that a document may technically be exempt, the Agency may, in its discretion, determine that it is disclosable because there would be no foreseeable harm in turning it over. For a complete discussion of the standard of foreseeable harm and the application of the discretionary disclosure, see “Discretionary Disclosure” section, *infra*.

⁵⁵ With respect to “partially exempt” documents, the FOIA requires that any reasonably segregable portion should be disclosed. 5 U.S.C. 552(b). Further, portions of otherwise disclosable material may be non-responsive. This requires a line by line review of the document in question.

⁵⁶ If the requester decides, after clarification, that he wants “copies of all copies”, he must make a new FOIA request which clearly includes the copies so that the new request can be processed within the appropriate time limits.

The FOIA processor must take care to manage in an organized fashion all the original responsive documents uncovered in his search, as well as the copies for the FOIA file, which must exactly match the order of the originals. This is especially important in the event of an appeal or lawsuit. Indeed, in the event of an appeal or a lawsuit, the Regions must send the documents in question to Washington for review. Thus, the FOIA processor must make sure that the pages of multi-page documents are in consecutive order, that documents are complete, that the original documents are accurately copied,⁵⁷ that fax cover sheets or memoranda remain attached to the appropriate documents and that all documents are identified to indicate the portion of the request to which they are responsive.⁵⁸

V. Preparing Documents for Release.

A. Generally

After it has been determined which documents or portions thereof are disclosable either pursuant to the FOIA or in the Agency's discretion, the FOIA processor must prepare them for release by making redactions to show exempt and non-responsive portions. As discussed with regard to the contents of the FOIA file, *supra*, the FOIA processor should initially make three

⁵⁷ He must assure that all documents are properly photocopied so that no markings on the outer edges are left out. This sometimes requires that documents be photocopied one at a time or in reduced-size format, rather than by means of automatic feed.

⁵⁸ If one document, such as a letter, is responsive to different parts of the request, *e.g.*, it is an attachment to a requested witness statement, but is also responsive on its own as one of "all letters," then only one copy need be furnished, with an explanation that the letter was also an attachment to the witness statement.

complete copies of all pages of arguably responsive documents.⁵⁹ One is the original copy of the arguably responsive document. This copy should not be marked in any manner. The second copy serves as a working copy and shows the redactions highlighted with reasons so that the underlying text is readable.⁶⁰ The third copy is the grease pencil/white-out copy on which redactions are made and the reasons indicated and serves as the copy which is photocopied for release to the requester. All three copies must be kept in the FOIA file. The third copy is especially important because it indicates the precise extent of all material disclosed and withheld. However, it is only usable for this purpose if the working copy and clean copy are also available in the file for comparison.

Again, where information is withheld pursuant to an exemption, any reasonably segregable portion must be provided.⁶¹ The EFOIA Amendments further provide that the basis for the deletions must be indicated, either electronically or manually, on the released portion of the document, if technically feasible, in the place in the record where the deletion is made, unless including the indication would harm a protectible FOIA interest.⁶²

⁵⁹ Again, while the cost of duplicating only one copy may be charged to the requester, the total cost of duplication in the process of responding to the FOIA request should be marked on the NLRB Form 4933 for the purposes of the Annual Report.

⁶⁰ This working copy may be needed by the Office of Appeals or Special Litigation to understand the Region's process in determining whether to disclose the documents. It will also provide invaluable assistance to a Regional FOIA processor in remembering how the request was processed, should he or she be requested to provide an affidavit in litigation about the processing of the case.

⁶¹ 5 U.S.C. 552(b).

⁶² Id.

B. The FOIA Processor's Working Copy.

On the working copy, the FOIA processor should highlight with a transparent marker all parts of the document which are either non-responsive or exempt. He should also indicate on the working copy beside each highlighted portion of the document why it is being deleted. If the reason is that the section is non-responsive, he should so indicate. If the material is being deleted pursuant to a FOIA Exemption, the exemption number[s] should be noted.⁶³ The particular FOIA Exemption claimed should be noted even if the Board has made a determination that the material, although technically exempt, should be disclosed within its discretion. In this case, the Exemption and the notation "Disclosed within the Agency's Discretion" should be marked at the appropriate highlighted text. The FOIA processor also must indicate whether any portions of the original document are blank, if such portions, after photocopying, could reasonably cause confusion as to whether they contained deleted material. The working copy should be approved by the FOIA supervisor before making final redactions for disclosure. An example of a redacted document is attached hereto as PA 54-61.

C. The Disclosed Document: Grease Pencil/White Out Copy.

The FOIA processor must conform the third copy of the documents in the FOIA file to the final decisions regarding appropriate redactions to the working copy. That is, the processor must copy all ultimately determined redactions from the working copy to the Grease Pencil/White Out copy and also indicate, precisely as on the working copy, the reason for each

⁶³ If the same Exemption[s] are claimed for every marking on the page or a discrete portion thereof, the FOIA processor may so indicate in the margin or other suitable place on the face of the document. If Exemption 5 is claimed, the specific privilege—e.g. attorney work-product or deliberative process should be noted—but only on the working copy for internal use. On the released document it is sufficient to mark only the Exemption number.

such deletion. This is best accomplished by using a felt-tip pen overlaid with grease pencil.⁶⁴ Redactions should be marked neatly, and care should be taken that all privileged original notations or signatures are completely concealed. The grease-pencil copy is maintained in the FOIA file as a back-up, but, more importantly, also serves as the template that is photocopied for release to the requester.

The use of white-out tape or fluid usually is appropriate only with typewritten documents where isolated words and phrases are deleted. Otherwise, the requester would not be able to distinguish blank portions of a document (unless they are clearly indicated) from redacted portions. However, white-out tape or fluid may also be used in other documents where the deleted material can be set off in brackets.

D. The Final Copy for Release.

The grease pencil or white-out copy must be photocopied for release to prevent the requester from discerning the underlying redactions. The Region must use its discretion to determine whether the FOIA processor's markings on the document, which indicate the redactions or the reasons, might reasonably be confused with original markings.⁶⁵

E. Pointers on Redactions.

It is important in making redactions to keep in mind the precise extent of the disclosable information as well as the purpose of the redaction. The impact of disclosure in

⁶⁴ Because the wording under a felt tip pen marking can be read, use of a felt tip pen alone is insufficient to protect the redacted material.

⁶⁵ In those rare cases where there might be some confusion, such as where a "scratched out" word or phrase in an original might be misconstrued as a FOIA redaction, the FOIA processor should underline his FOIA markings with colored pen and advise the requester of such in the cover letter which accompanies the release of the documents.

open cases, or in closed cases where there is an open related case, should always be examined. This is best accomplished by involving those Board agents who are actively involved in the open case.

FOIA processors should be sensitive to the privacy interests of charging parties, discriminatees and third parties mentioned in the agency record. This includes not just the name of the individual but his or her personal identifiers. The name of an individual must be marked out with one stroke, so that initials or the length of the first and last name are not indicated in such a way as to reveal his identity. This is especially important when the context of the document or the circumstances of the request demonstrate that only a few individuals are involved, so that privacy or confidentiality risks are magnified. Further, while personal identifiers must be redacted, in a list, unless the actual number of the items on the list are protected,⁶⁶ each entry must be redacted separately, leaving the spaces between the entries blank, so that their total number can be ascertained. For example, in a list of license plate numbers of cars seen near a picket line, the cars' license plate numbers would be redacted, but the blank spaces, as they appear on the original document, would show the number of vehicles involved.

Any special redaction problems involving information from photographs and video or audio tapes or handwritten material where the handwriting would reveal privileged information should be brought to the attention of the FOIA Officer at Headquarters, or the

⁶⁶ While the numbers generally are not exempt, the processor should analyze the case and make that determination on a case by case basis. For example, the Agency has taken the position that the number of union authorization cards is protected under Exemption 4 (5 U.S.C. 552(b)(4)). 29 C.F.R. 101.18; American Airlines, Inc. v. NMB, 588 F.2d 863 (2d Cir. 1978).

Special Litigation Branch if litigation is expected, for further instructions.

Of course, documents which were furnished by or copied to the requester, which should be indicated as such in the file by the investigator, must be furnished to the requester in unredacted form, but only upon specific request.⁶⁷ However, it is essential, particularly with respect to witness statements and other documents where the source might not be obvious from the face of the document, that the file clearly indicates that the requester was the party that furnished the documents to the Board.

VI. Assessing Charges to the Requester

29 C.F.R. 102.117(d) sets forth the Board's regulations regarding the assessment of fees for responding to FOIA requests. Also included in this section are provisions regarding the appropriate user fee category and the possibility of fee waiver or fee reduction. For a full discussion of fee categories, fee waivers and reductions and appeals of fee-related issues see FOIA Manual (Substantive Portion). **See Revised Language in Proposed FOIA Regulations, SA 29.**

The key points to remember are that:

1. Based on the user category, requesters can be charged for one or more of three services—search, review and duplication.
2. Agencies may charge for search time even if they fail to locate any responsive records or even if the records located are determined to be exempt from disclosure. OMB Fee Guidelines, 52 Fed. Reg. 10,019 (1987), attached hereto.

⁶⁷ Otherwise, the Determination Letter should indicate that those documents have been withheld, but will be furnished upon request.

3. Search for material should be done in the most efficient and least expensive manner. *Id.* at 10,018.

4. A request for information to be used in litigation before the Board ordinarily should be considered a commercial use request as it is a “use that further[s]. . . [the requester’s] business interests as opposed to a use that in some way benefits the public.” 52 Fed. Reg. at 10,013.

Commercial use requesters are assessed full costs of search, review and duplication. **See**

Revised Language in Proposed FOIA Regulations, SA 29.

5. Under Section 102.117(d)(2)(iii)(A), fees are waived for responses to FOIA requests that do not exceed \$5.00.

6. Current charges for responding to FOIA requests are \$3.10 per quarter-hour of clerical time; \$9.25 per quarter-hour of professional time; and \$.12 per page of photoduplication.

Section 102.117(a)(2)(i)(A),(B) and (C).

VII. FOIA Requests for Information Arguably Covered by Exemption 4

All Regional responses to FOIA requests for arguably confidential commercial or designated confidential Exemption 4 material should explain *to the requester* that:

- the requested records may be covered by FOIA Exemption 4, 5 U.S.C. § 552(b)(4);
- pursuant to Executive Order No. 12,600,⁶⁸ the Agency is required to undertake a specified evaluation process with respect to those records;
- the requester needs to review the attached redacted documents or the list of documents attached as an Appendix to the letter by the Agency, and identify the documents which he

⁶⁸ Executive Order No. 12,600. *See* 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (1994) (attached to the FOIA Manual, Substantive Portion SA 13-14).

- or she still wants as part of the FOIA request; and
- once the Agency receives the requester's response noting the redacted or withheld documents he or she continues to request, the Agency will compile the requested documents and send them to the submitter, who must be given the opportunity to assert objections to disclosure under one of the two applicable governing legal standards.⁶⁹

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

- the submitter has submitted certain attached redacted or listed records to the Agency, and that such records [may contain information arguably covered by Exemption 4] or [were previously designated by the submitter as confidential commercial information];
- the submitter is being provided with the opportunity to object to the disclosure of the records by submitting a written opposition within 10 working days of the date of the Agency's letter;

⁶⁹ In order to determine whether the information is entitled to protection as "confidential," FOIA processors should first identify the nature of the submitted information as either "voluntary" or "required." If the submitter was required to provide the information to the Agency, the submitter must be able to demonstrate that its disclosure "would cause substantial harm to its competitive position" or "is likely to impair the government's ability to obtain necessary information in the future." If the information was voluntarily submitted, the submitter must show that the information "would customarily not be released to the public by the person from whom it was obtained." See Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 878-879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993) and National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). See Substantive Manual in Exemption 4 section.

See PA 11 and PA 20 for sample letter and list to a requester indicating the Agency's need to follow Executive Order procedures prior to disclosure.

- the submitter's written objection should specify those portions of the records which [the submitter] asserts should not be disclosed and should state in detail all grounds upon which disclosure is opposed, including the confidential nature of the information and [whether and how disclosure of the records is likely to cause substantial competitive harm to his or her organization and is likely to impact on the government's ability to obtain reliable information in the future] **OR** [whether the information contained in the records is
- customarily disclosed to the public and whether the government will be ensured continued and full availability of the information if disclosure is required];⁷⁰
- any additional information provided by the submitter may itself be subject to disclosure under the FOIA;
- factual assertions contained in such written submissions should, if appropriate, be supported with declarations or affidavits;
- if a timely written objection is not submitted, the Agency may assume that the requested records do not contain information covered by Exemption 4;
- if, after careful review of the [submitter's] written objections to disclosure of the described records, the Agency decides not to sustain the objections and instead to release the records to the requester, the submitter will be notified by letter of that determination, with a statement of reasons briefly explaining the Agency's decision.⁷¹

⁷⁰ If the FOIA processor is uncertain as to the "voluntary" or "required" nature of the submission or of a submitter's treatment of the requested information, the submitter should be notified and given the opportunity to provide the Board with a description of its treatment of the information, including any disclosures that are customarily made and the conditions under which such disclosures occur.

⁷¹ See PA 12, PA 13 and PA 20, respectively, for sample letters to a submitter who has submitted records containing arguably confidential commercial information or who has previously designated the requested material as confidential commercial information and sample appendix.

After the Agency carefully considers the submitter's objections and specific grounds for nondisclosure of the requested information and makes an ultimate disclosure determination, FOIA processors must promptly notify the requester and the submitter in writing of such decision.⁷² FOIA processors should also be aware that whenever a requester files a lawsuit seeking to compel the disclosure of commercial information, the submitter must be promptly notified in writing. Similarly, whenever a submitter files a lawsuit seeking to prevent the disclosure of commercial information (a "reverse FOIA" action), the Agency must notify the requester.⁷³

VIII. Agency Release Policies

A. General Release Policy

In open and closed cases, the Regions should release to all requesters, *whether a party to the case or not*, based on a specific request, any formal documents in a case and any other non-confidential material in the case file, such as collective bargaining agreements, newspaper clippings, and arbitrators' decisions.⁷⁴ Additionally, transcripts should be released only upon

⁷² See PA 14, PA 15, and PA 16, respectively, for sample letters to a requester and a submitter announcing decision to withhold records pursuant to Exemption 4 and to a submitter announcing decision to disclose notwithstanding objection. (The requester will be informed of the disclosure decision by the Determination Letter.)

⁷³ See PA 17 and PA 18, respectively, for sample letters notifying a requester of the "reverse FOIA" action filed by the submitter of the requested records and notifying a submitter of the commencement of a FOIA action filed by the requester.

⁷⁴ See PA 5 and PA 6, respectively, for sample letters referring to the formal documents and to documents the requester already has in its possession where the request is for all documents in the investigative file.

specific request due to the considerable expense.⁷⁵ The Board agent should not withhold or delete any material solely because it identifies Board personnel unless some harm would result from disclosure, for example, harassment of the Board employee. (See FOIA Manual (Substantive Portion) for discussion regarding disclosure of federal employee information.)

B. Discretionary Disclosure

As a matter of policy, the Board is free to make discretionary disclosures of exempt information whenever it is not otherwise prohibited from doing so.⁷⁶ In her FOIA Policy Statement of October 4, 1993, and its update of May 1, 1997 (See PA 62. PA 64 attached), Attorney General Janet Reno set forth the approach of "government openness," the cornerstone of which is the new "foreseeable harm" standard governing the discretionary disclosure of information exempt under the FOIA. Pursuant to this policy, agencies are encouraged to disclose technically exempt information except where doing so would cause "foreseeable harm" to the agency and its processes. Such discretionary disclosures are especially appropriate when only a government interest would be affected. Application of this policy is to be done on a case-by-case basis, with consideration of the reasonably expected consequences of disclosure in a particular case. That is, in each case, the FOIA

⁷⁵ Federal Advisory Committee Act, 5 U.S.C. app.2, § 11 ("agencies . . . shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings"). Pursuant to the Agency's contract with its court reporting companies, the Agency can reproduce and turn over a transcript in response to a formal FOIA request. However, if an informal request is made for a transcript, the requester should be referred to the court reporting company and will have to purchase a copy from the company.

⁷⁶ See e.g., CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1134 n.1 (D.C. Cir. 1987), cert. den. 485 U.S. 977 (1988)(order in "reverse FOIA" suit under Exemption 4 prohibited government disclosure of certain information).

processor should determine if an exemption applies, and if so, the processor should then analyze whether or not there would be any foreseeable harm in disclosing the document in whole or in part, in accordance with the general principles set forth below. If such a foreseeable harm can be articulated, discretionary disclosure would not be appropriate. If, on the other hand, foreseeable harm cannot be articulated, and the FOIA processor believes a discretionary disclosure would be appropriate, the FOIA Officer in Washington should be contacted.⁷⁷ **Prior to any discretionary disclosure of exempt information, with the limited exceptions set forth below, the FOIA Officer in Washington must be consulted in order to ensure a coordinated policy of discretionary releases.** Moreover, it is important to note that the discretionary release of information does not create any justiciable rights for requesters in FOIA litigation.⁷⁸

Generally, the Board's ability to make a discretionary disclosure of exempt information will vary according to the nature of the FOIA exemption and the interests involved. Discretionary disclosure is appropriate under Exemption 2 for nearly all "low 2" material—that is, trivial administrative material-- based on application of the "foreseeable harm" standard.⁷⁹

⁷⁷ One consequence of discretionary disclosure is the waiver of exemptions that may have applied to the particular documents disclosed. See, "Waiver" section in FOIA Manual (Substantive Portion). Accordingly, care must be exercised in analyzing potential discretionary disclosures to consider the impact of such disclosure because unrestricted release to the individual requester will require a global release of the identical document.

⁷⁸ *Spannaus v. DOJ*, 942 F. Supp. 656,658 (D.D.C. 1996)("Foreseeable harm" standard not part of mandatory analysis of Exemption 5; no judicial review is available even under abuse of discretion standard.)

⁷⁹ Accordingly, a FOIA processor need not routinely include trivial materials in a response to a request that does not explicitly seek them, such as a request for "all documents" in an investigative file. If a follow-up request is received, the FOIA processor should supply the "low 2" material after it is determined that no other exemptions apply, including Board personnel identities, where harm might result from the disclosure. See sample letters at PA 7, PA 8, and PA 9.

This is because "low 2" permits withholding based on the agency's administrative burden rather than any harm due to disclosure.⁸⁰ On the other hand, "high 2" material would generally not be subject to discretionary disclosure due to the potential harm if disclosed.

Under Exemption 5's deliberative process privilege, the "foreseeable harm" standard requires FOIA processors to consider whether disclosure would "actually inhibit candor in the decision-making process."⁸¹ In analyzing whether to release, within the Agency's discretion, information protected under the deliberative process privilege the factors to be considered are: the nature of the decision and the decision-making process involved, the status of the decision and decision making, the status of the personnel involved, the potential for and significance of any process impairment, the age of the information, and the sensitivity of each item of information.

As to the application of the "foreseeable harm" standard to records falling within Exemption 5's attorney work-product privilege, the Agency needs to consider whether or not the information has any inherent or lingering sensitivity, to either current or pending litigation, even if the information is from a closed case. Further, even if there is such sensitivity to some portion of the information, the Agency could segregate and protect the attorney work-product information from all non-sensitive information (that is, attorney thought process versus facts) to

⁸⁰ Prior to disclosure of "low 2" documents, the FOIA processor should review the material and make appropriate deletions to protect privacy and confidentiality interests privileged from disclosure by Exemptions 6, 7(C) and 7(D), as well as information privileged by Exemption 5, if any.

⁸¹ Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1072 (D.C. Cir. 1993).

achieve a maximum disclosure. Lastly, keep in mind the strong connections between attorney-client privilege and deliberative process privilege as they apply to federal agencies. This means that, almost invariably, the privilege that attaches to the attorney's legal advice will be one that the Agency is free to invoke as a matter of its administrative discretion, and is the Agency's own privilege to waive if it chooses to do so.⁸²

Further, Exemption 7(E), the first clause of which broadly protects "law enforcement techniques" with no required showing of harm, is characteristically an exemption that protects information in which there is only a governmental interest. Thus, the "foreseeable harm" standard appropriately is applied to this type of information and could result in discretionary disclosures. On the other hand, the second clause of Exemption 7(E) protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law." This harm analysis is comparable to the "high 2" aspect of Exemption 2. Accordingly, in light of the "harm" requirement, information protected under the second clause of Exemption 7(E) most likely would not include material that can be disclosed within the Board's discretion based on the "foreseeable harm" standard.

In addition, agencies do not ordinarily make discretionary disclosure under the FOIA of information that falls within the scope of Exemption 3.⁸³ Similarly, under Exemption 4, trade secrets and commercial or financial information is not ordinarily subject to discretionary

⁸² The exception to this is the narrow circumstance in which a government attorney represents an agency employee who is sued individually in a federal case. Bivens v. Six Unknown named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

⁸³ 5 U.S.C. 552 (b)(3). This information accommodates nondisclosure provisions in other federal statutes such as tax return information under 26 U.S.C. 6103. See also, note 30, supra.

disclosure.⁸⁴ Additionally, under Exemptions 6 and 7(C), which protect personal privacy interests in non-law enforcement and law enforcement records, respectively, and where the balancing of public interest considerations is built into the analysis, such information is not ordinarily subject to discretionary disclosure. Further, Exemption 7(A) already has a built-in "harm" analysis permitting the withholding of information only where disclosure would interfere with law enforcement proceedings. To the extent that a danger of such interference could be said to exist, discretionary disclosure would be inappropriate. Finally, Exemption 7(D)'s protection of confidential source-furnished information that identifies the source is not appropriate for discretionary disclosure -- that is, the witness' name and identifying information should be redacted prior to disclosure.

There are several limited exceptions to the requirement, set forth above, that the Headquarters' FOIA Officer be consulted prior to any discretionary disclosure of technically exempt information. For example, the NLRB's current policy is that "low 2" documents are no longer withheld (after appropriate privacy-related deletions are made), even though technically exempt. In addition, in closed cases, Regions are instructed to release, as an exercise of the General Counsel's discretion, Board agent-prepared affidavits where the affiant has brought a suit against the requester in another forum that raises the same or related issues as the Board proceeding.⁸⁵ However, contrary to his previous position, the General Counsel, will no longer,

⁸⁴ The Trade Secrets Act, 18 U.S.C. 1905 (1994), prohibits the unauthorized disclosure of most, if not all, of Exemption 4 information.

⁸⁵ Prior to any such discretionary release, the FOIA processor should redact information in the affidavit pursuant to Exemptions 6 and 7(C) to protect the privacy interests of others identified in the affidavit, as well as any significant privacy interests of the affiant, pursuant to Exemption 7(D) to protect confidential sources, and pursuant to Exemption 4 to protect commercial information.

in the exercise of his discretion, disclose to a labor organization a copy of the Excelsior list that had previously been in the possession of that labor organization because to do so would require global disclosure.

In addition, in open cases, the General Counsel, in his discretion, has maintained a practice of releasing briefs, letters, or statements submitted in support of or in opposition to an appeal of a dismissal of an unfair labor practice charge, even though these documents arguably may be withheld pursuant to Exemption 7(A). These documents are redacted to protect the privacy interests of the parties.⁸⁶ All such requests for appeals documents in open cases should be forwarded to the Agency's FOIA Officer. In closed cases, whether the appeal is sustained or denied, appeals and attachments thereto are released to requesting parties. Redactions are made in the documents to protect privacy information and information protected by other exemptions. However, where the appeal has been sustained and the information sought would otherwise be exempt under 7(A), no evidentiary material should be turned over. To insure uniformity in closed cases, Regional offices should confer with the Agency's FOIA Officer to ascertain if a request for appeals documents had been made when the case was open and, if so, the redactions that had been made at that time. Further, the Agency regularly releases OM and GC memoranda and has allowed the release, in its discretion, of selected "go" Advice Memoranda after the case, and any related cases, have closed. Again, to insure uniformity in the disclosure and the types of deletions, it is Headquarters, rather than the Regions, which exercises this discretion and coordinates the release of the Appeals documents and the GC and

⁸⁶ In open cases, the General Counsel does not disclose attachments to such appeals documents because such attachments tend to be voluminous and accordingly burdensome to review for information that may be covered by other exemptions which restrict discretionary disclosures.

OM Memoranda. Thus, all such requests should be referred to the FOIA Officer in Washington.

Finally, it should be noted that by making these discretionary disclosures, the agency will not be held to have waived the ability to invoke applicable FOIA exemptions for similar or related information in the future.⁸⁷ In Mobil Oil Corp. v. EPA, 879 F.2d 698 (9th Cir. 1989), the Court of Appeals for the Ninth Circuit rejected a FOIA requester's argument that by making a discretionary disclosure of certain records that could have been withheld under Exemption 5, the agency had waived its right to invoke that exemption for a group of related records. After surveying the law of waiver under the FOIA, the court found "no case . . . in which the release of certain documents waived the exemption as to other documents. On the contrary, [courts] . . . generally have found that the release of certain documents waives FOIA exemptions only for those documents released."⁸⁸ This holding is supported by sound policy considerations since "[a] contrary rule would create an incentive against voluntary disclosure of

⁸⁷ With regard to identical information previously disclosed, without restriction, to a FOIA requester, we do not believe that it is possible to defend the selected disclosure of information to one or more persons and not to others. Upon such disclosure, whether in the Board's discretion or otherwise, all exemptions applicable to such information are waived.

⁸⁸ Id. at 701 (emphasis in original); see also, Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982)("[D]isclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case.")

information."⁸⁹ Further, such discretionary disclosures should not be the basis for an award of attorneys' fees.⁹⁰

C. Policies Relating to Affidavits

Much of the interest generated by FOIA as it relates to the NLRB has centered on witness statements in NLRB files. Most of this interest has stemmed from attempts to use a public disclosure act as a private discovery tool. It is clear, however, that FOIA was not intended to serve such a function and that a showing of a litigation need for documents does not enhance a requester's rights under FOIA.⁹¹

In brief, and as more fully discussed in the FOIA Manual (Substantive Portion) under the sections on specific exemptions, Board agent-prepared affidavits in open cases should be withheld under Exemption 7(A) and Exemption 5 (attorney work-product) and, to the extent applicable, under Exemptions 4, 6, 7(C) and 7(D). Non-Board agent prepared affidavits in open cases also should be withheld under Exemption 7(A) and, to the extent applicable, Exemptions 4, 6, and 7(C). Further, even if affidavits or portions of affidavits have been produced to a party during a hearing, pursuant to Section 102.118(b) (Jencks Act), the affidavits should not be released pursuant to a later FOIA request.⁹² In closed cases, Board agent-prepared affidavits are

⁸⁹ Mehl v. EPA, 797 F. Supp. 43, 47 (D.D.C. 1992).

⁹⁰ See Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 712 n.34 (D.C.Cir. 1977)("Certainly where the government can show that information disclosed . . . was nonetheless exempt from the FOIA a plaintiff should not be awarded attorney fees.")

⁹¹ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

⁹² The only exception to protecting such affidavits is where the affidavits themselves became a part of the formal evidentiary record in the Board case. If such an unlikely event occurs, they should be disclosed in identical form to that in the formal record.

protected in full under Exemption 5, and in part under Exemptions 4, 6, 7(C) and 7(D).⁹³ Non-Board agent-prepared witness statements and attachments and attachments to Board-agent prepared affidavits should be disclosed with appropriate deletions to protect privacy interests, confidential sources (Board-agent prepared affidavits only), and/or material privileged from disclosure by Exemption 4.

As stated above, Exemption 7(D) is one of the exemptions applicable to protect affidavits from disclosure in open and closed cases.⁹⁴ With respect to Exemption 7(D), the Agency has adopted the practice of providing assurances of confidentiality, reflected in boilerplate language, in all affidavits taken by Board agents.⁹⁵ However, confidentiality of sources ordinarily is not presumed, but must be proven by the agency.⁹⁶ In order to meet this

⁹³ A common error to avoid is reliance upon Exemption 7(A) in closed cases. See, e.g., Poss v. NLRB, 565 F.2d 654, 657 (10th Cir. 1977). However, even after a proceeding is closed, Exemption 7(A) may remain applicable if the agency can demonstrate that disclosure could be expected to interfere with a related pending proceeding. See, e.g., New England Medical Center Hosp. v. NLRB, 548 F.2d 377, 386 (1st Cir. 1976).

⁹⁴ While Exemption 7(D) protecting confidential sources is generally applicable to witness statements, it should not be invoked where the identity of a source has already been publicly disclosed. This would include, for example, the named charging party to a proceeding whose identity and obligation to cooperate is too well known to warrant protection as a confidential source.

⁹⁵ See Form NLRB-5168 (3/90) Affidavit ("I have been given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed unless it becomes necessary for the government to produce the affidavit in connection with a formal proceeding.")

⁹⁶ U.S. Dep't of Justice v. Landano, 508 U.S. 165, 181 (1993)(". . . the question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential."); Computer Professionals for Social Responsibility v. U.S. Secret Service, 72 F.3d 897, 906 (D.C. Cir. 1996) citing to Landano (while "certain circumstances characteristically support an inference of confidentiality". . . the manner in which an agency 'routinely' handles information is not sufficient to establish an implied assurance of confidentiality as to any particular source."); Quinon v. FBI, 86 F.3d 1222, 1231 (D.C.Cir. 1996)(requiring FBI on remand to support inference of assurance of confidentiality with additional affidavits establishing informants' particular relationships with subjects of investigation and nature of information provided by them); Ortiz v. HHS, 70 F.3d 729, 734-35 (2d Cir. 1995), cert. denied 116 S. Ct. 1422 (1996)(court found implied assurance of

burden of proof most effectively in the future, a Board agent should document any concerns of confidentiality expressed by potential witnesses, as well as any oral assurances of confidentiality specifically given. For example, this would occur where the affiant specifically requests confidentiality, and the Board agent deems it necessary to expressly assure confidentiality in order to obtain vital information.⁹⁷

Further, it is important not to respond to a FOIA request to which Exemption 7(D) is applicable in a manner that implicitly identifies the source. If a requester simply requests "all documents in a file," this is not usually a problem. Use Exemption 7(D) to deny any confidential source information and the requester ordinarily will not be able to tell who those sources were. However, if a requester identifies the individual whose affidavit is sought, and the affiant is not the charging party or some other individual whose provision of an affidavit is so well known as not to warrant protection as a confidential source, simply withholding the affidavit will have the unintended consequence of showing that the affiant did in fact supply an

confidentiality where evidence cumulatively established seriousness of informant's allegation against subject of investigation, informant's close relationship to subject of investigation, possibility of retaliation against informant, and anonymity of informant).

In applying this exemption, FOIA processors should tilt in favor of nondisclosure since it is impossible to correct an improper release, while the Office of Appeals can always redress an improper withholding.

⁹⁷ See Davin v. U.S. Dept. of Justice, 60 F.3d 1043, 1061 (3d Cir. 1995) (agency's policy of granting express promises of confidentiality on routine basis insufficient); Steinberg v. U.S. Dept. of Justice, 23 F.3d 548, 549 (D.C. Cir. 1994) (stating that Landano requires government to make "more particularized showing" of confidentiality).

affidavit. In order to avoid this consequence, the FOIA processor should use the procedure known as *glomarization*, whenever denying a request that seeks affidavits from named individuals, even if those individuals did not supply affidavits. That is, the FOIA processor should respond by neither admitting nor denying that the named individual supplied the affidavit.⁹⁸ Otherwise, savvy requesters would soon learn that a response neither admitting nor denying the existence of an affidavit means that an affidavit was supplied.

⁹⁸ See Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976). See PA 28 for sample letter.