



NATIONAL LABOR RELATIONS BOARD

FREEDOM OF INFORMATION ACT MANUAL

FOIA MANUAL
(SUBSTANTIVE PORTION)

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FOIA MANUAL (SUBSTANTIVE SECTION)

I. Purpose of Manual

This Manual has been prepared by the General Counsel to furnish guidance to Agency employees in making determinations concerning the public release of Agency records under the Freedom of Information Act (“FOIA”), as amended,¹ and in litigating FOIA-based lawsuits. This FOIA Manual does not constitute a final determination by the General Counsel or the Board concerning the availability of any document; nor does it create legally binding obligations to release or withhold documents. This manual is offered solely for the convenience and assistance of Agency employees who are called upon to process and litigate FOIA requests. **This guide supersedes all previous General Counsel and Operations-Management FOIA memoranda, which are hereby rescinded.**

II. Introduction

The core purpose of the FOIA is to “shed light on an Agency’s performance of its statutory duties.”² The FOIA has two automatic disclosure provisions—5 U.S.C. 552(a)(1) and (a)(2).³ The first provision requires the publication in the Federal Register of basic information regarding how the agency transacts its business, including its rules and regulations, statements of procedure and its organization and functions.⁴ The second automatic disclosure provision

¹ The FOIA is found at Title 5 of the United States Code, Chapter 5, Subchapter II at Section 552 (5 U.S.C. 552) and is attached hereto as Substantive Appendix (“SA”) SA 1-8. Certain definitions applicable to the whole of Subchapter II, including the FOIA, are contained at Section 551.

² U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989).

³ For a complete overview of the FOIA, see SA 9-12, attached hereto.

⁴ 5 U.S.C. 552(a)(1).

requires the creation of conventional and electronic reading rooms, where certain categories of documents are routinely made available for public inspection and copying, unless the materials are promptly published and copies offered for sale.⁵

The FOIA's other disclosure provision, 5 U.S.C. 552(a)(3), allows any person to access those records which are not automatically disclosed, as just discussed, and which are not otherwise exempt under one of the nine specific exemptions or three exclusions.⁶ Requests under subsection (a)(3) require search, including by electronic means, and review by agency personnel prior to disclosure to the requester. Moreover, this subsection requires that the agency make reasonable efforts to disclose records in the form or format preferred by the requester, including electronic format, where the records are readily reproducible in that format. This subsection also requires that each agency promulgate administrative regulations regarding the time, place, fees and procedures to be followed in making a FOIA request.

The NLRB has promulgated Subpart K, Section 102.117 of its *Rules and Regulations*, which sets forth the Agency's administrative FOIA procedures. Subparagraphs (c) and (d) set forth the administrative procedures that a FOIA requester must follow in making a FOIA request to the Agency, filing an administrative appeal, and exhausting administrative remedies

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

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

within given time constraints. They also provide for fee category placement, assessment of costs and the standards for determining whether a fee waiver will be granted. Subparagraph (e) incorporates the nine FOIA exemptions by reference and grants to the General Counsel and the Board the right to make discretionary FOIA disclosures.

Finally, the FOIA provides that upon complaint,⁷ with an answer required within 30 days,⁸ United States District Courts have jurisdiction, with de novo review, to enjoin an agency from withholding agency records. If a requester substantially prevails, reasonable attorneys' fees and costs may be awarded.⁹

III. Related Statutes

A. The Federal Records Act

The FOIA controls the disclosure of agency records. However, it does not control whether the Agency is required to maintain particular records, or whether they may be disposed of. Rather, the records creation, management, and disposal duties of federal agencies are set out in a collection of statutes known collectively as the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101 et seq., 2901 et seq., 3101 et seq., and 3301 et seq. See Public Citizen v. Carlin, 2 F.Supp. 2d 1 (D.D.C. 1997) appeal pending, No. 97-5356 (D.C. Cir. Dec. 29, 1997). The FRA is intended to assure, among other things, "[a]ccurate and complete documentation of the policies and transactions of the Federal Government," "[c]ontrol of the quantity and quality of records produced by the Federal Government," and "[j]udicious preservation and disposal of records." 44 U.S.C. § 2902.

⁷ 5 U.S.C. 552(a)(4)(B).

⁸ 5 U.S.C. 552(a)(4)(C).

⁹ 5 U.S.C. 552(a)(4)(E).

A portion of the FRA, the Records Disposal Act, 44 U.S.C. §§ 3301 et seq., requires agencies to create “schedules” for the disposal of their records having no “sufficient administrative, legal, research, or other value to warrant their further preservation by the Government,” and to obtain the approval of those schedules from the Archivist of the United States. See 44 U.S.C. §§ 3303(3), 3303a. The schedules are created in accordance with National Archives and Records Administration regulations. Pursuant to these provisions, the Agency has obtained approval from the Archivist for the disposition of Agency records. For example, official case files should be transferred to a Federal Records Center two years after the “cutoff” of the file, which occurs at the close of the calendar year during which the case was closed. The Federal Records Center then destroys the files 6 years after the cutoff. Certain records, however, may be designated for “permanent retention.”¹⁰ A complete listing of the Agency’s “Disposition Standards” can be found in Appendix I of the Files Management and Records Disposition Handbook, issued by the Library and Records Management Branch.

The FRA defines what constitutes an agency “record.” That definition includes “all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data

¹⁰ Between one and three percent of agency case files are selected for permanent retention. These files “illustrate significant developments in the administration of the National Labor Relations Act or otherwise represent the most important cases considered by the Board in a given year” Standard 802-02, NLRB Records Disposition Standards.

in them.” 44 U.S.C. § 3301. Only those documents that meet this definition of “record” are subject to the requirements of the FRA and the Agency’s retention and disposal schedules. However, a separate, generally broader definition of “agency record,” has developed under FOIA law, including documents (i) created or obtained by an agency, and (ii) under agency control at the time of the FOIA request. See United States Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (see infra for a more detailed discussion of “agency records” under the FOIA). Thus, while the Agency’s schedules may not require that particular documents be retained, the documents, if they exist, nonetheless may be subject to disclosure pursuant to a FOIA request if they meet the definition of “agency record” under the FOIA.¹¹

B. The Privacy Act

The Privacy Act, 5 U.S.C. § 552a et seq., both (i) requires agencies to provide requesters access to their own “records,” 5 U.S.C. § 552a(d)(1), and (ii) prohibits the disclosure of covered records about third parties. 5 U.S.C. § 552a(b). For the Privacy Act’s access or nondisclosure requirements to apply, the requested documents must be in a “record” and must be “contained in a system of records.” See 5 U.S.C. § 552a(a)(4)&(5). The Board publishes notices of its systems of records in the Federal Register and on its web site. There currently are twenty systems of records for which the Board has published notice. See 58 Fed. Regis. 57633 (Oct. 26, 1993) and 53 Fed. Regis. 17262 (May 16, 1988) for a list of citations to the Board’s system notices.

¹¹ There is no statute of limitations for the filing of a FOIA request. However, once a FOIA plaintiff has exhausted his administrative remedies he must file suit within the six year general federal statute of limitations, 28 U.S.C. 2401(a). See Spannaus v. Department of Justice, 824 F.2d 52, 55-56 (D.C.Cir. 1987).

1. Access Rights. With certain exceptions, the Privacy Act grants a requester a right of access “to his record or to any information pertaining to him which is contained in” a “system of records” and is retrievable by the name of the requester. See 5 U.S.C. § 552a(d)(1). See also Henke v. Department of Commerce, 83 F.3d 1453, 1460 (D.C. Cir. 1996). The Agency receives very few requests for access to records under the Privacy Act. However, FOIA processors are encouraged to consider whether a requester may be entitled to records under the Privacy Act, even if the request references only the FOIA. [Note that, if a requester has a right of access to his record under the Privacy Act, the Board must release the record even if a discretionary FOIA exemption would permit the Agency to withhold the document under the FOIA. See 5 U.S.C. § 552a(t)(1).]

Requests for access under the Privacy Act should be addressed to the manager of the system of records containing the requested records. If a Regional Director or Resident Officer receives a request for access to records under the Privacy Act, he or she should contact the Headquarters FOIA Officer, who will forward the request to the appropriate system manager, if any.

2. Nondisclosure Rules. Title 5 U.S.C. § 552a(b) prohibits agencies from disclosing any “record” contained in a “system of records,” except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. Note that while the exemptions to the FOIA are discretionary, the Privacy Act’s nondisclosure provision is mandatory. Thus, unless it has the consent of the covered individual, the Agency must withhold records subject to the Privacy Act’s nondisclosure provision. It therefore is particularly important for the FOIA processor to consider whether documents requested under the FOIA may be covered by the Privacy Act’s nondisclosure provision.

However, there are several statutory exceptions to the Privacy Act's nondisclosure provision, see 5 U.S.C. § 552a(b)(1)-(12), including a major exception based on the FOIA. See 5 U.S.C. § 552a(b)(2). The FOIA exception requires disclosure to a FOIA requester of a record which otherwise would be nondisclosable under the Privacy Act without the covered individual's consent, but only if the record is disclosable under the FOIA and is not subject to any FOIA exemption. See id.; Dept. of Defense v. FLRA, 114 S. Ct. 1006, 1011-12 (1994). Thus, if a FOIA requester seeks a record that both is disclosable under the FOIA and is covered by the Privacy Act's nondisclosure rules, the request should be handled as follows:

- a. If the individual to whom the Privacy Act record pertains consents to disclosure, and no FOIA exemption applies, the record must be released under the FOIA;
- b. If the individual to whom the Privacy Act record pertains consents to disclosure, and one or more FOIA exemptions apply, the record must be withheld unless the Agency exercises its discretion to release the document.
- c. If the individual to whom the Privacy Act record pertains does not consent to disclosure, and no FOIA exemption applies, that is, disclosure is required under the FOIA, the documents must be released under the FOIA;
- d. If the individual to whom the Privacy Act record pertains does not consent to disclosure, and a FOIA exemption applies, the FOIA exemption must be asserted and the documents must be withheld under the Privacy Act.

IV. Agency Records and Electronic FOIA

As set forth above, the FOIA applies to “records” maintained by the Agency. While the term “records” does not include “tangible, evidentiary objects,”¹² “records” does include information in practically any form, including audio and video tapes, and documents in electronic form.¹³ In recognition of the growing number of electronic FOIA issues, Congress enacted amendments to the FOIA entitled “Electronic FOIA Amendments of 1996” (“EFOIA Amendments”) which were signed into law on October 2, 1996, and address for the first time the subject of electronic records. Among other changes described below, the EFOIA Amendments now define the term “record” as including “any information that would be an agency record subject to the requirements of [the FOIA] when maintained by an agency in any format, including an electronic format.” 5 U.S.C. § 552 (f)(2) (effective March 31, 1997). Consequently, all documents in electronic form, including e-mail and documents created through word-processing programs, are potentially subject to disclosure and must be considered when responding to a request.

A. Agency Records Subject to Potential Disclosure

Since electronic records are treated the same as ordinary records under the FOIA, the same considerations which govern whether ordinary records are “agency records” subject to disclosure also govern electronic records. Generally, whether a document is an agency

¹² Nichols v. United States, 325 F. Supp. 130, 135-36 (D. Kan. 1971) (archival exhibits consisting of guns, bullets, and clothing pertaining to assassination of President Kennedy were not records), aff’d on other grounds, 460 F.2d 671 (10th Cir.), cert. denied, 409 U.S. 966 (1972).

¹³ New York Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990).

record depends on the circumstances surrounding the creation and use of each document, and such determinations must be made on a case-by-case basis, according to a careful weighing of all considerations. While the FOIA does not define the term “agency records,” the Supreme Court has articulated a two-part test for determining what constitutes an “agency record” under the FOIA:¹⁴ “Agency records” are documents which are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. United States Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989).¹⁵ The District of Columbia Circuit has further articulated four factors to examine, including the intent of the document’s creator to retain or relinquish control over the records, the ability of the agency to use and dispose of the record as it sees fit, the extent to which agency personnel have read or relied upon the document, and the degree to which the document was integrated into the agency’s record system or files. Tax Analysts v. United States Dep’t of Justice, 845 F.2d at 1069; Dow Jones & Co. v. General Serv. Admin., 714 F. Supp. 35, 38 n. 14 (D.D.C. 1989). Where documents have been obtained by an agency from an outside source, “control or possession” by the withholding agency is the critical factor in the agency record analysis. Gallant v. NLRB, 26

¹⁴ The requirement that materials sought by a private party be “agency records” is jurisdictional. Only when an agency withholds an agency record does the district court have authority to compel disclosure. Bureau of National Affairs, Inc. v. United States Dep’t of Justice, 742 F.2d 1484, 1488 (D.C. Cir. 1984).

¹⁵ In determining whether an agency has sufficient “control” over a document to make it an agency record, the Supreme Court has stated that “[b]y control we mean that the materials have come into the agency’s possession in the legitimate conduct of its official duties.” Tax Analysts, 492 U.S. at 145. The Court has further noted that the “control” requirement is in accord with the principle that “‘agency records’ is not so broad as to include personal materials in an employee’s possession, even though the materials may be physically located at the agency.” Id. These descriptions of “control” are in accord with the analysis employed by the District of Columbia Circuit, set forth infra.

F.3d 168, 172 (D.C. Cir. 1994). But where documents have been created within the agency, “use of the document” becomes more important in determining whether a document created by an agency employee can be attributed to the agency. Id. (citing Bureau of Nat’l Affairs v. United States Dep’t of Justice, 742 F.2d 1484, 1490 (D.C. Cir. 1984)). “[A]n agency employee’s creation of a document can be attributed to an agency depending on the purpose for which the document was created, the actual use of the document, and the extent to which the creator of the document and other employees acting within the scope of their employment relied upon the document to carry out the business of the agency.” Gallant, 26 F.3d at 172.

Accordingly, some documents physically located within an agency may be considered personal records of an employee rather than agency records, even where the documents relate to an employee’s work or were created on agency time with agency resources. Thus, in Gallant, the D.C. Circuit held that letters sent by a former Board member in an attempt to secure her reappointment were “personal records” of the Board member, rather than agency records. The letters were created with the “purely personal objective of retaining [the Board member’s] job,” and there was a lack of reliance on the correspondence by the Board member and other agency employees to carry out the business of the agency. The Court noted that while records may relate to an employee’s work, the FOIA does not “sweep into . . . reach personal papers that may ‘relate to’ an employee’s work . . . but which the individual does not rely upon to perform his or her duties” Gallant, 26 F.3d at 171 (quoting Bureau of Nat’l Affairs, 742 F.2d at 1493).

Similarly, in American Federation of Government Employees, Local 2782 v. United States Department of Commerce, 632 F. Supp. 1272, 1277 (D.D.C. 1986), the court found that handwritten logs were personal records of the employee who created the logs, even though

they were kept in notebooks which contained agency records. The court noted that “personal notes which are not intended for distribution through normal agency channels and which cannot be said to be within the ‘control or dominion’ of an agency are ordinarily considered to be beyond the scope of the FOIA.” Accordingly, while the logs were work-related, they were “a voluntary piece of unofficial scholarship of an employee who wished only to facilitate her own performance of her duties,” and were found not to be agency records. Likewise, “personal notes” containing observations about a co-worker were found not to be agency records where the notes were made for the sole purpose of refreshing the writers’ memories, were maintained at their homes or in private files at work, or in chronological logs or diaries, and were never circulated. Kalmin v. Department of the Navy, 605 F. Supp. 1492, 1494-95 (D.D.C. 1985). See also Spannaus v. United States Dep’t of Justice, 942 F. Supp. 656, 658 (D.D.C. 1996) (“personal files” of attorney no longer employed by agency were “beyond the reach of FOIA” if they were not turned over to agency at end of employment); Dow Jones & Co. v. General Servs. Admin., 714 F. Supp. 35, 38-39 (D.D.C. 1989) (list of official’s business partners is personal record where official created list with intent for it to remain personal property, list was kept in locked safe, and only limited agency employees had access to it); Sibille v. Federal Reserve Bank, 770 F. Supp. 134, 138 (S.D.N.Y. 1991) (notes of meetings and telephone conversations are personal records where they were created by employees for their personal convenience, were not written for circulation within the agency, and were kept in a locked drawer in a credenza so that only the employee and secretary had access); British Airports Auth. V. CAB, 531 F. Supp. 408, 416 (D.D.C. 1982) (employee notes maintained in personal file and retained at employee’s discretion are not agency records).

Under these principles, e-mails created or obtained by employees in the conduct of agency business generally would be considered “agency records” subject to disclosure, absent any applicable exemption. The purpose of such documents necessarily would be to further agency business. Likewise, by their very nature as “communications,” most e-mails are not intended for personal use only, but are relied on by the recipients to conduct agency business. Conversely, to the extent that any notes are created in electronic form, but are not circulated to other employees for their use in conducting agency business and are not otherwise integrated into the agency’s files,¹⁶ they would be considered personal notes rather than agency records. As in the cases discussed above, even if the notes assist the employee in performing work, if such electronic notes are kept for the employee’s convenience only, and are not circulated to other employees, they would not constitute agency records subject to disclosure.

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

B. Discretionary Use of E-mail

The Agency has separate obligations apart from the FOIA under the Federal Records Act, 44 U.S.C. § 2201 et seq., 2901 et seq., 3101 et seq., 3301 et seq., to maintain electronic records. By Administrative Bulletin dated March 19, 1997 (AB 97-28) (attached as SA 24) the Agency distributed an e-mail policy in response to National Archives and Records Administration regulations on e-mail. That memo directs Agency employees to preserve e-mail

¹⁶ An example is the “Notepad” accessory available in Windows 95.

messages if they meet the definition of “records” contained in the Federal Records Act, 44 U.S.C. § 3301.¹⁷ Specifically, the memo instructs employees to print e-mail messages and attachments which meet the definition of “records” and to annotate the printed message with essential transmission and receipt data if the printed message does not reflect that information (sender, receiver, date of transmission, receipt of message). The memo further directs employees to file the printed messages with related office files. These steps are necessary until technology allowing archival capabilities for long-term electronic storage and retrieval of e-mail messages is available.¹⁸

While this e-mail policy has been distributed in response to the Agency’s obligations under the Federal Records Act and regulations promulgated thereunder, they are not determinative of our FOIA obligations. That is, even if an e-mail message does not meet the definition of “record” for purposes of the Federal Records Act, and therefore need not be printed and stored, the e-mail message may still be an “agency record” under the FOIA, pursuant to the criteria described above. In light of this result, and in light of the fact that communications which in the past may have been accomplished only orally, but are now being conducted through e-mail, the Agency is now in the process of formulating an e-mail

¹⁷ 44 U.S.C. § 3301 provides:

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

¹⁸ The Agency is continuing to adhere to this “print and delete” policy notwithstanding the decision in Public Citizen v. Carlin, 2 F. Supp. 2d 1 (D.D.C. 1997), appeal pending, No. 97-5356 (D.C. Cir. Dec. 29, 1997), which rejected this policy.

policy to offer guidance on the appropriate use of e-mail. Until that policy is formulated, all Agency employees should be aware that e-mail messages are potentially subject to disclosure when they meet the definition of “agency record” under the FOIA and should be appropriately circumspect when using this tool.

C. Retrieving and Disclosing Electronic Documents

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) (effective March 31, 1997).

Agency FOIA processors should also be aware that the EFOIA Amendments address the format in which a requested record must be disclosed under the FOIA. “[A]n agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” 5 U.S.C. § 552(a)(3)(B) (effective March 31, 1997). In addition, “[e]ach agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.” Id. These provisions require the Agency to comply with a requester’s specified choice of format if the format is “readily reproducible” with a “reasonable effort.” This represents a departure from previous procedures, and potentially could require the Agency to scan into electronic format documents that the Agency does not otherwise maintain electronically. Whether such efforts are required would be determined on a case-by-case basis, measured by whether the Agency can supply the

requested format with “reasonable efforts.” In the event that a request is made to supply documents in electronic format, please contact the Headquarters FOIA Officer so that the Agency can make uniform determinations about whether such requests can be satisfied.

In addition, when disclosing documents which have been redacted in part, the FOIA now requires that “[t]he amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by . . . [an] exemption” 5 U.S.C. § 552(b) (effective March 31, 1997). The FOIA also now requires that “[i]f technically feasible, the amount of information deleted shall be indicated at the place in the record where such deletion is made.” *Id.*¹⁹ These provisions apply to both electronic and non-electronic records.

D. Electronic Reading Room

Section (a)(2) of the FOIA, known as the “reading room” requirement, requires the Agency to make certain records available for public inspection and copying. Previously, the required reading room documents included (1) final opinions rendered in the adjudication of cases; (2) Agency policy statements; and (3) administrative staff manuals and instructions to staff that affect the public. 5 U.S.C. § 552(a)(2). The 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)) (effective March 31, 1997). Accordingly, FOIA processors

¹⁹ A court is required to accord substantial weight to the agency’s determinations regarding technical feasibility for indicating deletions of information at the place in the record where the deletion is made, and regarding the reproducibility of records in specified formats. 5 U.S.C. § 552(a)(4)(B).

should provide to the Headquarters FOIA Officer any documents believed to fall in this new category. Caution should be used, however, in cases where the initial disclosure was to a first-party requester that is, a requester seeking information that involves his own interests.²⁰ Prior to their placement in the reading room, the disclosed documents should be examined for any additional exempt material which was not required to be withheld from the first-party requester.

The EFOIA Amendments now also require the Agency to maintain its reading room in electronic form. For any reading room records created on or after November 1, 1996, the Agency must make them available to the public by “electronic means.” 5 U.S.C. § 552(a)(2). In light of the strong statutory preference that this new electronic availability be provided by agencies in the form of on-line access, the Board has created a web site. Most of the Agency’s

²⁰ Generally, agencies should treat all requesters alike in making FOIA disclosure decisions. See Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989) (“Reporters Committee”). The only exception to this is that an agency should not withhold from a requester any information that implicates that requester’s own interest only; making a disclosure to a “first-party” requester in such a circumstance “is consistent with . . . denying access to all other members of the general public.” Id.

electronic reading room obligations are now satisfied by the on-line access to the Agency's web site (<http://www.nlr.gov/foia/reading.htm>).²¹

V. Application of FOIA Privileges

Once records responsive to a FOIA request have been located, it is necessary to determine whether the records are privileged from disclosure by one or more of the exemptions set forth in Section 552(b) of the Freedom of Information Act. In our experience, and given the nature of most of our files, the three exemptions most frequently utilized are Exemptions 5, 6, and 7. In addition, we occasionally rely on Exemptions 2 and 4. Each of these exemptions will now be examined in depth.²²

²¹ Documents which are required to be made available for public inspection and copying under Section (a)(2) of the FOIA -- the "Reading Room" requirement -- are not included within those documents which the Agency is required to disclose pursuant to a request made under Section (a)(3). 5 U.S.C. § 552(a)(3). 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]" Accordingly, a response to a request for Reading Room documents need only direct the requester to the availability of the Reading Room. This is not the case, however, with respect to the new Reading Room category of frequently-requested documents (5 U.S.C. § 552(a)(2)(D)), discussed supra, which should be provided to a requester despite their placement in the Reading Room.

²² Exemptions 1 (national security), 3 (prohibitions contained in other statutes), 8 (related to regulation of financial institutions), and 9 (geological data) and criminal law exclusions to the FOIA for protecting especially sensitive criminal law matters (552(c)(1)(2) and (3)) either are inapplicable to our agency or arise so infrequently that they are not worth treating here. If you think you may have a document that is covered by one of these exemptions, either consult the Justice Department Guide or call the FOIA Officer in Washington for advice.

VI. Exemption 2

Exemption 2 exempts from mandatory disclosure records "related solely to the internal personnel rules and practices of an agency."²³ Courts have interpreted Exemption 2 to have two distinct aspects, "low 2," covering trivial administrative material and "high 2," which covers more substantial internal matters such as procedural manuals and guidelines, the release of which would risk circumvention of a legal requirement.²⁴ Once the threshold of a personnel rule or internal practice of an agency is met, if the material relates to trivial administrative matters of no genuine public interest,²⁵ the information is considered "low 2" and is automatically exempt under the statute. If there is a "legitimate public interest" in the information the material is generally considered "high 2" and should be disclosed unless there is a risk of "circumvention of lawful agency regulation."²⁶ In making this analysis, agencies must always bear in mind that "a reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interest."²⁷

Examples of "low 2" material are routine or ministerial internal matters such as administrative markings, file numbers, room numbers, facsimile cover sheets (which contain no

²³ 5 U.S.C. § 552(b)(2).

²⁴ See, e.g., Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (describing "low 2" and "high 2" aspects of exemption).

²⁵ The Supreme Court's interpretation of what constitutes "public interest" was defined in U.S. D.O.J. v. Reporters Committee for the Freedom of the Press, 489 U.S. 749 (1989). See Discussion in Exemption 6 section, infra.

²⁶ Founding Church of Scientology v. Smith, 721 F.2d 828, 830-831, n.4 (D.C.Cir. 1983). It would be rare to have "low 2" information or trivial information in which there is a legitimate public interest. In such a case, the information should be released unless, as with "high 2" information, disclosure would risk circumvention of the law.

²⁷ Id., at 830-31.

substantive exempt material), transmittal slips (which contain no substantive exempt material), return receipt slips, envelopes, NLRB casehandling forms including computer forms, and filing instructions. (“Low 2” documents are particularly appropriate for discretionary disclosure. See Procedural Manual, p. 39.)

The second category of records covered by Exemption 2 is internal matters of a more substantial nature, the disclosure of which would risk circumvention of a statute or agency regulation. The concern under “high 2” is that a FOIA disclosure should not “benefit those attempting to violate the law and avoid detection.”²⁸

In Crooker v. ATF, the D.C. Circuit fashioned a two-part test for determining which sensitive materials are exempt from mandatory disclosure under Exemption 2. This test requires both (1) that a requested document be “predominantly internal” and (2) that its disclosure “significantly risks circumvention of agency regulations or statutes.”²⁹

Specific guidance on what constitutes an “internal” document may be found in Cox v. United States Department of Justice,³⁰ which held protectible information that “. . . prescribe[s] the methods and strategy to be followed by law enforcement agents in the performance of their duties [providing that it] does not purport to regulate activities among members of the public. . . .” Id.

Records whose release could involve a risk of circumvention of law or regulations

²⁸ Crooker v. ATF, 670 F.2d 1051, 1054 (D.C. Cir. 1981 (en banc)).

²⁹ Id. at 1073-74.

³⁰ 601 F.2d 1, 4-5 (D.C. Cir. 1979) (per curiam).

include such materials as general guidelines for conducting investigations³¹ or records that would reveal the nature and extent of a particular investigation.³² For example, the Agency has withheld, in their entirety, casehandling memoranda regarding the use of “reservation language” in settlement agreements and regarding the assessment of the General Counsel’s 10(j) priorities. However, when a document is determined to be “high 2” it is important to remember that there remains an obligation to review the document to see whether there is any reasonably segregable portion that can be disclosed without harm.³³ For example, the Agency has disclosed, with portions redacted, casehandling memoranda dealing with the effects of settlement agreements on decertification petitions, the litigation of multiple charges against the same respondent, and the use of expedited ALJ hearings in lieu of 10(j) injunction proceedings.

“High 2” is closely related to Exemption 7(E), discussed *infra*.³⁴ If such materials are related to law enforcement, there is no practical difference, and both exemptions may be cited in support of a decision to withhold records. However, if the material sought does not relate to law enforcement, only “high 2” would apply. In the interest of consistent application of this exemption, if you plan to use “high 2” in response to any FOIA request, please contact the FOIA Officer in Washington, D.C.

³¹ See, e.g., PHE, Inc. v. U.S. Dep’t of Justice, 983 F.2d 248, 251 (D.C. Cir. 1993).

³² See, e.g., Watson v. U.S. Dep’t of Justice, 799 F.Supp. 193, 195 (D.C. 1992).

³³ See, e.g., Schiller v. NLRB, 964 F.2d at 1210. Kimberlin v. Department of Justice, 139 F.3d 944, 950-951 (D.C.Cir.) cert. denied, 119 S. Ct. 210 (1998).

³⁴ See, Kaganove v. EPA, 856 F.2d 884, 888-889 (7th Cir. 1988).

VII. Exemption 4

Exemption 4 exempts the Board from being required to disclose (1) "trade secrets" and "commercial or financial information" (2) obtained from a "person" (3) where the information is "privileged or confidential."³⁵ Exemption 4 is designed to encourage providers to furnish useful and reliable commercial and financial information to the government and to protect against competitive disadvantage potentially resulting from disclosure.

For purposes of FOIA, the term "trade secret" has been defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."³⁶ Because it is unusual for the Board to obtain records containing trade secrets, this FOIA Manual focuses on the second type of information covered by Exemption 4 -- commercial and financial information.

Commercial and financial information is broadly defined. It includes information that relates to the provider's business activities or trade that "reveal[s] basic commercial operations."³⁷ The term covers anything "pertaining or relating to or dealing with commerce,"

³⁵ "Person" is defined broadly for FOIA purposes: a "person" includes a partnership, corporation, association, and public or private organization, other than an agency of the federal government. 5 U.S.C. §§ 551(1)&(2).

³⁶ Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

³⁷ Id. at 1290.

including certain information from labor unions³⁸ and non-profit organizations.³⁹ Documents prepared by the Agency fall within Exemption 4 if they contain summaries or a reformulation of commercial information supplied by a person.⁴⁰

The next step is to determine whether the commercial or financial information is “confidential.”⁴¹ The test for confidentiality is designed to protect governmental as well as private interests. Thus, both the Board’s practice and the submitter’s practice of treating information as confidential must be examined.⁴² The District of Columbia Circuit has drawn a distinction for Exemption 4 purposes between commercial information obtained under compulsion and commercial information provided voluntarily.⁴³

If the requested information has been obtained under compulsion (for example, in

³⁸ American Airlines, Inc. v. NMB, 588 F.2d 863, 870 (2d Cir. 1978) (authorization card information submitted by a labor union). See also Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) (“information relating to the employment and unemployment of workers”).

³⁹ See Critical Mass Energy Project v. NRC, 975 F.2d 871, 880 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993). Examples of commercial and financial information can include commerce information, bid information, economic bargaining proposals, salary and wage information, and the number of union authorization cards submitted as a showing of interest.

⁴⁰ See, e.g., Gulf & Western Indus. V. U.S., 615 F.2d 527, 529-530 (D.C.Cir. 1979) (Contractor information contained in agency audit report).

⁴¹ Exemption 4 also protects non-confidential commercial and financial information which is “privileged.” However, it is uncommon for the Board to possess such information, and judicial decisions relating to “privilege” in the context of Exemption 4 are rare.

⁴² See American Airlines, 588 F.2d at 871.

⁴³ Critical Mass, 975 F.2d at 880.

response to a Board subpoena),⁴⁴ the FOIA processor must apply a two-part analysis: is disclosure “likely [either] (1) to impair the government's ability to obtain necessary information in the future, or (2) to cause substantial harm to the competitive position of the person from whom it was obtained.”⁴⁵ The test for confidentiality of compelled information is an objective one.⁴⁶ Although disclosure may not adversely affect the government's ability to compel the disclosure of information, the court noted that the government still has an interest in assuring the reliability of information provided under compulsion in the future. Actual competitive harm need not be demonstrated for purposes of the competitive harm prong. Evidence of “actual competition and a likelihood of substantial competitive injury” is all that need be shown.⁴⁷

The exemption for agency records containing confidential commercial or financial information voluntarily submitted to the government is broader: Exemption 4 categorically protects voluntarily submitted commercial or financial information provided that the submitter

⁴⁴ Information provided under compulsion is not limited to that provided pursuant to subpoena or court order. Courts have held that submissions that are required to realize the benefits of a program are considered mandatory, even if participation in the program is voluntary. See McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316, 318 (D.D.C. 1995).

⁴⁵ Critical Mass, 975 F.2d at 878, quoting National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). See also Anderson v. Dep't of Health & Human Serv., 907 F.2d 936 (10th Cir. 1990). Though not yet widely litigated, a third National Parks prong – protection of government interests such as compliance and program effectiveness – also exists. See Critical Mass, 975 F.2d at 879.

⁴⁶ See National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 766 (D.C. Cir. 1974); Critical Mass, 975 F.2d at 871, 879.

⁴⁷ See CAN Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988); Inter Ocean Free Zone v. U.S. Customs Service, 982 F. Supp. 867, 872 (S.D. Fla. 1997)(even a failing business/submitter may suffer competitive harm and be entitled to Exemption 4 protection.)

does not “customarily” disclose the information to the public.⁴⁸ Thus, the standard for disclosure of voluntarily submitted information is a subjective one that is controlled by the practice of the individual provider. Neither the general practices of the industry nor an objective measure of what reasonably would be publicly disclosed is determinative. Further, the customary treatment standard allows for the provider previously to have disclosed the information consistent with its own business interests, as long as those disclosures were not to the public.⁴⁹

It is important that FOIA processors guard against the release of protected Exemption 4 material, because release of such material may expose the Board to litigation. The Board’s disclosure decision may be challenged in a “reverse FOIA” action under the Administrative Procedure Act.⁵⁰ Also, other laws, such as the Trade Secrets Act may proscribe release of trade secrets or confidential information.⁵¹ An objecting provider of information may initiate an APA action to attempt to enjoin release of information on this ground as well.⁵² It is critical that the Agency develop a comprehensive administrative record, as the courts in reverse FOIA cases have placed the evidentiary burden on the party seeking to release information, and on several

⁴⁸ Critical Mass, 975 F.2d at 879.

⁴⁹ Id. at 880. FOIA processors should be mindful that documents and records submitted voluntarily often may contain information not customarily provided to the public. For example, documents generated in preparation for eventual settlement of a case may qualify for protection under Exemption 4. See, e.g. M/A-Com Information Systems, Inc. v. HHS, 656 F. Supp. 691 (D.D.C. 1986).

⁵⁰ 5 U.S.C. § 701, et seq. (1994). See Worthington Compressors, Inc. v. Costle, 662 F.2d 45, 54 (D.C. Cir. 1981); Penziol Co. v. Federal Power Comm’n, 534 F.2d 627, 630 (5th Cir. 1976).

⁵¹ 18 U.S.C. § 1905.

⁵² See Chrysler, 441 U.S. at 317; Owens-Corning, 626 F.2d at 971.

occasions have remanded reverse FOIA cases back to the Agency for development of a more complete record.⁵³

If the FOIA processor is inclined to grant a FOIA request but believes that the requested records at least arguably could be within Exemption 4, Executive Order No. 12,600,⁵⁴ requires the Board to notify the submitter promptly and to provide the submitter a reasonable period of time – e.g. at least ten (10) working days -- to object to the proposed disclosure.⁵⁵ Further, a telephone call to the submitter soliciting authorization for disclosure often will be successful. All such disclosure authorizations must be in writing. The FOIA processor also must advise the requester that the submitter is being given an opportunity to comment. If the information was submitted voluntarily, in objecting to disclosure, the submitter should be asked to provide an affidavit describing its treatment of the information, including any disclosures that are customarily made, the conditions under which such disclosures occur and the impact of disclosure on the availability of this information to the government. On the other hand, if the information was submitted under compulsion, the submitter should be asked to provide an affidavit including an explanation of any competitive harm that is likely to occur and the impact of disclosure on the reliability of the information provided to the government. If the FOIA processor determines that either: (1) material voluntarily given the Board reveals commercial or financial information that the submitter would not customarily make available

⁵³ See Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342, 346 (D.C. Cir. 1989).

⁵⁴ 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (1994), attached hereto as SA 13-14.

⁵⁵ The Agency is publishing regulations implementing the Executive Order. Until such regulations are finalized, the FOIA processor should follow the procedures set forth herein and should consult with FOIA Officer in Headquarters in every Exemption 4 case.

to the public and disclosure would likely impact the continued and full availability of the information to the government, or (2) the provider would be substantially harmed by the disclosure of information which has not been voluntarily submitted and is likely to impact on the government's ability to obtain reliable information in the future, the information should be withheld. A decision to withhold under Exemption 4 must be promptly communicated in writing both to the FOIA requester and the submitter. If the determination is to disclose commercial information over the submitter's objection, the submitter must be given a brief written statement explaining the decision at least ten (10) working days prior to a specified disclosure date. Neither the FOIA nor Executive Order No. 12,600 provides a submitter with the right to an evidentiary hearing or to an administrative appeal of the Agency's decision.⁵⁶

VIII. Exemption 5

Exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)) permits an agency to withhold from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party. . . in litigation with the agency."⁵⁷ As such, it has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context."⁵⁸ Exemption 5 incorporates into the FOIA all of the normal civil discovery privileges which the government enjoys under relevant statutory and case law.⁵⁹ The three primary, most

⁵⁶ See CAN Fin. Corp. v. Donovan, 830 F.2d 1132, 1159 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988); Federal Elec. Corp. v. Carlucci, 687 F. Supp. 1, 5 (D.D.C. 1988).

⁵⁷ 5 U.S.C. § 552(b)(5).

⁵⁸ NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see also FTC v. Grolier, Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C.Cir. 1987).

⁵⁹ Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184 (1975).

frequently invoked privileges include the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.⁶⁰

A. Threshold Question of the Applicability of Exemption 5

The threshold issue under Exemption 5 is whether an agency record is covered by the phrase "inter-agency or intra-agency memorandums." While this would seem to cover only those documents generated within an agency and not circulated beyond the executive branch, the courts have construed the phrase to encompass certain documents generated outside an agency but pursuant to agency initiative, including recommendations from Congress,⁶¹ advice from a state agency,⁶² and documents generated by outside consultants.⁶³ These cases establish that "inter-agency" and "intra agency" are not rigidly exclusive terms but rather, embrace any agency document that is part of the deliberative process.⁶⁴ However, whether a document

⁶⁰ NLRB v. Sears, Roebuck & Co., 421 U.S. at 149.

⁶¹ Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980) (congressional responses to questionnaires held protectible).

⁶² Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 315 (S.D.N.Y. 1976).

⁶³ Soucie v. David, 448 F.2d 1067, 1078 n. 44 (D.C. Cir. 1971). See Public Citizen, Inc. v. U.S. Department of Justice, 11 F.3d 168 (D.C. Cir. 1997)(communications from former presidents on archival matters held protectible as "consultative relationship").

⁶⁴ Ryan v. Department of Justice, 617 F.2d at 790. This pragmatic approach has been characterized as the "functional test" for assessing the application of Exemption 5. Under this test, the pertinent element is the role, if any, the document plays in the process of agency deliberations – i.e. whether they are regularly relied upon by agency authors and supervisors in making the agency's decisions. Formaldehyde Institute v. HHS, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989). Compare Texas v. ICC, 889 F.2d 59, 62 (5th Cir. 1989) (agreeing with the court's "functional" test but rejecting its application to documents submitted by a private party who "did not stand in any consultative or advisory role" to the agency). Compare also County of Madison v. Department of Justice, 641 F.2d 1036, 1042 (1st Cir. 1981); M/A-COM Information Systems v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) regarding communications between an agency and an adverse party generated in the course of settlement negotiations.

satisfies the “intra-agency” threshold has presented some courts with difficult issues, particularly in the areas of witness affidavits⁶⁵ and communications between an agency and an adverse party generated in the course of settlement negotiations.⁶⁶

B. Deliberative Process Privilege

The most frequently used privilege is the deliberative process privilege (also referred to as the executive or governmental privilege), which protects the internal decision-making processes of government agencies in order to safeguard the quality of agency decisions.⁶⁷

⁶⁵ Board agent-prepared affidavits arguably meet this threshold requirement and may be withheld under Exemption 5 as attorney work-product. See Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987). But see, Thurner Heat Treating Corp. v. NLRB, 839 F.2d 1256, 1258-1259 (7th Cir. 1988) (affidavits from respondent's employees as recorded by Board agents not intra-agency memoranda and not protected by Exemption 5); Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (witness affidavits not "internal agency documents" and not protected by Exemption 5); Poss v. NLRB, 565 F.2d 654, 659 (10th Cir. 1977) (witness statements do not constitute memoranda or letters).

⁶⁶ FOIA processors should be aware that settlement documents prepared by agency personnel in preparation of eventual settlement of a case may qualify for protection under one of the traditional Exemption 5 privileges, see, e.g. Coastal Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)(deliberative process); Fulbright & Jaworski v. Treasury, 545 F.2d 615, 620 (D.D.C. 1982)(same); Cities Serv. Co. v. FTC, 627 F.Supp. 827, 832 (D.D.C. 1984)(attorney work-product), *affd.*, 778 F.2d 889 (D.C. Cir. 1985)(unpublished table decision). For a discussion of these privileges, see sections B. and C. below. Further, settlement information may qualify for protection under Exemption 4 where the information meets the “commercial or financial” threshold. See section on Exemption 4. In addition to the cases that establish that settlement documents may qualify for protection under Exemption 4 or one of the Exemption 5 privileges, there is also a recent development of a distinct “settlement negotiation” privilege outside of the FOIA. See, e.g., Butta-Brinkman v. FCA International Ltd., 164 F.R.D. 475, 477 (N.D. Ill. 1995); Olin Corp. v. Insurance Co. of N. America, 603 F.Supp. 445, 449-50 (S.D.N.Y. 1985). FOIA processors should not release any information that qualifies for the settlement privilege. If necessary, contact the FOIA Officer in Washington for guidance.

⁶⁷ NLRB v. Sears, Roebuck & Co., 421 U.S. at 150-51, 152.

There are essentially three policy bases for this privilege: (1) to protect and encourage the creative debate and candid discussion of alternatives, recommendations and advisory personal opinions between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they have been finally adopted; and (3) to protect against confusing the issues and misleading the public by the disclosure of reasons and rationales that ultimately do not form the basis for an agency's actions.⁶⁸

There are two fundamental requirements which must be satisfied before an agency may properly withhold a document or communication pursuant to the deliberative process privilege: (1) the document or communication must be "predecisional," i.e. prepared in order to assist an agency decision maker in arriving at his decision,⁶⁹ and (2) the communication must be "deliberative", i.e. "it must form a part of the agency's deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."⁷⁰ The burden is upon the agency to show the requested information satisfies both requirements.⁷¹ In this regard, an agency need not "identify a specific decision in connection with which a

⁶⁸ See, e.g., Maricopa Audubon Society v. U.S. Forest Service, 108 F.3d 1089, 1095 (9th Cir. 1997) (withheld materials consisted of recommendations and suggestions from an inferior to a superior that reflected the personal opinion of the writer rather than the policy of the agency); Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); EPA v. Mink, 410 U.S. 73, 87 (1972).

⁶⁹ Jordan v. U.S. Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978); Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. at 184 (suggested dispositions of a case). See also, North Dartmouth Properties, Inc. v. HUD, 984 F. Supp. 65, 68 (D. Mass. 1997)(post-decisional e-mail protected where message reiterated agency's pre-decisional deliberations and reflected sender's personal views, opinions and recommendations concerning matter decided.)

⁷⁰ Vaughn v. Rosen, 523 F.2d 1136, 1143-1144 (D.C. Cir. 1975).

⁷¹ Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992).

memorandum is prepared," but need only show that the document constituted a recommendation in connection with the examination of some agency policy.⁷² In determining whether a document is predecisional, FOIA processors should consider whether the document is a "final opinion," whether the person preparing the document lacked decision-making authority, and whether the document flowed upwards or downwards along the decision-making chain.⁷³ Where it is unclear whether a recommendation provided the basis for a final decision, the recommendation should be protectible.⁷⁴ In concept, the privilege protects not merely documents, but the underlying recommendations and tentative assessments which themselves are the essence of the deliberative process, and therefore, the integrity of the deliberative process itself where the exposure of the agency's process would result in harm.⁷⁵

Moreover, the protected status of a predecisional document is not altered by the

⁷² NLRB v. Sears, Roebuck & Co., 421 U.S. at 151, n. 18 ("Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.").

⁷³ Ordinarily, documents that flow from the top down are held not to be predecisional. There are exceptions, however, for comments from a headquarters office to regional offices that were more advisory than binding. See, e.g., National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114, 1123 (9th Cir. 1988).

⁷⁴ See Renegotiation Board v. Grumman Aircraft Eng'g Corp., 421 U.S. at 184-185; Afshar v. Department of State, 702 F.2d 1125, 1143 n. 22 (D.C. Cir. 1983). See e.g., Greyson v. McKenna & Cuneo, 879 F. Supp. 1065, 1069 (D.Colo. 1995).

⁷⁵ National Wildlife Federation v. U.S. Forest Service, 861 F.2d at 1119 and 1121 (noting that subjecting a policymaker to public criticism on the basis of such tentative assessments is precisely what the deliberative process privilege is intended to prevent).

subsequent issuance of a decision,⁷⁶ by the agency opting not to make a decision,⁷⁷ or by the passage of time. It should be remembered though that even if a document is predecisional, it may lose this protected status if it is adopted, formally or informally, or expressly incorporated by reference, as the agency's position on an issue or used by the agency in its dealings with the public.⁷⁸

In contrast, however, are postdecisional documents. These documents generally embody statements of policy and final opinions that have the force of law, implement an established policy,⁷⁹ or explain actions that an agency has already taken.⁸⁰ Exemption 5 does not protect postdecisional documents from disclosure. They constitute "final opinions," and the public is entitled to know what the government is doing and why.⁸¹ Note, however, that portions of a postdecisional document that discuss predecisional recommendations that have not been expressly adopted may be protected.⁸²

⁷⁶ Wolfe v. HHS, 839 F.2d 768, 776 (D.C. Cir. 1988) (en banc).

⁷⁷ See Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 13 (D.D.C. 1995), aff'd. 76 F.3d 1232 (D.C. Cir. 1996).

⁷⁸ NLRB v. Sears, Roebuck & Co., 421 U.S. at 161 (noting then, that a document may only be withheld if it falls within the coverage of some exception other than Exemption 5); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

⁷⁹ NLRB v. Sears, Roebuck & Co., 421 U.S. at 152; Brinton v. Department of State, 636 F.2d 600, 605 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981).

⁸⁰ NLRB v. Sears, Roebuck & Co., 421 U.S. at 153-154.

⁸¹ See Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 868.

⁸² NLRB v. Sears, Roebuck & Co., 421 U.S. at 151 (noting that communications in postdecisional documents may be subject to deliberative process privilege "as long as prior communications and the ingredients of the decision-making process [have not been] disclosed").

The fact that a document is predecisional and deliberative does not end the analysis. A primary limitation on the scope of the deliberative process privilege is that it ordinarily does not protect purely factual matters that do not reflect the agency's deliberative process, or factual portions of an otherwise deliberative and privileged document.⁸³ Under the FOIA, an agency has the statutory duty to release all "reasonably segregable" factual portions of an exempt or withheld document. 5 U.S.C. § 552(b).⁸⁴ Generally, factual material may be withheld where: (1) that factual material is so "inextricably intertwined" with the privileged deliberative material that its disclosure would expose or cause harm to the agency's deliberations or decision-making process;⁸⁵ (2) the very act of separating the significant facts from the insignificant facts in a file constitutes an exercise of deliberative judgment by agency personnel;⁸⁶ or (3) it is impossible to reasonably segregate meaningful portions of the factual information from the deliberative information without imposing an inordinate burden and

⁸³ Local 3, IBEW v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988); Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 867.

⁸⁴ See EPA v. Mink, 410 U.S. at 93 (low level, routine, factual reports severable from private remainder of a document must be produced); Schiller v. NLRB, 964 F.2d at 1209 (remanded to the district court to hold the Board to its obligation to disclose reasonably segregable portions of withheld documents); see also U.S. v. Weber Aircraft Corp., 465 U.S. 792, 800 n. 17 (1984).

However, even if an agency document contains facts, which would be disclosable under the deliberative process privilege, such document may still be entitled to protection under Exemption 5's attorney work-product privilege and thus, would be withheld in its entirety. For a more detailed discussion on the applicability of the attorney work-product privilege, see section C., *infra*.

⁸⁵ Ryan v. Department of Justice, 617 F.2d at 791; Wolfe v. HHS, 839 F.2d 768, 774-776 (D.C. Cir. 1988).

⁸⁶ Lead Industries Association, Inc. v. OSHA, 610 F.2d 70, 85 (2d Cir. 1979) (disclosing factual segments of summaries would reveal deliberative process by revealing which facts were considered important).

result in a useless disclosure.⁸⁷ For example, a final investigation report (FIR), or its equivalent, prepared by a Board agent, will contain a recounting of "facts." However, because these facts are typically a "selective" summarization of a body of investigative materials, combined with recommendations and evaluations, and are thus "intertwined" with the Board's decision-making processes, they are entitled to the same protection afforded to deliberative material.⁸⁸ Similarly factual or statistical information that is actually an expression of deliberative communication may also be withheld on the basis that to reveal that information would reveal the agency's deliberations.⁸⁹

Thus, documents that are commonly protected by the deliberative process privilege include internal recommendations, proposals, and deliberations comprising part of a process by which governmental decisions and policies are formulated.⁹⁰ Deliberative process Board

⁸⁷ Local 3, IBEW v. NLRB, 845 F.2d at 1180 (declining to compel disclosure where stripping short document down to its "bare-bone facts" would render it "nonsensical"); Lead Industries Association, Inc. v. OSHA, 610 F.2d at 85-86.

⁸⁸ The factual matters in a FIR would likewise be exempt from disclosure under the attorney work-product privilege to the extent that it reveals the thought processes of the Board agent and contains his analysis of the legal issues of the case. See Associated Dry Goods v. NLRB, 455 F. Supp. 802, 810 (S.D.N.Y. 1978); Kent Corp. v. NLRB, 530 F.2d 612, 623-624 (5th Cir.), cert. denied, 429 U.S. 920 (1976) (where contents of the reports were not "primary information" such as verbatim witness statements or objective data, but were mainly reports reflecting counsel's appraisal of evidence, court concluded that such material was protected in its entirety by Exemption 5 by a properly raised claim of work-product privilege, regardless of opposing counsel's need; court noted, however, that it did not hold that the FIRs of the NLRB are always wholly within the work-product privilege). For a full discussion of the attorney work-product privilege, see section C., *infra*.

⁸⁹ National Wildlife Federation v. U.S. Forest Service, 861 F.2d at 1120-21.

⁹⁰ NLRB v. Sears, Roebuck & Co., 421 U.S. at 150; Strang v. Collyer, 710 F. Supp. 9, 12 (D.D.C. 1989), *aff'd sub nom.* Strang v. DeSio, 899 F.2d 1268 (D.C. Cir. 1990) (table) (meeting notes that reflect the give-and-take between agency personnel or divisions of NLRB).

documents may include but are not limited to:

- Final Investigation Reports (FIRs),⁹¹
- Agenda Minutes,⁹²
- Internal Advice or Appeals memoranda to the General Counsel,
- General Counsel Minutes,
- Advice submission memoranda,
- Regional Office comments on appeal,
- Internal Section 10(j) recommendation memoranda,
- Recommendations for approval of election agreements, and
- Recommendations to issue Notice of Hearing.

Exemption 5 also protects "drafts" of these documents, although it has been noted that such designation "does not end the inquiry."⁹³ It also should be remembered that in light of the opinions, comments, and recommendations of lower level Agency personnel that are encompassed in a draft document, the very process by which a draft evolves into a final document can itself constitute a deliberative process warranting protection.⁹⁴ Thus, Exemption

⁹¹ To the extent that a FIR or any of the other listed Board documents reflect the consideration or mental processes of various Board employees, i.e., identifying initials or hand-written or typed comments in the margins, those markings also should be protected by the deliberative process privilege. See Rothschild v. CIA, 1992 WL 71393 (D.D.C. 1992).

⁹² Be aware that an after-the-fact memorandum memorializing a decision already made or communicated would not be predecisional and therefore would not be exempt under Exemption 5's deliberative process privilege.

⁹³ Arthur Anderson, 679 F.2d 254, 257 (D.C. Cir. 1982) (citing Coastal States, 617 F.2d at 866). See, e.g., Lee v. FDIC, 923 F. Supp. 451, 458 (S.D.N.Y. 1996) (Court required disclosure of draft document because there was no claim by agency of harm to the agency's deliberative process and "draft" status does not "automatically" exempt the document). Cf. Hansen v. U.S. Air Force, 817 F. Supp. 123, 125 (D.D.C. 1992)(unpublished internal monograph lost draft status when consistently treated by agency as finished product over many years).

⁹⁴ National Wildlife Federation v. U.S. Forest Service, 861 F.2d at 1121-1122; Marzen v. HHS, 825 F.2d 1148, 1155 (7th Cir. 1987).

5 protection can be available to a draft document regardless of whether it differs from its final version.⁹⁵

Advice and Appeals Memoranda and the General Counsel's "GC" or "OM" Memoranda are Board documents warranting special attention. The deliberative process privilege protects from disclosure Advice and Appeals Memoranda that concern the filing of a complaint and the commencement of litigation. However, the deliberative process privilege does not protect from disclosure Advice memoranda, which authorize the Regions not to issue complaint and direct the dismissal of a charge without any other directions.⁹⁶ These "no go" memoranda must be disclosed in their entirety without regard to the open or closed status of the case.⁹⁷ Requests for all other types of Advice memoranda should be referred to the FOIA Officer in Washington.

⁹⁵ City of W. Chicago v. NRC, 547 F. Supp. 740, 747-748 (N.D. Ill. 1982); Lead Industries Association v. OSHA, 610 F.2d at 85-86 (factual summaries sought had been altered prior to the final document, in which case their revelation would amount to disclosure of the deliberative process leading up to the final reports).

⁹⁶ In these types of "no go" cases, Advice has been advised to draft memoranda to avoid references which would constitute clearly unwarranted invasions of personal privacy pursuant to 5 U.S.C. §§ 552 (b)(7)(C) and (b)(6). Further, Appeals, in its dismissal letters, generally names only those individuals named in the charge or the Regional Director's dismissal letter to protect individual privacy.

⁹⁷ NLRB v. Sears, Roebuck & Co., 421 U.S at 155. "No go" Advice Memoranda are disclosable upon issuance even though there remains the possibility that the General Counsel, acting through the Office of Appeals, may reverse Advice and direct issuance of a complaint. Id. at 158, n. 25. However, if Advice *sua sponte* decides to recall one of its "no go" memoranda before the Region has acted upon it, the Board has taken the position that the initial memorandum is not final, and will release only the later version provided that it is, itself, a "no go" memorandum.

These include "go" memoranda, "casehandling" memoranda,⁹⁸ and "mixed no-go" memoranda, e.g., those that also contain "go" or "casehandling" instructions. However, Exemption 5 does not protect "GC" Memoranda -- memoranda in the format "GC-xx" which contain the notation "Release to the Public." Of course, these memoranda should be released to a requester in their entirety. Requests for other "GC" Memoranda, or any "OM" Memoranda, should be referred to the General Counsel's FOIA Officer.

C. Attorney Work-Product Privilege

The attorney work-product privilege protects documents and other memoranda that reveal an attorney's mental impressions and legal theories and were prepared by an attorney in contemplation of litigation.⁹⁹ Litigation need not have commenced for the privilege to attach, so long as there is "some articulable claim likely to lead to litigation."¹⁰⁰ The work-product privilege extends to documents prepared in anticipation of foreseeable or inevitable litigation, even if no specific claim has been identified.¹⁰¹ It also has been held to cover documents

⁹⁸ Casehandling memoranda are those that direct neither issuance of a complaint nor dismissal of a charge, but rather deal with some other intermediate aspect of the processing of a case. They include, for example, deferral memoranda, memoranda concerning settlement, instructions to further investigate a case, and all internal Section 10(j) memoranda.

⁹⁹ See Hickman v. Taylor, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3). See also NLRB v. Sears, Roebuck & Co., 421 U.S. at 132 (protecting from disclosure agency memoranda reflecting decision to prosecute ULP charges).

¹⁰⁰ Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 865; Kent Corp. v. NLRB, 530 F.2d at 613.

¹⁰¹ Schiller v. NLRB, 964 F.2d at 1208 (documents that provide advice and instructions on how to handle future EAJA litigation held protectible).

"relat[ing] to possible settlements" of litigation,¹⁰² and recommendations to close litigation.¹⁰³

The privilege also protects materials prepared by non-attorneys who are supervised by attorneys.¹⁰⁴ It also protects the disclosure of work-product documents, even after litigation is terminated and the case for which they were created is closed.¹⁰⁵

The policy underlying the attorney work-product privilege was originally explained in Hickman v. Taylor, supra, where the Supreme Court held that an attorney in a civil suit should not have been ordered to turn over to opposing counsel memoranda, notes and statements of fact he had gathered from witnesses in anticipation of litigation. None of the documents or information sought in Hickman concerned legal strategies or deliberative material, 329 U.S. at 508-509; nevertheless, discovery of the factual information was not permitted on the basis of the work-product privilege. The Court's reasons for recognizing this privilege emphasized the intrusion upon the attorney's deliberative processes that would be occasioned by allowing

¹⁰² U.S. v. Metropolitan St. Louis Sewer Dist., 952 F.2d 1040, 1045 (8th Cir. 1992) (remanded to determine if privilege was waived).

¹⁰³ See, e.g., A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 146-147 (2d Cir.) (even if staff attorney was considering or recommending closing investigation, exemption still applies), cert. denied, 115 S.Ct. 574 (1994).

¹⁰⁴ Durham v. U.S. Department of Justice, 829 F. Supp. 428, 432-33 (D.D.C. 1993); U.S. v. Nobles, 422 U.S. 225, n.13 (1975); FRCP 26(b)(3).

¹⁰⁵ See FTC v. Grolier, Inc., 462 U.S. at 28, which established that the scope of the work-product immunity is not temporal: "[U]nder Exemption 5, attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation." See also In Re Murphy, 560 F.2d 326, 334 (8th Cir. 1977)(a "perpetual protection of work-product" is needed "if we are to remain faithful to the articulated policies of Hickman").

disclosure of the material. 329 U.S. at 511.¹⁰⁶

The Supreme Court's subsequent decisions in U.S. v. Weber Aircraft Corp.¹⁰⁷ and FTC v. Grolier, Inc.,¹⁰⁸ viewed in the light of the traditional contours of the attorney work-product privilege, afford sweeping work-product protection to factual materials under Exemption 5 of the FOIA. Thus, the distinction between "factual" and "deliberative process" materials applied to the deliberative process privilege does not apply to the attorney work-product privilege as incorporated within Exemption 5 of the FOIA because the work-product privilege does not distinguish between factual and deliberative material in the context of civil discovery. Additionally, the protection provided by Exemption 5 for attorney work-product material is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. Although a showing might be adequate to obtain production of attorney work-product in a civil discovery case,¹⁰⁹ the Supreme Court has expressly rejected the contention that FOIA Exemption 5's protection should be similarly qualified. FTC v. Grolier, Inc., 462 U.S. at 28. In this broad view of the privilege, factual

¹⁰⁶ Note that the reasoning in this Supreme Court case supports protecting Board agent-prepared affidavits under Exemption 5 as attorney work-product. See Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

¹⁰⁷ 465 U.S. 792 (1984).

¹⁰⁸ 462 U.S. 19 (1983).

¹⁰⁹ Within the civil discovery context, there is a qualified privilege from civil discovery for such documents, i.e. such material is discoverable only upon a showing of necessity and justification. Hickman, 329 U.S. at 511. See also U.S. v. Weber Aircraft Corp., 465 U.S. at 799, citing FTC v. Grolier, Inc., 462 U.S. at 26; NLRB v. Sears, Roebuck & Co., 421 U.S. at 149 and n. 16. See Fed. R. Civ. P. 26(b)(3).

material is fully entitled to work-product protection, and the segregation of factual material from an otherwise protected document is not required.¹¹⁰

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

- Final Investigation Reports (FIRs)
- Agenda Minutes
- General Counsel Minutes
- Legal research memoranda prepared by Board agents during investigation
- Internal Advice or Appeals Memoranda to the General Counsel
- Advice submission memoranda
- Regional Office comments on appeal
- Internal Section 10(j) recommendation memoranda
- Memoranda and handwritten notes to case files,¹¹¹
- Recommendations for approval of election agreements

¹¹⁰ Spannaus v. U.S. Department of Justice, 942 F. Supp. 656, 657 (D.D.C. 1996) (“the work-product privilege simply does not distinguish between factual and deliberative material”); Martin v. Office of Special Counsel, 819 F.2d at 1187 (segregation of materials prepared “in contemplation of litigation” is not strictly demanded for work-product documents); Norwood v. FAA, 993 F.2d 570, 576 (6th Cir. 1993) (work-product privilege protects documents regardless of status as factual or deliberative); Nadler v. U.S. Department of Justice, 955 F.2d 1479, 1492 (11th Cir. 1992); Manchester v. DEA, 823 F. Supp. 1259, 1269 (E.D.Pa. 1993) (segregation not required where factual information is incidental to, and bound with, privileged information); United Technologies Corp. v. NLRB, 632 F. Supp. 776, 781 (D. Conn.), *aff’d* on other grounds, 777 F.2d 90 (2d Cir. 1985).

¹¹¹ See, e.g., Nadler v. U.S. Department of Justice, 955 F.2d at 1491; Associated Dry Goods v. NLRB, 455 F. Supp. at 811.

- Recommendations to issue Notice of Hearing
- “GC” Memoranda said to have been prepared in contemplation of litigation.¹¹²

D. Attorney-Client Privilege

The third traditional privilege incorporated into Exemption 5 protects from disclosure "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."¹¹³ Unlike the attorney work-product privilege, the attorney-client privilege extends beyond efforts taken in anticipation of litigation. The privilege applies to facts divulged by a client to his attorney and also encompasses any opinions given by an attorney to his client based on those facts,¹¹⁴ as well as communications between attorneys, which reflect client-supplied information.¹¹⁵

The concept of confidential communications within the attorney-client relationship, and thus Exemption 5 protection under the privilege, may be inferred when the communications suggest that "the government is dealing with its attorneys as would any private party seeking

¹¹² Board-Agent prepared affidavits are also protected as attorney work product. See Section "Policies Relating to Affidavits" in Procedural Portion of the FOIA Manual.

¹¹³ Mead Data Central, Inc. v. U.S. Department of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). There is a "great deal of overlap" between the attorney-client privilege and the deliberative process privilege. The distinction between the two exemptions is that the attorney-client privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of underlying facts, while the deliberative process privilege directly protects opinions and advice and does not protect the underlying facts unless they would indirectly reveal the agency's decision-making process. Id. at 254, n. 28.

¹¹⁴ See, e.g., Schlefer v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983).

¹¹⁵ Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984).

advice to protect personal interests.'"¹¹⁶ The privilege extends to those communications between an attorney and all agents or employees of the agency or organization.¹¹⁷ For example, communications by and between Agency personnel, which would be covered by the attorney-client privilege, include the relationship between the Board and the General Counsel's Office (excluding Appeals and Advice), when the latter acts as the Board's attorney in an attorney-client relationship.

A fundamental prerequisite to assertion of the privilege is that confidentiality is maintained consistently at the time of communication and thereafter.¹¹⁸ Courts have found an attorney-client privilege claim to fail where an agency is unable to affirmatively establish the document's confidentiality and that it was reasonably careful to keep this confidential information protected from general disclosure.¹¹⁹ The FOIA Officer at Headquarters should be contacted in every case in which attorney-client privilege is claimed.

IX. Exemption 6

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

¹¹⁶ Scott Paper Co. v. U.S., 943 F. Supp. 489, 499 (E.D.Pa. 1996) (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 863). But see Dow, Lohnes & Albertson v. Presidential Commission on Broadcasting to Cuba, 624 F. Supp. 572, 578 (D.D.C. 1984) (confidentiality must be shown in order to invoke Exemption 5).

¹¹⁷ Mead Data Central, Inc. v. U.S. Department of the Air Force, 566 F.2d at 253, n. 24.

¹¹⁸ Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 863.

¹¹⁹ Id.; Scott Paper Co. v. U.S., 943 F. Supp. at 499-500.

clearly unwarranted invasion of personal privacy."¹²⁰ Although the specification of the types of files protected appears limited, it is now settled that privacy protection is to be interpreted broadly and does not "turn upon the label of the file."¹²¹ Instead the threshold "files" requirement covers all information which "applies to a particular individual."¹²²

Once information meets the threshold to qualify for protection under Exemption 6, the inquiry turns to whether disclosure "would constitute a clearly unwarranted invasion of

¹²⁰ 5 U.S.C. §552(b)(6).

¹²¹ U.S. Dept. of State v. Washington Post Co., 456 U.S. 595, 601-602 (1982). Further, the term "similar files" is generally not construed in a narrow technical way if to do so would defeat the purpose of Exemption 6. Committee on Masonic Homes v. NLRB, 556 F.2d 214, 219 (3d Cir. 1977); Arieff v. U.S. Dept. of the Navy, 712 F.2d 1462, 1466 (D.C. Cir. 1983) (discussing broad construction of term "similar files").

¹²² Washington Post, supra, 456 U.S. at 601-602. Neither corporations nor business associations possess protectable privacy interests. See National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976). An exception is closely held corporations. Id. at 685-686. Individuals in a closely held corporation retain an expectation of privacy which expectation, however, is somewhat diminished when the individual is acting in a business capacity. See, e.g., Lawyers Comm. For Human Rights v. INS, 721 F.Supp. 552, 559 (S.D.N.Y. 1989). Also, the majority rule is that the deceased have no privacy rights. See, e.g., Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F.Supp. 1397, 1413 (D Haw. 1995). Although in many instances Board agents reviewing documents for possible disclosure will not know whether persons mentioned in the documents are living or deceased, an agency ordinarily is not required to conduct research in order to determine whether an individual has died. Manna v. Dept. of Justice, 51 F.3d 1158, 1165 (3d Cir.), cert. denied, 116 S.Ct. 477 (1995). However, courts retain discretion to require an agency to demonstrate that individuals upon whose behalf it asserts the privacy exemption are in fact alive, and courts are particularly likely to require such a demonstration in cases involving older documents. See, e.g., McDonnell v. U.S., 4 F.3d 1227, 1254 (3d Cir. 1993). Hall v. U.S. Department of Justice, 26 F. Supp. 2d 78, 82 (D.D.C. 1998)(Court applied rule that a rebuttable presumption existed that if the document or the event it described was 50 years old, the subject was deceased.)

personal privacy."¹²³ This requires a balancing of the public's right to disclosure against the individual's right to privacy.¹²⁴ First, a recognizable privacy interest must be identified or the exemption simply does not apply.¹²⁵ Then, some public interest must be identified, in the absence of which the privacy-related information is plainly exempt from disclosure.¹²⁶ If both a public interest and a privacy interest exist, then it is necessary to strike a balance between the two.

Examples of privacy interests recognized by the courts include threats of violence and retaliation,¹²⁷ allegations of assault,¹²⁸ charges of sexual deviancy,¹²⁹ information concerning

¹²³ The burden is on the government to establish that the invasion of privacy is clearly unwarranted. U.S. Department of State v. Ray, 502 U.S. 164, 172 (1991).

¹²⁴ The burden of proof as to the public interest in disclosure is on the requester. See Carter v. United States Dept. of Commerce, 830 F.2d 388, 390-391 nn. 8 & 13 (D.C. Cir. 1987).

¹²⁵ The privacy interest need not involve something intimate or embarrassing to qualify for protection. U.S. Dept. of State v. Washington Post Co., 456 U.S. 595, 600 (1982). In considering privacy interests, the agency should also consider the universe of possible consequences that release of the information might trigger, since the issue is not simply what the requester might do with the information but "what anyone else might do with it." Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996).

¹²⁶ National Association of Retired Federal Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir.), cert. denied, 494 U.S. 1078 (1990) ("something, even a modest privacy interest, outweighs nothing every time").

¹²⁷ Alirez v. NLRB, 676 F.2d 423, 425 (10th Cir. 1982) (applying Exemption 7(C)).

¹²⁸ Id.

¹²⁹ Id.

marital status,¹³⁰ legitimacy of children,¹³¹ identity of fathers of children,¹³² medical conditions,¹³³ alcohol consumption,¹³⁴ family fights,¹³⁵ wage rates,¹³⁶ job performance and personnel action,¹³⁷ social security numbers,¹³⁸ or other "intimate and personal details."¹³⁹

Further, Excelsior lists – containing the names and addresses of eligible voters – have been held to be categorically exempt under Exemption 6. See, Reed v. NLRB, 927 F.2d 1249 (D.C.

¹³⁰ See Marathon LeTourneau Company Marine Division v. NLRB, 414 F.Supp. 1074, 1084 (S.D. Miss. 1976) (discussing Exemption 7(C)).

¹³¹ Id.

¹³² Id.

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Wayland v. NLRB, 627 F.Supp. 1473, 1479 (M.D. Tenn. 1986) (applying Exemption 7(C)).

¹³⁷ Id. Even favorable job performance information can be protected on the basis that it may embarrass an individual, incite jealousy among co-workers, or reveal by omission the identities of employees who did not receive favorable job performance ratings. Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); FLRA v. U.S. Dept. of Commerce, 962 F.2d 1055, 1059 (D.C. Cir. 1992).

Civilian federal employees have no reasonable expectation of privacy with respect to their names, position descriptions and present and past titles, grades, salaries, and duty stations. However, if disclosure of this information in connection with a particular case would cause harm (e.g., the identity of Board counsel at Board headquarters assigned to draft a particular decision), it should be protected. Note that other private information of civilian federal employees is protectable. See Core v. United States Postal Service, 730 F.2d 946, 948 (4th Cir. 1984); National Western Life Insurance Co. v. United States, 512 F.Supp. 454, 461 (N.D. Tex. 1980); Barvick v. Cisneros, 941 F.Supp. 1015 (D. Kan. 1996)). See also, 5 C.F.R. 293.311, attached hereto as SA 28.

¹³⁸ Aronson v. I.R.S., 973 F.2d 962, 968 (1st Cir. 1992).

¹³⁹ Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985-986 (9th Cir. 1985).

Cir.), cert. denied, 502 U.S. 1047 (1992). In addition, Union authorization cards have been held to be exempt from disclosure under Exemption 6, as the disclosure of the cards would constitute a serious invasion of employee privacy and would seriously intrude upon the secrecy of representation elections. The privacy interest being protected is the support or non-support for the Union. See, e.g., Madeira Nursing Center v. NLRB, 615 F.2d 728 (6th Cir. 1980); Masonic Homes v. NLRB, 556 F.2d 214 (3d Cir. 1977). However, we no longer withhold the related showing of interest form (Form 4069), since it has been revised to delete the exact number of cards submitted, thereby minimizing the possibility that a requester could infer from it anything about which individuals may have signed cards. See Pacific Molasses Co. v. NLRB, 577 F.2d 1172, 1184 n.9 (5th Cir. 1978).

This list above of course is not comprehensive. Individuals also have an obvious privacy interest in keeping secret the fact that they were subjects of a law enforcement investigation. The privacy interest also extends to third parties who may be mentioned in investigatory files, as well as to witnesses and informants who provided information during the course of an investigation.¹⁴⁰ Further, while the names of FOIA requesters (except for First-Party Requesters—that is, requesters seeking information that involves their own interests) are generally disclosable, personal information about FOIA requesters such as home addresses and home telephone numbers should not be disclosed. Finally, information about a single individual whose identity cannot be determined after redaction of personal identifiers from the

¹⁴⁰ See Nation Magazine, Washington Bureau v. U.S. Customs Service, 71 F.3d 885, 894 (D.C. Cir. 1995).

records (e.g., name, home address, or social security number) does not qualify for protection.¹⁴¹

A. Analytical Approach of Supreme Court in Reporter's Committee

In the landmark decision of U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press,¹⁴² the Supreme Court enunciated an analytical approach for evaluating privacy-related FOIA requests.

1. Identity of Requester and Specific Purpose of Requester are Irrelevant: The Court made plain that neither the identity of the requester nor the purpose for which the request is made is generally relevant in the analysis.¹⁴³ The proper approach is to consider the relationship of the document to the public interest generally rather than the identity or specific purpose of the requester.

2. "Public Interest" is Narrowly Defined: The Court narrowly defined the scope of the public interest to be considered under the privacy exemptions, declaring that it is limited to "the kind of public interest for which Congress enacted the FOIA."¹⁴⁴ This "core purpose" of

¹⁴¹ Citizens for Environmental Quality, Inc. v. USDA, 602 F.Supp. 534, 538-539 (D.D.C. 1984). On the other hand, where the number of individuals involved is small, mere deletion of personal identifiers may be insufficient to protect their privacy, in which case the records should be withheld in their entirety. Alirez v. NLRB, 676 F.2d 423, 428 (10th Cir. 1982) (applying Exemption 7(C), court held that mere deletion of names and other identifying data concerning small group of coworkers was inadequate to protect them from embarrassment or reprisals because requester could still possibly find individuals.)

¹⁴² 489 U.S. 749 (1989) (holding that Exemption 7(C) permits non-disclosure of the contents of an FBI rap sheet to a third party). While Reporters Committee involved the application of Exemption 7(C), the fundamental principles announced there are equally applicable to Exemption 6. U.S. Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 114 S.Ct. 1006, 1012-1013 & n.6 (1994).

¹⁴³ 489 U.S. at 771. The sole exception is that information about the requester cannot be withheld from the requester on privacy grounds (First Party Requests).

¹⁴⁴ 489 U.S. at 774.

FOIA,¹⁴⁵ as the Court termed it, is to "shed [] light on an agency's performance of its statutory duties." Id. at 773.¹⁴⁶

3. Establishment of "Practical Obscurity" Standard: The Court explained that substantial privacy interests can exist in personal information that has been made available to the public at some point in time. Establishing a "practical obscurity" standard, the Court held that where the public disclosure was limited and the material not readily obtainable, a privacy interest in it may still exist.¹⁴⁷

¹⁴⁵ Id. at 775.

¹⁴⁶ The Supreme Court has applied these "core purpose" principles strictly. See Department of Defense v. FLRA, 510 U.S. 487, 114 S.Ct. 1006, 1012, 1015 (public interest "virtually non-existent" where disclosure would not contribute significantly to public understanding of the operations or activities of the government)("Department of Defense"). See also Bibles v. Oregon Natural Desert Ass'n, 117 S.Ct. 795 (1997). In Bibles, the Supreme Court summarily reversed the Ninth Circuit's decision to disclose a Bureau of Land Management ("BLM") mailing list based upon the alleged public interest in the ability of third parties to furnish information to the persons on the mailing list contrary to that furnished by BLM. 117 S.Ct. at 795. The Supreme Court again held that the only relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know "what their government is up to." 117 S.Ct. at 795. Given these recent Supreme Court decisions, Board agents should narrowly interpret the "public interest" requirement and closely scrutinize requesters' assertions of public interest underlying FOIA requests. Further, in those requests where the alleged public interest is in discovering government wrongdoing, it is not enough that a requester merely allege government wrongdoing without any evidentiary support. See Computer Professionals for Social Responsibility v. U.S. Secret Service, 72 F.3d 897, 904-905 (D.C. Cir. 1996) (public interest "insubstantial" unless requester submits compelling evidence that agency is engaged in illegal activity and information sought is necessary to confirm or refute that evidence.) See also Stern v. F.B.I., 737 F.2d 84, 93-94 (D.C. Cir. 1984); Sheet Metal Workers' International Ass'n, Local Union No. 19 v. VA, 135 F.3d 891, 900 (3d Cir. 1998) ("Reporters Committee and Department of Defense demonstrate both an increased appreciation for employees' privacy and a concomitant decrease in the belief that disclosure of personal information for the purpose of monitoring Davis-Bacon Act compliance serves a public interest.")

¹⁴⁷ 489 U.S. at 762, 767.

4. "Categorical Balancing" is Permissible Under Certain Circumstances: Importantly, the Court in Reporters Committee made clear that agencies may engage in "categorical balancing" in favor of nondisclosure.¹⁴⁸ Under this approach, it may be determined, "as a categorical matter," that a certain type of information always is protectable under a privacy-related exemption, "without regard to individual circumstances."¹⁴⁹

B. "Derivative Uses" of the Disclosed Documents Should Not be Considered

Reporters Committee and other case law, suggest that to be within the public interest, the requested information itself must reveal something directly about performance of an agency's official duties. Public interest that stems not from the document itself but from a "derivative use" to which the document could be put does not qualify. That is, if the requester must contact listed individuals, or compare the requested information to other material to bring that information within the core purpose of FOIA, that information does not qualify as having a public interest which reveals agency operations.¹⁵⁰ While the Supreme Court in Ray, *supra*, expressly declined to decide whether a public interest that stems not from the documents themselves but from a "derivative use" to which the documents could be put could ever be weighed in the balancing process against a private interest (502 U.S. at 178-179), the Court's recent unanimous reaffirmation of the "public interest" core concept and implicit rejection of a derivative use argument in Bibles (see note 146, *supra*) strongly supports the

¹⁴⁸ Id. at 776-780 & n.22; See also, Reed v. NLRB, 927 F.2d 1249 (D.C. Cir.), cert. denied, 502 U.S. 1047 (1992) (Excelsior lists are categorically exempt).

¹⁴⁹ Id. at 780.

¹⁵⁰ Reporters Committee, 489 U.S. at 773; Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991); NARFE v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).

position that a derivative indirect use does not satisfy the public interest requirement.¹⁵¹

Thus, FOIA processors (relying upon Exemptions 6 and 7(C)) should refuse categorically to honor requests which seek personal information about individuals, unrelated to the Board's mission. Where a requester seeks information that implicates privacy interests and that also does "shed light on the agency's performance of its statutory duties," the information should be supplied, but only where the redaction of all identifying information would be sufficient to protect the privacy interests or where the public interest in disclosure plainly outweighs all privacy interests.

Finally, when a request is focused on records concerning identifiable individuals and the records are of a particularly sensitive nature, it may be necessary to go beyond a mere denial of access to the records and to refuse to confirm or deny that responsive records exist (a "Glomar" response).¹⁵² This approach is appropriate whenever the mere acknowledgment of the existence of records would cause an invasion of privacy.

¹⁵¹ See also Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991) (refusing to compel disclosure of names, addresses and wages of individuals as contained in payroll records requested by union in order to contact employees for purpose of monitoring HUD's enforcement of Davis-Bacon Act: "were we to compel disclosure of personal information with so attenuated a relationship to governmental activity, however, we would open the door to disclosure of all personal information, thereby eviscerating the FOIA privacy exemptions"); Painting and Drywall Work Preservation Fund v. HUD, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (upholding HUD's redaction of names, social security numbers, and home addresses that would have enabled requester to determine earnings and work hours of individual employees: "as information that might reveal the failure of contractors to comply with [Davis-Bacon] does not in itself cast light on what HUD is up to, we can find no obvious public interest in its disclosure.")

¹⁵² See the related discussions of Glomar (Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976)) under Exemption 7(D), below.

X. Exemption 7

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information" would effectuate one of the enumerated harms set forth in subsections 7(A) through 7(F).¹⁵³ Exemption 7 protects the government's case by not allowing an opposing litigant earlier or greater access to investigative files than he or she would otherwise have.¹⁵⁴ As a threshold matter, before it may invoke Exemption 7, the government has the burden of proving the existence of a compilation for a law enforcement purpose. The requirement that the records be "compiled for law enforcement purposes" is not limited to documents prepared especially for the case in question when the information was first created or obtained. Rather, the compilation also can include documents and materials "already collected by the Government originally for non-law enforcement purposes," and later assembled for law enforcement purposes so long as the compilation occurred prior to "when the Government

¹⁵³ 5 U.S.C. § 552(b)(7). Subsection 7(B) deals with records the release of which would deprive a person of a right to a fair trial or an impartial adjudication and subsection 7(F) deals with endangering the life or physical safety of any individual. Because these exemptions rarely arise in our cases, they are not discussed further here. If you receive a request raising issues under either of these subsections, consult with FOIA Officer in Washington for advice.

¹⁵⁴ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978).

invokes the Exemption."¹⁵⁵

The Supreme Court has determined that the statutory provision "compiled for law enforcement purposes" must be construed in a "functional way" and that the overriding consideration must be "the effect that disclosure would have on the interest the exemption seeks to protect."¹⁵⁶ Law enforcement purposes encompass statutes authorizing administrative regulatory proceedings.¹⁵⁷ Records meet this threshold requirement when they involve the enforcement of the Agency's statute or regulation within its authority.¹⁵⁸

Applying the above principles, Exemption 7 is applicable to documents prepared for the investigation and prosecution of unfair labor practice cases.¹⁵⁹ It is also the Board's position to

¹⁵⁵ John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989), *rehg denied*, 493 U.S. 1064 (1990).

Conversely, the Supreme Court has held that information originally compiled for law enforcement purposes continued to meet the threshold requirements of Exemption 7 when it was summarized in a new document not created for law enforcement purposes. FBI v. Abramson, 456 U.S. 615, 623 (1982). See Exner v. United States Dept. of Justice, 902 F. Supp. 240, 242 fn. 3 (D.D.C. 1995)(records of FBI organized crime investigation remain entitled to Exemption 7 protection even though "a copy of the documents might also be found in a non-law enforcement file.").

¹⁵⁶ John Doe Agency, 493 U.S. at 157. See also Lurie v. Department of the Army, 970 F.Supp. 19, 36 (D.D.C. 1997)(threshold requirement met where investigation focused directly on conduct of identified officials which could lead to disciplinary proceedings against active military personnel and administrative action against military and civilian employees).

¹⁵⁷ Ehringhaus v. FTC, 525 F. Supp. 21, 22-23 (D.D.C. 1980).

¹⁵⁸ See Lewis v. IRS, 823 F.2d 375, 379 (9th Cir. 1987); Birch v. Postal Service, 803 F.2d 1206, 1210-1211 (D.C.Cir. 1986).

¹⁵⁹ See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 226 (1978), in which the Court concluded that "Congress intended to preserve existing law relating to NLRB proceedings -- case law that had looked to the "reasons" for the Exemption and found them to be present where an unfair labor practice proceeding was pending and the documents sought were potential witnesses' statements." 437 U.S. at 234.

claim Exemption 7 with respect to documents created during the investigation of a representation case because, as is the case with unfair labor practice proceedings, the conduct of representation proceedings indisputably lies at the heart of the Board's regulatory responsibilities under the NLRA. Thus, Section 7 of the NLRA grants employees, inter alia, the right to bargain collectively through representatives of their own choosing or to refrain from engaging in any concerted or union activity except to the extent that a contract provides for a union security clause. Section 9(c)(1) implements some of these rights by vesting in the Board the power to determine if a "question of representation" exists among employees in a bargaining unit and, if one does exist, to "direct an election by secret ballot" and to "certify the results thereof."

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

purposes.”¹⁶⁰

Although recognition of the “law enforcement purposes” underlying representation proceedings is consistent with the Supreme Court’s functional interpretation of Exemption 7’s threshold requirement, some reviewing courts have been unwilling to find that the exemption covers all representation case material.¹⁶¹ For example, the Third Circuit held that authorization cards were not “compiled for law enforcement purposes” because law enforcement purposes “must relate to some type of formal proceeding, and one that is pending.”¹⁶² The District of Columbia Circuit in dicta has expressed skepticism that Excelsior lists were compiled for law enforcement purposes, noting that the lists were “obtained by the Board pursuant to routine pre-election procedures - not as part of a specific investigation into

¹⁶⁰ Wellman Industries, Inc. v. NLRB, 490 F.2d 427, 429 (4th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974), cited with approval in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 226 (1978). See also Clements Wire & Mfg. Co. Inc. v. NLRB, 589 F.2d 894, 897 (5th Cir. 1979)(representation case witness statement protected from disclosure under Exemption 7); Red Food Stores, Inc. v. NLRB, 604 F.2d 324, 325 (5th Cir. 1979)(same); Anderson Greenwood & Co. v. NLRB, 604 F.2d 322, 323 (5th Cir. 1979)(same). See also Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419-1420 (N.D. Cal. 1986)(parties did not dispute, and court agreed, that impounded ballots were records compiled for law enforcement purposes even though the election was over and the unfair labor practice case was settled); Howard Johnson Co., Inc. v. NLRB, 96 LRRM 2214 (W.D.N.Y. 1977)(authorization cards prepared for neutral investigatory pre-election proceedings are investigatory records compiled for law enforcement purposes); Deering Miliken, Inc. v. Irving, 548 F.2d 1131, 1136 (4th Cir. 1977) (“We do not depart from the sound precedent, including our own, which exempts from disclosure investigatory records compiled for representation and unfair labor practice proceedings.”)

¹⁶¹ However, these documents may well be exempt under other FOIA Exemptions.

¹⁶² Committee on Masonic Homes of the R.W.Grand Lodge v. NLRB, 556 F.2d 214, 218-29 (3d Cir, 1977)(Court rejected as “not enough” the Board’s argument that its cards may well be used in a future unfair labor practice proceeding, finding that “nearly all NLRB records could fit this definition.”). Accord Pacific Molasses Co. v. NLRB, 577 F.2d 1172, 1184 and n. 9 (5th Cir. 1978).

potential unfair labor practices.”¹⁶³ Additionally, the Fifth Circuit has held that Exemption 7 was inapplicable to marked voting lists indicating whether or not specific voters had voted, despite pending unfair labor practice cases against the employer/requester.¹⁶⁴

Although the law remains unsettled as to whether all representation case material meet Exemption 7’s threshold requirement, it is clear that the presence of pending unfair labor practice proceedings at the time of the FOIA request strengthens the Board’s position that requested documents were prepared for law enforcement purposes.

A. Exemption 7(A)

Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." Determining its applicability requires consideration of (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm.¹⁶⁵ Regarding the latter consideration, the government does not have to establish harm on a document-by-document basis.¹⁶⁶ An agency may specify generic categories of documents and the harm that would result from their

¹⁶³ Reed v. NLRB, 927 F. 2d. 1249, 1252 (D.C.Cir. 1991), cert. denied 502 U.S. 1047 (1992). See also Birch v. U.S. Postal Serv., 803 F.2d 1206, 1209-10 (D.C.Cir. 1986)(for agencies performing both law enforcement and administrative functions, only “investigations which focus directly on specifically alleged illegal acts” are covered by Exemption 7).

¹⁶⁴ Avondale Industries v. NLRB, 90 F.3d 955, 962 (5th Cir. 1996), reh. denied 99 F.3d 1137 (5th Cir. Sept. 27, 1996)(Table).

¹⁶⁵ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978)(government must show how release of records “would interfere with a pending enforcement proceeding”).

¹⁶⁶ Id. at 236 (affidavits in ULP proceeding).

release. However, an agency must review each document in order to assign the document to the proper category and explain to the reviewing court how each category would interfere with enforcement proceedings.¹⁶⁷ The fact that the government may justify nondisclosure on a categorical basis does not, however, eliminate the need to review each document line-by-line and to disclose those portions of each document which are reasonably segregable and not otherwise exempt.

The Board must disclose formal documents even if the case for which they were compiled remains open. Additionally, material given to or received from a party/requester, which is otherwise exempt under 7(A), should be disclosed to that party/requester. Regarding Board records for which the 7(A) exemption is claimed, “[f]oremost among the purposes of Exemption 7 is to prevent harm to the government’s case in court.”¹⁶⁸ In Robbins Tire, the Supreme Court observed that “the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding was precisely the kind of interference that Congress [wanted] to protect against.” Accordingly, the Court found that witness statements in pending unfair labor practice proceedings were exempt under the FOIA because of the risk that witness intimidation might interfere with enforcement proceedings, and because premature disclosure of witness statements could provide a suspected violator with advance access to the agency’s case.¹⁶⁹ The FOIA is not intended to function as a private

¹⁶⁷ Kay v. FCC, 867 F.Supp. 11, 18 (D.D.C. 1994)(citing Bevis v. Dept. of State, 801 F.2d 1386, 1389 (D.C.Cir. 1986)). See also U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 776-780 (1989)(Exemption 7(C)).

¹⁶⁸ Kilroy v. NLRB, 633 F.Supp. at 142.

¹⁶⁹ 437 U.S. at 232, 239-41.

discovery tool.¹⁷⁰ Thus, protections extend to any documents whose release would enable potential litigants to tailor their defense or otherwise obtain an unfair litigation advantage by premature disclosure.

For example, documents that would reveal preliminary evidence supporting a contemplated agency action, the focus of the investigation, strategy, the strengths and weaknesses of the agency's case, and the amount of resources devoted to the investigation are protected to prevent potential litigants from altering their litigation strategy and pre-complaint activities to frustrate the imposition of effective remedies, or from changing their responses to subsequent information requests.¹⁷¹

Exemption 7(A) is temporal in nature.¹⁷² This exemption ordinarily applies only so long as the proceeding remains pending or is fairly regarded as prospective.¹⁷³ To satisfy its burden, the agency must generally identify a concrete proceeding for which disclosure of the requested

¹⁷⁰ 437 U.S. at 242.

¹⁷¹ Ehringhaus v. F.T.C., 525 F.Supp. 21, 23-24 (D.D.C. 1980)(disclosure of documents relating to a survey to gather potential evidence for use in a future law enforcement adjudication would allow potential litigants insights into the FTC's strategy and evidence which it would not be able to obtain through established discovery procedures). See also Kay v. F.C.C., 867 F.Supp. at 19; Swan v. SEC, 96 F.3d 498, 499-500(D.C.Cir. 1996)(whether Exemption 7(A) applies depends on the character of the records and the interference with enforcement proceedings, regardless of the identity of the requester); J.P. Stevens & Co. v. Perry, 710 F.2d 136, 143 (4th Cir. 1983)(premature disclosure would "hinder [agency's] ability to shape and control investigations").

¹⁷² The other subsections of Exemption 7 are not temporal.

¹⁷³ Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 886-87 (6th Cir. 1984); Kilroy v. NLRB, 633 F. Supp. at 142, 143; Ehringhaus v. FTC, 525 F. Supp. at 22-23.

documents could reasonably be expected to cause harm.¹⁷⁴ The exemption remains viable throughout the duration of long-term investigations. Moreover, even after a proceeding is finally closed, the exemption may remain applicable if the agency can demonstrate that disclosure could be expected to interfere with a related, pending proceeding.¹⁷⁵ This is especially so where, for example, the cases involve similar or interrelated facts, the same employer, and a close temporal relationship.¹⁷⁶ Exemption 7(A) may also be invoked when an investigation has been terminated but an agency retains oversight or some other continuing enforcement-related responsibility. Thus, a district court found that although the election was over and the unfair labor practice case settled, the exemption protected impounded ballots because disclosure could interfere with the Board's authority to conduct future representation elections.¹⁷⁷

¹⁷⁴ Ehringhaus v. F.T.C., 525 F.Supp. at 23 (court found "a concrete and foreseeable possibility . . . that enforcement litigation will ensue" where the agency was engaged in an active investigation and devoted substantial resources to it). Cf. Seegull Mfg. Co. v. NLRB, 741 F.2d at 886-87, in which the Sixth Circuit invalidated the Board's prior practice of withholding documents for a six-month "buffer period" after a case closed and found that, by failing to offer specific evidence about the impact of disclosure on a pending proceeding, the Board did not satisfy its burden of proof of demonstrating the applicability of Exemption 7(A). See also Poss v. NLRB, 565 F.2d 654, 657 (10th Cir. 1977)(Exemption 7(A) not applicable to protect documents relating to the General Counsel's decision not to issue a complaint; because such a decision is final and unreviewable, there are no pending or contemplated enforcement proceedings).

¹⁷⁵ See, e.g., New England Medical Ctr. Hosp. v. NLRB, 548 F.2d 377, 386 (1st Cir. 1976).

¹⁷⁶ Id.

¹⁷⁷ Injex Industries v. NLRB, 699 F.Supp. 1417, 1419 (N.D.Ca. 1986)(disclosure would undermine the Board's decisions to impound the ballots and to allow withdrawal of the election petition).

If a case is no longer open and there is no foreseeability of interfering with other future proceedings, Exemption 7(A) can not be claimed. Accordingly, whether or not the requested documents can be protected must be considered under other available FOIA exemptions.¹⁷⁸

B. Exemption 7(C)

Exemption 7(C) permits an agency to withhold information compiled for law enforcement purposes where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." All of the bases for withholding documents discussed in connection with Exemption 6, above, apply to Exemption 7(C).¹⁷⁹ Application of either exemption involves determining whether the intrusion into private matters is "unwarranted" after balancing the need for protection of private information against the benefit to be obtained by disclosure of information concerning the workings of the Agency.¹⁸⁰ The balancing of public and private interests is the same under both exemptions. However, Exemption 7(C) imposes a lesser burden of proof on the government and is more protective of privacy than Exemption 6 because 7(C) "applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,' while [Exemption 6] bars

¹⁷⁸ For purposes of this FOIA Manual, representation proceedings are not considered closed so long as there is a reasonable expectation that a "test of certification" 8(a)(5) charge may result or an open related case exists.

¹⁷⁹ See Bibles v. Oregon Natural Desert Assn., 117 S.Ct. 795 (1997).

¹⁸⁰ Detroit Free Press, Inc. v. Dept. of Justice, 73 F.3d 93, 96 (6th Cir. 1996), reh'g denied Apr. 15, 1996; Reporters Committee, 489 U.S. at 773 (standard of public interest to consider is one specifically limited to the FOIA's "core purpose" of "shed[ding] light on an agency's performance of its statutory duties").

any disclosure that ‘would constitute’ an invasion of privacy that is ‘clearly unwarranted.’¹⁸¹

Under the balancing test that traditionally has been applied to both Exemptions 6 and 7(C), the agency must first identify and evaluate the privacy interests, if any, implicated in the requested records. Individuals have an obvious privacy interest in keeping secret the fact that they were subjects of a law enforcement investigation. The privacy interest also extends to third parties who may be mentioned in investigatory files, as well as to witnesses and informants who provided information during the course of an investigation.¹⁸² These privacy interests must then be weighed against an identified public interest to determine whether or not the exemption should apply.

¹⁸¹ U.S. Dep’t of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 114 S.Ct. 1006, 1013 n. 6 (1994). See, e.g., Stauss v. IRS, 516 F. Supp. 1218, 1222, n.7 (D.D.C. 1981) (civil case - disclosure of identities of and information about tax protesters could chill the lawful expression of disagreement with tax policies).

¹⁸² Nation Magazine, Washington Bureau v. U.S. Customs Service, 71 F.3d 885, 894 (D.C.Cir. 1995); Cuccaro v. Secretary of Labor, 770 F. 2d 355, 359 (3d Cir. 1985) (privacy interest of witnesses who participated in OSHA’s investigation outweighs public interest in disclosure of their names where disclosure could cause harassment or embarrassment); Computer Professionals for Social Responsibility v. U.S. Secret Serv., 72 F.3d 897, 904 (D.C.Cir. 1996)(release of individuals’ names, including nonsuspects, who attended public meeting that attracted attention of law enforcement officials would impinge upon their privacy); L & C Marine Transp., Ltd. v. U.S., 740 F.2d 919, 923 (11th Cir. 1984)(disclosure of identities of employee-witnesses in OSHA investigation could cause “problems at their jobs and with their livelihoods”); Kilroy v. NLRB, 633 F. Supp. 136, 145 (S.D. Ohio 1985)(names and telephone numbers of affiants exempt), *affd.* 823 F.2d 553 (6th Cir. 1987)(unpublished table decision); Alirez v. NLRB, 676 F.2d 423, 427 (10th Cir. 1982)(disclosure of statements that described threats of violence against employees involved in employment dispute, allegations of assault by discriminatee, charges of sexual deviancy by an employee, and statements regarding the union would potentially subject Board informants and others to embarrassment or reprisals); Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985)(disclosure of authors and subjects of affidavits that described “in painful detail the personalities, activities, biases and proclivities of employers, union members and officials” could cause substantial risk of embarrassment and reprisal).

The passage of time will not ordinarily diminish the applicability of Exemption 7(C).¹⁸³ On the one hand, once information has been publicly confirmed in connection with a proceeding, any privacy interest in that information may be lessened.¹⁸⁴ On the other hand, however, the “practical obscurity” concept expressly recognizes that the passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge but has long since faded from memory.¹⁸⁵

C. Exemption 7(D)

Exemption 7(D) protects against the disclosure of information that could disclose the identity of confidential sources.¹⁸⁶ A source is confidential if the source “provided information

¹⁸³ McDonnell v. U.S., 4 F.3d 1227, 1256 (3d Cir. 1993)(passage of 49 years does not negate individual’s privacy interest); Maynard v. CIA, 986 F.2d 547, 566 n. 21 (1st Cir. 1993)(effect of passage of time upon individual’s privacy interests found “simply irrelevant” when FOIA requester was unable to suggest a public interest in disclosure).

¹⁸⁴ Detroit Free Press v. Dep’t of Justice, 73 F.3d at 97 (mug shots not exempt from disclosure where indictees had already been identified by name by the federal government and their faces revealed during prior judicial appearances); Nation Magazine, Washington Bureau v. U.S., 71 F.3d at 894 n. 8 (individual waived his right to 7(C) protection of his identity by publicly claiming to have done the things that documents responsive to the FOIA request discuss); Akron Standard Div. of Eagle-Picher Indus. v. Donovan, 780 F.2d 568, 572 (6th Cir. 1986), reh’g denied 788 F.2d 1223 (6th Cir. 1986) (information relating to job performance that “had been fully explored in public proceedings” not exempt where public had an interest in disclosure of nature and extent of agency investigation of alleged retaliation). But see Kimberlin v. Dep’t of the Treasury, 774 F.2d 204, 209 (7th Cir. 1985) (Exemption 7(C) applicable to third party’s driver’s license and passport “which were introduced into evidence” in federal criminal trial where FOIA requester did not show *any* public interest in disclosure and where there was a reasonable possibility of harassment).

¹⁸⁵ Reporters Committee, 489 U.S. at 767. Thus, even though information may have been made available to the general public at some place and time, if such information actually were “freely available,” there would be no reason to invoke the FOIA to gain access to it. 489 U.S. at 762-63, 780.

¹⁸⁶ See, e.g., United Technology Corp. v. NLRB, 777 F.2d 90, 94 (2d Cir. 1985).

under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.”¹⁸⁷ Absent express assurances, the agency must prove that the particular circumstances surrounding a communication give rise to an implied assurance of confidentiality. In such a situation, “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.”¹⁸⁸ Because the applicability of this exemption hinges on the circumstances under which the information is provided, and not exclusively on the harm resulting from disclosure (in contrast to Exemptions 6 and 7(C)), no balancing test is applied under the case law of Exemption 7(D).

Confidentiality of sources ordinarily is not presumed, but must be proven by the agency asserting application of the exemption on a case-by-case basis. Relevant factors include “the character of the crime at issue” and “the source’s relation to the crime” and the nature of the

¹⁸⁷ U.S. Dep't of Justice v. Landano, 508 U.S. 165, 172 (1993). See United Technology Corp. v. NLRB, *supra*, (confidential source includes an informant who is promised or reasonably expects confidentiality unless and until the agency needs to call him as a witness at trial).

¹⁸⁸ Landano, 508 U.S. at 172.

assurances of confidentiality.¹⁸⁹ In order to meet this burden of proof most effectively, the Board should give specific assurances of confidentiality to sources, in addition to the standard boilerplate language on the Board affidavit forms,¹⁹⁰ *only* where such confidentiality is truly necessary to secure the information that the source can provide. In these rare cases, the Board agent should make and document any specific individual assurance of confidentiality.¹⁹¹

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

¹⁸⁹ 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 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.

¹⁹⁰ 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.")

¹⁹¹ 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).

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 affidavit. In this event, the FOIA processor should respond by neither admitting nor denying that the named individual supplied the affidavit.¹⁹²

D. Exemption 7(E)

Exemption 7(E) protects from disclosure all law enforcement information which "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." The first clause of Exemption 7(E) provides "categorical" protection for "techniques and procedures" not already well known to the public and does not require a showing of harm. Even generally known procedures, however, have been protected from release where "[t]he techniques themselves may be known to the public, but the circumstance of their usefulness ... may not be widely known."¹⁹³

¹⁹² See Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976). It is important to follow this procedure, known as *glomarization*, whenever denying a request that seeks affidavits from named individuals, even if those individuals did not supply affidavits. Otherwise, savvy requesters would soon learn that a response neither admitting nor denying the existence of an affidavit means that an affidavit was supplied. Note also that the death of a confidential informant does not extinguish Exemption 7(D)'s protection. Reiter v. DEA, 1998 WL 202247 (D.C.Cir. March 3, 1998).

¹⁹³ Parker v. United States Dept. of Justice, No. 88-760, slip op. at 8 (D.D.C. Feb. 28, 1990), *affd in pertinent part*, 934 F.2d 375 (D.C. Cir. 1991). See also Delviscovo v. FBI, 903 F. Supp. 1,3 (D.D.C. 1995)(withholding of FBI accomplishment report containing information on use and effectiveness of investigative techniques proper).

Exemptions 7(E)'s second clause separately protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law," and thus has a distinct harm standard built into it that is comparable to the "anti-circumvention," "high 2" aspect of Exemption 2.¹⁹⁴ Under both clauses in Exemption 7(E), the FOIA processor must be careful to disclose all reasonably segregable, nonexempt information.¹⁹⁵

XI. Waiver

Waiver of any exemption applicable to information can occur through prior disclosure of that information. To determine if waiver has occurred requires a careful analysis of the specific nature of and circumstances surrounding that prior disclosure.¹⁹⁶ In all cases, the burden will be on the party asserting a waiver to show that the information sought is publicly available or that the exemption sought has been otherwise waived.¹⁹⁷

¹⁹⁴ See *supra*, discussing the Exemption 2, "high 2" Risk of Circumvention standard.

¹⁹⁵ Information contained in Operations-Management and General Counsel memoranda, which have not been released to the public, may contain information privileged from disclosure under Exemption 7(E). For this reason, as well as for the reasons noted above, requests for GC Memoranda that do not contain the notation "Release to the Public," as well as requests for any "OM" memoranda, should be referred to the FOIA Officer in Washington. If there is any question as what memoranda, or manuals, or parts thereof are public, contact the FOIA Office in Washington.

¹⁹⁶ See also *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 700 (9th Cir. 1989) ("The inquiry into whether a specific disclosure constitutes waiver is fact specific."); *Carson v. United States Dep't of Justice*, 631 F.2d 1008, 1015 n.30 (D.C. Cir. 1980) ("[T]he extent to which prior agency disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed").

¹⁹⁷ See *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 342 (D.C. Cir. 1989) ("It is far more efficient, and obviously fairer, to place the burden of production on the party who claims that the information is publicly available.")

Most importantly, the prior disclosure must “match” the exempt information in question.¹⁹⁸ For example, where only the general subject matter of exempt information has been publicly discussed, only the conclusion reported, or only some of the information released, there likely will be no finding of waiver.¹⁹⁹ Thus, the difference between the scope of the prior disclosure and the information later sought may constitute a sufficient basis for concluding that no waiver has occurred.²⁰⁰

As a general rule, a prior voluntary, official agency disclosure (i.e. a direct acknowledgment by an authoritative government official, or an express authorization) waives

¹⁹⁸ See, Mobil Oil Corp. v. EPA, 879 F.2d 698, 701 (9th Cir. 1989)(The burden is on the requester to show that “the withheld information has already been specifically revealed to the public and that it appears to duplicate that being withheld.”)

¹⁹⁹ See, e.g. Kimberlin v. Department of Justice, 921 F. Supp. 833, 836 (D.D.C. 1996) (holding that public acknowledgment of investigation does not waive use of Exemption 7(C) on underlying documents); Public Citizen v. Department of State, 11 F.3d 198, 201 (D.C. Cir. 1993) (finding that “agency official does not waive FOIA Exemption 1 by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure”); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (holding that very general information about agency’s methods in Senate report “cannot be equated with [more specific] disclosure by the agency itself”); Kay v. FCC, 867 F. Supp. 11, 20-21 (D.D.C. 1994) (finding that inadvertent disclosure of some informants’ names does not waive Exemption 7(A) protection for information about other informants); Mehl v. EPA, 797 F.Supp. 43, 47 (D.D.C. 1992)(partial disclosure of contents of documents by published report did not constitute waiver of applicable FOIA exemptions for underlying documents); Dow Jones & Co., Inc. v. U.S. Dept. of Justice, 880 F.Supp. 145 (S.D.N.Y. 1995)(discussion in press conference of facts and conclusions set forth in reports deemed not to waive applicable FOIA exemptions for underlying reports).

²⁰⁰ Mehl v. EPA, 797 F.Supp. 43, 47 (D.D.C. 1992)(“. . . the existence and scope of a waiver depends upon the scope of the disclosure.”)

an otherwise applicable FOIA exemption.²⁰¹ This is true even where the disclosure is made to the press “off the record”²⁰² or where an agency’s carelessness has permitted access to certain information.²⁰³

If the disclosure is the result of a mistake, a finding of waiver is dependent on the extent of disclosure. Generally, where the mistake is limited in nature and quickly corrected, the exemption will be preserved.²⁰⁴ On the other hand, where mistake²⁰⁵ or carelessness²⁰⁶ result in widespread disclosure which cannot be remedied, or where denial of further disclosure would result in unfairness, otherwise applicable exemptions may be waived.

²⁰¹ See Kimberlin, 921 F. Supp. at 835-36 (holding exemption waived when material was released pursuant to “valid, albeit misunderstood authorization”); Quinn v. HHS, 838 F. Supp. 70, 75 (W.D.N.Y. 1993) (attorney work-product privilege waived where “substantially identical” information was previously released to requester).

²⁰² See Lawyers Comm. for Human Right v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989), motion for reargument denied, No. 87-Civ-1115, slip op. at 1-3 (S.D.N.Y. May 23, 1990).

²⁰³ See, e.g., Cooper v. Dep’t of the Navy, 594 F.2d 484, 488 (5th Cir. 1978), cert. denied 444 U.S. 926 (1979).

²⁰⁴ See Public Citizen Health Research Group v. FDA, 953 F. Supp. 400, 404-06 (D.D.C. 1996) (holding no waiver where material accidentally released and information not disseminated by requester); Nation Magazine v. Department of State, 805 F. Supp. 68, 73 (D.D.C. 1992) (dicta (“[N]o rule of administrative law requires an agency to extend erroneous treatment of one party to other parties, ‘thereby turning an isolated error into a uniform misapplication of the law’” (quoting Sacred Heart Med. Ctr. v. Sullivan, 958 F.2d 537, 548 n.24 (3d Cir. 1992))); Astley v. Lawson, No. 89-2806, 1991 WL 7162, at 8 (D.D.C. Jan. 11, 1991) (holding that inadvertent placement of documents into public record did not waive exemption when it was remedied immediately upon agency’s awareness of mistake).

²⁰⁵ See, e.g., Dresser Indus. Valve Operations, Inc, 2 Gov’t Disclosure Serv. (P-H) 82,197, at 82,575 (W.D. La. Jan. 19, 1982).

²⁰⁶ See, e.g., Cooper, 594 F.2d, at 487-88 (holding that careless prior disclosure to one party in litigation would be unfair and, therefore, results in waiver).

In addition, where the agency is claiming exemption based on the privacy interests of a third party, the exemption will be waived if that party has expressly waived confidentiality.²⁰⁷ Finally, courts have generally found a waiver where voluntary prior disclosure to one party would result in unfairness to a second requesting party.²⁰⁸

On the other hand, courts have generally found no waiver where the agency acted responsibly and the information was the subject of a limited release in furtherance of a legitimate governmental purpose.²⁰⁹ Therefore, limited disclosure pursuant to an investigation should not waive exemption.²¹⁰ Of course, circulation of a document within an agency does not constitute “public disclosure” resulting in waiver,²¹¹ nor should other disclosures

²⁰⁷ See e.g., Providence Journal Co. v. United States Dep’t of the Army, 981 F.2d 552, 566-67 (1st Cir. 1992) (source statements not entitled to Exemption 7(D) protection when individuals expressly waived confidentiality).

²⁰⁸ See e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978); Cooper, 594 F.2d, at 488.

²⁰⁹ See e.g., Badhwar v. United States Dep’t of the Air Force, 629 F. Supp. 478, 481 (D.D.C. 1986) (disclosure to outside person held necessary to assemble report in the first place), aff’d in part & remanded in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); United Technologies Corp. v. NLRB, 632 F.Supp. 776 (D.Conn. 1985)(no waiver where Board's disclosure was limited to charging party in unfair labor practice case since the charging party and the Board "shared common interests and were aligned together as [the requester's] adversaries").

²¹⁰ See McGivra v. National Transp. Safety Bd., 840 F. Supp. 100, 102 (D. Colo. 1993) (finding that release of cockpit voice recorder tapes to parties in accident investigation is not “public” disclosure under FOIA).

²¹¹ See, e.g., Direct Response Consulting Serv. v. IRS, No. 94-1156, 1995 WL 623282, at 3 (D.D.C. Aug. 21, 1995); Chemcentral/Grand Rapids Corp. v. EPA, No. 91-C-4380, 1992 WL 281322, at 6-7 (N.D. Ill. Oct. 5, 1992) (no waiver of attorney-client privilege when documents in question were circulated to only those employees who needed to review legal advice contained in it).

necessitated by effective agency functioning, such as disclosures among agencies²¹² or to a congressional committee,²¹³ or even to advisory committees which include members of the public.²¹⁴ Moreover, unofficial and speculative disclosure in a congressional report will not waive exemption if the agency itself has never publicly acknowledged the information.²¹⁵ Furthermore, if the agency has been compelled to disclose a document under limited and controlled conditions (e.g., limited disclosure of witness affidavit under Jencks rule, or pursuant to a protective order in an administrative proceeding), it should retain authority to withhold the document in the future.²¹⁶ Indeed, even where documents were ordered disclosed during discovery in previous litigation, where those documents fell within an exemption and were not

²¹² See e.g., Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982) (agency does not automatically waive exemption by releasing documents to other agencies; but waiver can occur where disclosure to private individuals).

²¹³ See e.g., Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941, 946-47 (11th Cir.) (holding no waiver of exemption due to court-ordered disclosure, involuntary disclosure to Congress, or disclosure of related information).

²¹⁴ See Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107-08 (D.C. Cir. 1976).

²¹⁵ See Earth Pledge Found. v. CIA, 95 Civ 0257, 1996 WL 694427, at *5 (S.D.N.Y. Dec. 4, 1996); Military Audit Project v. Casey, 656 F.2d 727, 744 (D.C. Cir. 1981).

²¹⁶ See e.g., Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 79 n.13 (2d Cir. 1979); see also Parker v. Department of Justice, 934 F.2d 375, 379 (D.C. Cir. 1991) (upholding nondisclosure under Exemption 7(D) even though confidential informant may have testified at requester's trial); Allnet Communication Servs. v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994) (court granted summary judgment to the agency where there was "specific affirmative evidence that no unrestricted disclosure has occurred . . .").

in fact turned over, there is no waiver of exemption.²¹⁷ Finally, courts have consistently held that an agency does not waive a FOIA exemption as a result of an agency employee's unauthorized disclosure (a leak).²¹⁸

Finally, similar to unrestricted disclosure in civil discovery or under Section 102.118, if information is disclosed, without any restrictions, pursuant to a FOIA request -- whether at the administrative level or during litigation under a stipulation to narrow the issues and documents at stake -- the applicable FOIA exemptions are waived. The circumstances surrounding the disclosure of information in the FOIA context (e.g., made in the Board's "discretion," or as part of a stipulation in settlement) do not immunize the Board against waiver as to those specific documents. Moreover, where a court orders disclosure of information in a FOIA action, de facto waiver results even though the disclosure is involuntary because the court has decided that such information is not exempt from disclosure. Accordingly, in either case, such

²¹⁷ In FTC v. Grolier, 462 U.S. 19, 21, 27-28 (1983), the Supreme Court rejected a requester's argument that attorney work-product material, generated during a Federal Trade Commission investigation and ordered disclosed during an earlier case, was no longer protected. The earlier civil penalty action filed by the Department of Justice was dismissed with prejudice when the Government declined to comply with the district court's discovery order. The Grolier Court held that "[I]t does not follow, however, from an ordered disclosure based on a showing of need that such documents are routinely available to litigants. The logical result of respondent's position is that whenever work-product documents would be discoverable in any particular litigation, they must be disclosed to anyone under the FOIA. We have previously rejected that line of analysis. . . . It is not difficult to imagine litigation in which one party's need for otherwise privileged documents would be sufficient to override the privilege but that does not remove the documents from the category of *normally* privileged." However, this is different from the situation where the documents have previously been disclosed without restriction. In these circumstances, waiver of any protective exemption would have occurred.

²¹⁸ See e.g., Murphy v. FBI, 490 F. Supp. 1138, 1142 (finding of waiver in such circumstances would only lead to "exacerbation of the harm created by the leaks"); Simmons v. United States Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (unauthorized and limited disclosure does not constitute waiver).

information must be disclosed to all subsequent requesters. Any questions concerning potential waiver in FOIA, Section 102.118 or in other contexts, should be addressed to the Special Litigation Branch in Headquarters.

XII. Section 102.118, Subpoenas, and the FOIA

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

Section 102.118 of the Board's Rules & Regulations, 29 C.F.R. § 102.118,²¹⁹ forbids any Board employee from producing Agency documents or testifying without the written consent of the General Counsel or the Chairman of the Board. § 102.118(a)(1).²²⁰ The consent of the Chairman is required if the individual or the documents are in Washington, D.C. and are under the control of the Board; the consent of the General Counsel is required if the individual or the documents are under the control of the General Counsel. *Id.* Requests for witness statements for purposes of cross-examination in unfair labor practice or post-election hearings generally are excluded from this prohibition. *See* § 102.118(b)(1)(Jencks Act).²²¹

Requests for documents or testimony made pursuant to § 102.118 must (1) be in writing; (2) identify the documents to be produced or person whose testimony is desired; (3) disclose the nature of any pending proceeding for which the documents or testimony are requested; and (4) the purpose that the production or testimony would serve. § 102.118(a)(1).

²¹⁹ Section 102.118 was promulgated pursuant to the Federal Housekeeping Act, 5 U.S.C. § 301.

²²⁰ Section 102.118(a)(2), a separate subsection of this regulation, incorporates restrictions on disclosure of information imposed by the Privacy Act of 1974, 5 U.S.C. § 552(a).

²²¹ That is, only that portion of the witness statement that relates to the subject matter of the testimony of the witness can be turned over pursuant to the exception in 102.118(b)(1).

B. Subpoenas

If a Board subpoena duces tecum or a Board subpoena ad testificandum is served on a Board employee or agent, unless otherwise directed by the Chairman or the General Counsel, a petition to revoke the subpoena should be filed on the ground that the evidence sought is privileged against disclosure by § 102.118 and by any other privileges which may apply. § 102.118(a)(1).

The effect of § 102.118 on the enforceability of state and federal court subpoenas is more complicated. Sovereign immunity generally precludes enforcement of a state court subpoena to the Board, in addition to any argument we might have under Section 102.118.²²² When asserting applicable privileges to a federal court subpoena, the Board also traditionally has argued that its employees may not be compelled to testify or produce documents pursuant to a third-party federal court subpoena, unless the subpoenaing party has obtained authorization for release of the requested information through a § 102.118 request.²²³ However, some courts have adopted the position that, though an agency employee cannot be held in contempt for refusing to testify or produce documents, an agency cannot rely on housekeeping regulations (such as § 102.118) as a substantive basis for refusing to comply with a third-party subpoena issued to the agency itself.²²⁴

If a state or federal court subpoena or discovery request is issued to and served on the

²²² Houston Bus. Jour. v. Office of Comptroller, 86 F.3d 1208, 1211 (D.C. Cir. 1996).

²²³ See United States ex rel. Touhy v. Ragen, 340 U.S. 462, 467-69 (1951); Davis v. Braswell, 363 F.2d 600, 602-03 (5th Cir. 1966)(quashing third-party subpoena to Board regional director).

²²⁴ See, e.g., Exxon v. Dep't of Interior, 34 F.3d 774, 776-78 (9th Cir. 1994).

Board or its employees or agents, the Assistant General Counsel for Special Litigation should be contacted immediately, regardless of whether the person issuing the subpoena previously or concurrently has requested the same information pursuant to § 102.118.

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

Section 102.117 of the Board's Rules & Regulations, 29 C.F.R. § 102.117, governs FOIA requests for Agency records.²²⁵ But, as described above, not all requests for records or other information are submitted under the FOIA. Requesters may seek Agency records, other documents, and Board agent testimony under § 102.118, through a Board subpoena, through discovery requests in judicial litigation in which the Board is a party, and through third-party judicial subpoenas (i.e. issued to obtain discovery or testimony in a case in which the Board is not a party).

Requests made explicitly under § 102.118, of course, should be handled under the procedures set forth in § 102.118. If a request explicitly is based on both the FOIA and § 102.118, it should be separately processed under each provision. If a written request is made for Board records without the explicit invocation of the FOIA, § 102.118, or any other statute, rule, or regulation, it ordinarily should be handled as a FOIA request, even if not labeled as such.

XIII. Fees and Fee Waivers Under the FOIA

A. Introduction

The Freedom of Information Reform Act of 1986, Pub. L. No. 99-570 (5 U.S.C. §552(a)(4)(A)) ("EFOIA Amendments"), inter alia revised fee schedules under the FOIA and

²²⁵ See Agency Records & Electronic FOIA section, supra, for a description of what constitutes an "agency record" under the FOIA.

required the Office of Management and Budget (OMB) to promulgate fee guidelines to which all Federal agencies must conform when promulgating their FOIA fee regulations.

Rather than issuing a single schedule of fees that would cover all Federal agencies, OMB promulgated fee guidelines defining the key terms enumerated in the statute. See, 52 Fed. Reg. 10,012 (1987)(see, SA 15-23, attached hereto). The Board subsequently developed its own FOIA fee rules pursuant to those guidelines. On June 17, 1987, the Board published its proposed regulation in the Federal Register (52 Fed. Reg. 27012-16) and on April 4, 1988, the Board published its regulation in final form (53 Fed. Reg. 10872)(Appendix A). This regulation is found at Section 102.117(d) of the Board's Rules and Regulations (29 C.F.R. §102.117(d)). On March 21, 1996, the Board amended its regulation pertaining to the rates charged for professional, clerical, photocopying fees and minimum charges (see infra). **The Agency has drafted new FOIA regulations. See Proposed FOIA Regulations, attached hereto as SA 29 et seq.**

B. The Statutory Framework

The EFOIA Amendments establish a three-tiered system of charges that an agency can impose for the costs of making information available to requesters. These tiers are distinguished based on the uses to be made of requested information and/or the identity of the requester. The EFOIA Amendments (5 U.S.C.(a)((4)(ii).²²⁶) provide for the following requester categories:

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

²²⁶ The FOIA fee guidelines and fee charges do not apply to individuals seeking access to their own records which are filed in Privacy Act systems of records. 52 Fed. Reg. 10012. Under the Board's Rules and Regulations, §102.117(h), the first copy of a record or information pertaining to that individual "will ordinarily be provided without charge to the individual. Fees for any other copies of requested records shall be assessed at the rate of 10 cents for each sheet of duplication." **This rate will be modified to conform to the FOIA rate of 12 cents per page.**

- (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
- (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication ["all other requesters"].

In general, charges may be assessed, depending on the user category, for one or more of three services: (1) search; (2) review; and (3) duplication.

Charges for document "search" include all time spent looking for responsive material, including page-by-page or line-by-line identification of material within documents. OMB Fee Guidelines, 52 Fed. Reg. 10,017 (1987). 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. *Id.* at 10,019. Searches for responsive materials should be done in the most efficient and least expensive manner. *Id.* at 10,018. Pursuant to the EFOIA Amendments, "search" is defined as locating records or information either "manually or by automatic means" and can require agencies to expend "reasonable efforts" in electronic searches, if requested to do so by requesters willing to pay for such search activity. 5 U.S.C. 552(a)(3)(C) and (D).

The costs of "review" chargeable to commercial use requesters consist of "the direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed" 5 U.S.C. §552(a)(4)(A)(iv). Review costs include processing the documents for disclosure, but does not include time spent resolving general legal questions regarding the applicability of particular exemptions or reviewing on appeal exemptions applied in a Region's response. 52 Fed. Reg. at 10,017, 10,018.

Duplication charges represent the reasonable "direct costs" of making copies of documents. 5 U.S.C. §552(a)(4)(A)(iv). Copies can take various forms, including paper copies,

microfilm, or machine-readable documentation. *Id.* at 10,017, 10,018. Pursuant to the EFOIA Amendments, the Board must honor a requester's choice of form or format if the record is "readily reproducible" in that form or format with "reasonable efforts" by the Board. 5 U.S.C. §552(a)(3)(B).²²⁷ For copies prepared by computer, such as discs or printouts, agencies should charge for the actual costs of production of such copies. *Id.* Be aware that, while requesters in the "all other requesters" category (see *infra*) are entitled to 100 pages of duplication without charge, such free duplication does not require duplication without charge for 100 computer discs. 52 Fed. Reg. at 10,019.

C. Statutory "Use" Categories

For FOIA fees purposes, the most critical initial decision to be made by the Regions is how to categorize requesters among the three user categories.²²⁸ As set forth below, the Board has generally adhered to OMB's detailed guidelines regarding user categories.

1. Commercial Use

The Board has adopted the OMB definition of Category I, "commercial use" request (29 C.F.R. 102.117(d)(1)(v))(See **Proposed Regulations for revised definition**):

"Commercial use request" refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial trade or profit interests of the requester or the person on whose behalf the request is made.

OMB instructs that whether a requester properly belongs in the commercial use category depends on the use to which the requester will put the requested documents. 52 Fed. Reg. at

²²⁷ Under 5 U.S.C. §552(a)(4)(B), if an agency's determination as to "reproducibility" is challenged, it is accorded "substantial weight" by the courts.

²²⁸ When the use to which the requester intends to put the document sought is unclear or, where the Region has reasonable cause to doubt the asserted use to which the records will be put, additional clarification of such use should be sought.

10,018.²²⁹ For example, a request by a direct mail marketing company for a list of names and home addresses in order to put certain employees on an industry mailing list would clearly be commercial in nature.

In addition, a request for information to be used in litigation before the Board should be considered a commercial use request, as it is a "use that furthers . . . [the requester's] business interests as opposed to a use that in some way benefit[s] the public." 52 Fed. Reg. at 10,013. While case law defining "commercial use" requesters is sparse, it supports this position.²³⁰

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

Similar to Category I, the Board has adopted OMB's definition for Category II

²²⁹ While other fee categories are determined by use and identity, the commercial use category is determined exclusively by the use for which the requester has requested the information. 52 Fed. Reg. 10,013. Note that when any FOIA request is submitted by someone on behalf of another person -- commonly by an attorney on behalf of a client -- it is nonetheless the underlying requester's intended use that determines the level of fees if it is a commercial user. 52 Fed. Reg. at 10,017-18. In addition, be alert to the fact that a requester's category can change over time. See National Sec. Archive v. DOD, 880 F.2d 1381, 1388 (D.C. Cir. 1989).

²³⁰ See, Avondale Industries, Inc. v. NLRB, No. 96-1227 (E.D. La. 3/30/98)(Court found Avondale's use of requested documents for purposes of contesting union election results and/or for defending itself in ULP proceeding to fall within commercial use category); Tax Analysts v. U.S. Dept. of Justice, 965 F.2d 1092, (D.C. Cir. 1992)(nonprofit news organization, which had successfully obtained information under the FOIA, was not entitled to attorney fees because the public benefit was minimal, and the publisher was motivated by its private interests to litigate under the FOIA). Cf., Muffoletto v. Sessions, 760 F.Supp. 268, 277-278 (E.D.N.Y. 1991)(Court found an individual who sought documents for use in his defense of a state court civil action to recover debts owed on certain notes and guarantees and who had no apparent commercial or profit purpose not to be a commercial user); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987)(court found no commercial interest because "information helpful to a tort claim furthers a requester's interest in compensation or retribution, but not an interest in commerce, trade, or profit"). See also, Republic of New Afrika v. F.B.I., 645 F.Supp. 117,121 (D.D.C. 1986)(Court rejected group's claim that it had non-commercial interests in obtaining information under the FOIA for use in a lawsuit for money damages against government officials and denied attorneys fees).

educational or noncommercial scientific institutions and representatives of the news media.²³¹

The Board's regulation defines this requester category as follows (**See Proposed Regulations for Revised Definitions**):

(vi) "Educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(vii) "Representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. In the case of "free-lance" journalists, they may be regarded as working for a news organization if they can demonstrate a reasonable expectation of publication through that organization, even though not actually employed by it.

29 C.F.R. §102.117(d)(1)(vi) and (vii).

Only a specifically referenced institution which operates a program or programs of "scholarly research" may qualify for this preferred fee category. 52 Fed. Reg. at 10,014. For instance, researchers working pursuant to educational institution grants or professors who are conducting research are properly placed in this category. Under this definition, there may be individuals not connected with an educational institution, who are performing worthy academic research, but nonetheless are not to be included in this category.²³²

²³¹ "[N]oncommercial scientific institution" is not defined in the Board's regulation because of the regulation drafters' view that it is highly unlikely that such an institution would make a request to the Board. If, however, such a request were made, the OMB definition (52 Fed. Reg. 10,018) -- "institution that is not operated on a 'commercial' basis . . . and which is operated solely for the purpose of conducting scientific research . . ." -- should be applied.

²³² OMB notes that student researchers will generally be excluded from this category because the research serves an individual, rather than institutional, goal. Nevertheless, such individuals may apply and be considered for fee waiver or fee reduction. 52 Fed. Reg. 10,014. See "Fee Waiver and Fee Reduction" Section, *infra*.

The definition which generated the most interest in terms of public comment is "representative of the news media". OMB's guideline states (52 Fed. Reg. 10018):

Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public.

The further definition of "news" - "information that is about current events or that would be of current interest to the public" - may raise questions in its application to particular requesters. See, 102.117(d)(1)(vii). Regions, however, should approach these definitional sections with the understanding that the publication services, when they are seeking information for publication that is of general interest to the labor bar, should be treated as representatives of the news media. On the other hand, when a research service is seeking information for an individual client's use, that requester generally should be treated as a commercial user. Where questions arise, guidance should be sought from the FOIA Officer in Washington.

3. All Other Requesters

The third statutory category, which is not specifically defined in the Board's or OMB's rules, applies only to those requesters who do not fall within the first two categories. As set forth above, requesters in this category are charged for search and duplication (but not review) costs. In every case, the burden is on the requester to show that he or she should be placed in a particular user category. Otherwise, such requester will be deemed a commercial use requester. 29 C.F.R. §102.117(d)(2)(ii)(E).

D. Imposition of Fees

1. Limitations on the Imposition of Fees

The EFOIA Amendments provide that no fee may be charged "if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee." 5

U.S.C. 552(a)(4)(A)(iv)(I) and 52 Fed. Reg. 10018.²³³ Thus, a threshold fee consideration for every FOIA request is whether the charges involved will exceed the expense of processing the fee. This figure, originally set forth in the Board's Rules and Regulations as any amount less than \$11.00, was revised downward on March 21, 1996 to any amount less than \$5.00 (102.117(d)(2)(iii)(A)). For example, for a commercial use category request involving little or no search or review time, a requester would be entitled to a total of 41 pages, having a duplication cost of \$4.92, without charge. However, for a request requiring 42 pages of duplication, once the charge exceeds \$5.00, the requester will be billed for the entire \$5.04 amount of duplication charges.

2. Chargeable Fees by the NLRB

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

The commercial use category is the only one that allows charges for "review" time. "Review" is defined by our Regulations as (29 C.F.R. §102.117(d)(1)(iv)) (**See Proposed Regulations for Revised Definition**) as:

. . . the process of examining documents located in response to a request that is for commercial use to determine whether a document or any portion of any document located is permitted to be withheld. It includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release.

Review time does not include time spent in researching or reading court decisions to support the redacting of material in the requested documents, nor does it include time spent discussing or deciding policy questions of disclosure (OMB Guidelines, 52 Fed. Reg. at 10017). In

²³³ In addition, the EFOIA Amendments provides that the two categories of News Media and Educational Institution Requesters and All Other Requesters are entitled to a certain amount of free services, see *infra*, prior to the calculation of the minimal fee threshold. 5 U.S.C. 552(a)(4)(iv)(II).

addition, as set forth above, commercial use requesters are entitled to neither free search time nor free duplication and are thus properly assessed the full costs of duplication and search.

b. News Media and Educational Institution Requesters (Free Search and Review; 100 free pages).

Representatives of the news media or educational institution requesters are not charged for search or review time. Only duplication costs are properly charged and this charge is limited to pages in excess of the 100 pages of free duplication. 29 C.F.R. §102.117(d)(2)(ii)(B) and (C) and (d)(2)(iii)(A). After crediting the requester with the appropriate free services, the \$5.00 minimum must be met before any charges are properly assessable. 29 C.F.R. §102.117(d)(2)(iii).

c. All Other Requesters (2 Free Hours of Search; Free Review; 100 Free Pages)

All other requesters are properly billed for duplication and search charges, but not for review time. Such a requester is entitled to 100 pages of free duplication and 2 hours of free search time. 29 C.F.R. §102.117(d)(2)(ii)(D). After crediting the requester with the appropriate free services, the \$5.00 minimum must be met before any charges are properly assessable. 29 C.F.R. §102.117(d)(2)(iii).

3. Schedule of Charges

Charges for responding to FOIA requests include \$3.10 per quarter-hour of clerical time; \$9.25 per quarter-hour of professional time; and \$.12 per page of photoduplication.²³⁴ The \$.12 per-page charge for photoduplication includes the Agency's expenses of machine rental and materials. 29 C.F.R. §102.117(d)(2)(i)(A), (B), and (C). Clerical time spent making copies also is included in the \$.12 per page.

Further, a subparagraph to the rules provides for the imposition of charges based on "[a]ll other direct costs of preparing a response to a request." 29 C.F.R. §102.117(d)(2) and 52

²³⁴ Note that the March 21, 1996 amendments to the Board's Rules and Regulations revised these rates upward from their previous rates.

Fed Reg. 10,018. Specific examples of these additional charges that may be imposed include certifying records as true copies, providing for special means (such as overnight mail delivery) of transmitting records to the requester or from the Federal Records Storage Center, programming time to retrieve materials from the Board's data processing equipment, and the cost of replicating video, computer, or audio tapes.

E. Principles of General Applicability

1. Aggregation of Requests

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 and charge accordingly. 29 C.F.R. §102.117(d)(2)(iii)(B). **(See Proposed Regulations for Revised Language.)** The OMB Guidelines (52 Fed. Reg. at 10,019-20) should be consulted for additional guidance on aggregating requests. See SA 15-23, attached hereto.

2. Interest

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.

3. Assumption of Liability for Fees

Assumption of financial liability is required in all requests. 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. 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. Id.

4. Advance Payments

Prepayment of charges prior to beginning the search generally is not required unless the requester has previously been delinquent.²³⁵ 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. 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, 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 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).²³⁶ 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.

5. 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

²³⁵ 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).

²³⁶ 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 Division of Operations Management, the Office of Appeals should be advised as to all delinquent requesters.

subsequent requests by those requesters. This estimate is calculated by estimating the amount of professional and clerical time and photocopying pages, at the rates set forth in the regulations, 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.

6. Fee Waiver and Fee Reduction

Fee waiver or reduction is a determination separate and apart from placement in a user category. Such determination requires balancing whether the public benefit from disclosure outweighs the commercial or personal benefit to the requester. "[I]n simple terms, the public should not foot the bill unless it will be the primary beneficiary of the [disclosure]." Burriss v. CIA, 524 F.Supp. 448, 449 (M.D.Tenn. 1981). All categories of requesters may qualify for waiver or reduction of fees, although the likelihood of a commercial user qualifying for such a waiver or reduction is less than that of the other categories. Each request for fee waiver or reduction must, however, be analyzed on a case-by-case basis.²³⁷ The Board's Regulations (102.117(d)(2)(iv)) follow the statutory fee waiver test (**See Proposed Regulations for Revised Language**):

Documents are to be furnished without charge or at reduced levels if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

Each portion of this test: (a) "likely to contribute" (b) "significantly" (c) "to public understanding" (d) of "operations or activities of the Government" must be met in order to

²³⁷ As a result, the Board is not bound by its previous administrative decisions -- even if it involves a similar request from the same requester.

qualify for a waiver.²³⁸ Further, the fee waiver is not an all or nothing proposition. When only some of the requested records satisfy the fee waiver test, a partial waiver may be granted. For example, if sixty percent of the documents satisfy the test, a sixty percent waiver is warranted.

Further, the rule requires that the request not be "primarily in the commercial interest of the requester." In assessing this requirement, the Region should consider: (a) whether the requester has a commercial interest that would be furthered by the requested disclosure; and (b) if so balance whether the identified commercial interest of the requester outweighs the identified public interest in disclosure. 5 U.S.C. §552(a)(4)(A)(iii). Thus, it is well settled that indigence alone, without a showing of public benefit, is insufficient to warrant a fee waiver. See, Ely v. United States Postal Serv., 753 F.2d 163, 165 (D.C. Cir. 1985). While the FOIA does not specifically provide for administrative appeals of denials of requests for fee waivers, appeal rights for such issues should be expressly set forth in the Region's determination. See, Section 7., below.

It would be a rare circumstance where a request of a party litigant or its representative in a case pending before the Board, for information to be used in the litigation of the case, could ever qualify for a fee waiver, since it is our position that a request for records for such a use would be primarily for the commercial interest of the requester, as opposed to the public interest. Nevertheless, each fee waiver or fee reduction request should be evaluated on its

²³⁸ The specific analytical factors relevant to applying the statutory fee waiver standard were discussed in more detail in McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1286 (9th Cir. 1987). See also, Sloman v. Department of Justice, 832 F.Supp. 63 (S.D.N.Y. 1993). Further, the requester's ability and intent to disseminate the requested information to the public, by itself, could be determinative of whether a fee waiver should be granted. Larson v. CIA, 843 F.2d 1481, 1483 and n.5 (D.C. Cir. 1988).

individual merits.²³⁹ In all cases where fee waiver situations raise questions about application of this test, the Regions should seek guidance from the FOIA Officer in Washington.

7. Appeals of Fee-Related Issues

In order to ensure uniformity of treatment of requesters and administrative exhaustion prior to court litigation, the Regions should inform requesters of their right to appeal fee waiver or reduction decisions and the determinations concerning placement of requesters in a particular FOIA use category. The appeals process will be handled in the same manner in which appeals from the denial of requests for documents are handled.

The EFOIA Amendments are silent with respect to the standard and scope of judicial review for an agency determination of fee category. The standard should therefore remain the same as that under the predecessor statutory fee provision. That is, agency action should be upheld unless it is found to be "arbitrary and capricious," in accordance with the Administrative Procedure Act. 5 U.S.C. §706. See e.g., Trennery v. IRS, 1993 WL 565354 (N.D.Okla. 1993)(assessed fees found reasonable, in accordance with agency regulations, and not arbitrary and capricious).

For fee waiver determinations, on the other hand, the EFOIA Amendments provides for review according to a de novo standard. 5 U.S.C. §552(a)(4)(A)(vii). This provision also expressly limits the scope of judicial review to the administrative record established before the agency. Id. Thus, it is important that the fee waiver denial letter create a comprehensive administrative record of all the reasons for the denial. See, Friends of the Coast Fork v. U.S. Dept. of the Interior, 110 F.3d 53, 55 (9th Cir. 1997).

²³⁹ We often receive FOIA requests from non-profit organizations. The mere fact that a requester is a non-profit is insufficient to warrant a fee waiver. Moreover, conclusionary statements are insufficient to satisfy a fee waiver requester's burden of establishing a fee waiver is warranted. McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987).