Discretionary Disclosure and Waiver

Introduction

The Freedom of Information Act is an information disclosure statute which, through its exemption structure, strikes a balance between information disclosure and nondisclosure,[1] with an emphasis on the "fullest responsible disclosure."[2] In administrating the FOIA it is important to note that the President and Attorney General have issued memoranda to all agencies emphasizing that the FOIA reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure."[3] (For a discussion of these memoranda, see Procedural Requirements, President Obama's FOIA

[1] See John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989) ("Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence'" (citing H.R. Rep. No. 1497, at 6 (1966))); see also NARA v. Favish, 541 U.S. 157, 172 (2004) (observing that while under FOIA government information "belongs to citizens to do with as they choose," this is balanced against statutory "limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it").

[2] S. Rep. No. 89-813, at 3 (1965) (stating FOIA's statutory objective is that of achieving "the fullest responsible disclosure"); accord Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum] (FOIA "should be administered with a clear presumption: [i]n the face of doubt, openness prevails"); Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf ("strongly encourag[ing] agencies to make discretionary disclosures of information"); see also Favish, 541 U.S. at 171-72 (emphasizing FOIA's underlying purpose of informing citizens about government actions as "structural necessity in a real democracy"); DOD v. FLRB, 510 U.S. 487, 494 (1996) (reiterating that FOIA reflects general philosophy of full agency disclosure); DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754 (1989) (explaining that "statute known as the FOIA" is founded on general philosophy of full agency disclosure); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (describing principles of government openness and accountability underlying FOIA).

[3] President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683; accord Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

Memorandum & Attorney General Holder's FOIA Guidelines, above.) President Obama issued his FOIA Memorandum on January 21, 2009, his first full day in office.[4] He declared that the FOIA "encourages accountability through transparency" and further described the Act as "the most prominent expression of a profound national commitment to ensuring an open Government."[5] On March 19, 2009, Attorney General Holder issued FOIA Guidelines applicable to all agencies which were designed "to underscore" FOIA's "fundamental commitment to open government" and to "ensure that it is realized in practice."[6] Attorney General Holder stressed that "an agency should not withhold information simply because it may do so legally."[7] Moreover, the Attorney General instructed agencies to consider making partial disclosure of records when full disclosures are not possible.[8] As the Attorney General described, "[e]ven if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure."[9]

Accordingly, and inasmuch as the FOIA's exemptions are discretionary, not mandatory,[10] agencies may make "discretionary disclosures" of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so.[11]

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[4] President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683.

[5] Id.

[6] Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[7] Id.

[8] See id.

[9] Id.

[10] See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) (reasoning that application of agency FOIA policies may require "some balancing and accommodation," and noting that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure"); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) (stating that "FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information").

[11] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1334 n.1 (D.C. Cir. 1987) (explaining that agency's FOIA disclosure decision can "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions."); see also Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (encouraging agencies to make discretionary disclosures); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (providing guidance on making discretionary disclosures); FOIA Update, Vol. VI, No. 3, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4") ("[A]gencies generally have discretion under the Freedom of Information Act to decide whether to invoke

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Discretionary Disclosure

As a general rule, the ability to make a discretionary release will vary according to the exemption involved and whether the information is required to be protected by some other legal authority.[12] Some of the FOIA's exemptions -- such as Exemption 2,[13] and Exemption 5,[14] for example -- protect a type of information that is not generally subject to a disclosure prohibition.[15] By contrast, the exemptions covering national security, commercial and financial information, personal privacy, and matters within the scope of nondisclosure statutes protect records that are also encompassed within other legal authorities that restrict their disclosure to the public.[16] Thus, agencies are constrained in their ability to make discretionary disclosures of records covered by the following exemptions:

Exemption 1 of the FOIA protects from disclosure national security information, provided that it has been properly classified in accordance with both the substantive and procedural requirements of an existing executive order.[17] If information is properly classified, and therefore is exempt from disclosure under Exemption 1, it is not appropriate for discretionary FOIA disclosure.[18] (See the discussion of Exemption 1, above.)

Exemption 3 incorporates into the FOIA nondisclosure provisions that are contained

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applicable FOIA exemptions."); cf. *FOIA Post*, "The Use of Contractors in FOIA Administration" (posted 09/30/04) (advising of general rule that agencies may "contract out" tasks involved in FOIA administration by "allowing contractors to do any work that does not require discretionary decisionmaking").

[12] See *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (describing exemptions where discretionary disclosure can most readily be made and those for which discretionary disclosure is not available).

[13] 5 U.S.C. §§ 552(b)(2) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[14] 5 U.S.C. § 552(b)(5).

[15] See *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[16] See id. (describing exemptions for which discretionary disclosure is not available).

[17] 5 U.S.C. § 552(b)(1) (implementing Executive Order 12,958, as amended, 68 Fed. Reg. 15,315 (Mar. 28, 2003), reprinted in 50 U.S.C. § 435 (2006)).

[18] See *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

in a variety of other federal statutes.[19] Some of these statutory nondisclosure provisions, such as those pertaining to grand jury information[20] and census data,[21] categorically prevent disclosure harm and establish absolute prohibitions on agency disclosure; others leave agencies with some discretion as to whether to disclose certain information, but such administrative discretion generally is exercised independently of the FOIA.[22] (See the discussion of Exemption 3, above.) Therefore, it is not appropriate for agencies to make discretionary disclosures under the FOIA of information that falls within the scope of Exemption 3.[23]

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[24] (See the discussions of Exemption 4, above, and Reverse FOIA, below.) Significantly, a specific criminal statute, the Trade Secrets Act,[25] prohibits the unauthorized disclosure of most information falling within Exemption 4; its practical effect is to constrain an agency's ability to make a discretionary disclosure of Exemption 4 information,[26] in the absence of an agency regulation (based upon federal statute) that expressly authorizes disclosure.[27] (See the discussion of this point under Reverse FOIA, below.)

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[19] See 5 U.S.C. § 552(b)(3); see also *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03).

[20] See Fed. R. Crim. P. 6(e) (enacted as statute in 1977).

[21] See 13 U.S.C. § 8(b), 9(a) (2006).

[22] See, e.g., Aronson v. IRS, 973 F.2d 962, 966 (1st Cir. 1992).

[23] See, e.g., Ass'n of Retired R.R. Workers v. R.R. Ret. Bd., 830 F.2d 331, 335 (D.C. Cir. 1987) (deciding that FOIA jurisdiction does not extend to exercise of agency disclosure discretion within Exemption 3 statute); see also *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09). But see Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992) (ordering VA to disclose existence of certain medical records, finding that public benefit of release outweighed privacy interest in disclosure, pursuant to discretionary terms of 38 U.S.C. § 7332(b) (2006)).

[24] 5 U.S.C. § 552(b)(4).

[25] 18 U.S.C. § 1905 (2006).

[26] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1144 (D.C. Cir. 1987); see also *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09); FOIA Update, Vol. VI, No. 3, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

[27] See Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979); see, e.g., St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 409-10 (5th Cir. 1979).

Exemptions 6 and 7(C) of the FOIA protect personal privacy interests, in non-law enforcement records[28] and law enforcement records,[29] respectively. As with private commercial information covered by Exemption 4, the personal information protected by Exemptions 6 and 7(C) is not the type of information ordinarily considered appropriate for discretionary FOIA disclosure. Significantly, with Exemptions 6 and 7(C), a balancing of public interest considerations is built into the determination of whether the information is exempt in the first place.[30] (See the discussions of this point under Exemption 6, above, and Exemption 7(C), above.) Moreover, personal information covered by Exemptions 6 and 7(C) in many cases falls within the protective coverage of the Privacy Act of 1974,[31] which mandates that any such information concerning U.S. citizens and permanent-resident aliens that is maintained in a "system of records"[32] not be disclosed unless that disclosure is permitted under one of the specific exceptions to the Privacy Act's general disclosure prohibition.[33] Specifically, the Privacy Act contains a prohibition on disclosure of information not required to be released under the FOIA.[34] Thus, if Privacy Act-protected information falls within a FOIA exemption, a discretionary release of such information is not appropriate.[35]

Records protected by the remaining FOIA exemptions can be subjects of discretionary release.[36] Of these, records protected by Exemptions 2 and 5 hold the greatest potential for discretionary disclosures.[37] The most common examples of information that an agency might disclose as a matter of administrative discretion can be found under Exemption 5, which incorporates civil discovery privileges that protect the institutional interests of the agency possessing the information. (See the discussion of Exemption 5, above.) The universal considerations to take into account in considering whether to make a discretionary release of information that otherwise could be withheld under the deliberative process privilege are the

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[28] 5 U.S.C. § 552(b)(6).

[29] Id. § 552(b)(7)(C).

[30] See NARA v. Favish, 541 U.S. 157, 171 (2004) (holding that agency must balance privacy interests of persons affected by disclosure against public interest in disclosure).

[31] 5 U.S.C. § 552a (2006).

[32] 5 U.S.C. § 552a(a)(5).

[33] 5 U.S.C. § 552a(b)(1)-(12).

[34] 5 U.S.C. § 552a(b)(2).

[35] See DOD v. FLRA, 964 F.2d 26, 30-31 n.6 (D.C. Cir. 1992) (discussing Privacy Act's limitations on discretionary FOIA disclosure); see also *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[36] See *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (advising FOIA professionals to use their judgment in making such determinations).

[37] See id.

sensitivity of the record's contents and the age of the document.[38] Records protected by other Exemption 5 privileges can be the subjects of discretionary release as well.[39]

The potential held by other FOIA exemptions for discretionary disclosure necessarily varies from exemption to exemption -- but in all cases agencies should be guided by the "fundamental commitment to open government" that the Attorney General has directed agencies to follow.[40]

When reviewing records to determine if any discretionary disclosure is possible, agencies should keep in mind that the FOIA requires them to take reasonable steps to segregate and release nonexempt information.[41] (See discussions of this issue under Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, below.) This segregation obligation takes on added significance under Attorney General Holder's FOIA Guidelines in which he directed agencies to review records both to determine if there are reasonably segregable nonexempt portions, as well as any reasonably segregable portions that may be technically exempt, but which can be released as a matter of discretion.[42]

In a case addressing the issue of the impact of discretionary disclosures on the ability of an agency to protect other, similar documents, the Court of Appeals for the Ninth Circuit surveyed the law of waiver under the FOIA and found: "no case . . . in which the release of certain documents waived the exemption as to other documents. On the contrary, [courts]

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[38] See *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[39] See id.

[40] Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag /foia-memo-march2009.pdf; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[41] See 5 U.S.C. § 552(b) (sentence immediately following exemptions); see also Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; Stolt-Nielsen Transp. Group Ltd. v. United States, 534 F. 3d 728, 734 (D.C. Cir. 2008) (finding that "the established rule for FOIA" means that agencies cannot withhold entire documents simply because portions are exempt); Sussman v. U.S. Marshals Serv., 494 F. 3d 1106, 1116 (D.C. Cir. 2007) ("Even when FOIA exemptions apply, '[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.'"); Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. 1999) (holding that district courts have affirmative duty to consider issue of segregability sua sponte even if issue has not been specifically raised by plaintiff).

[42] Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/ foia-memo-march2009.pdf; see also *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

generally have found that the release of certain documents waives FOIA exemptions only for those documents released."[43]

Such a general rule of nonwaiver through discretionary disclosure is supported by sound policy considerations, as the Ninth Circuit discussed at some length:

> Implying such a waiver could tend to inhibit agencies from making any disclosures other than those explicitly required by law because voluntary release of documents exempt from disclosure requirements would expose other documents [of a related nature] to risk of disclosure. An agency would have an incentive to refuse to release all exempt documents if it wished to retain an exemption for any documents . . . . [R]eadily finding waiver of confidentiality for exempt documents would tend to thwart the [FOIA's] underlying statutory purpose, which is to implement a policy of broad disclosure of government records.[44]

This rule was recognized by the Court of Appeals for the District of Columbia Circuit many years ago, when it observed:

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[43] Mobil Oil Corp. v. EPA, 879 F.2d 698, 701 (9th Cir. 1989); see also Students Against Genocide v. Dep't of State, 257 F. 3d 828, 835-36 (D.C. Cir. 2001) (explaining that "releasing some photographs" does not mean government has waived its right to withhold other photographs); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) ("[D]isclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case."); Stein v. DOJ, 662 F.2d 1245, 1259 (7th Cir. 1981) (holding that exercise of discretion should waive no right to withhold records of "similar nature"); Ctr. for Biological Diversity v. OMB, No. 07-04997, 2009 WL 1246690, at *11 (N.D. Cal. May 5, 2009) (finding that "'waiver of exemption for these documents based on the release of related documents . . . would be contrary to both the case law on waiver and to the policies underlying FOIA'" (quoting Mobil Oil, 879 F. 2d at 700); Ctr. for Int'l Environmental Law v. Office of the U.S. Trade Representative, 505 F. Supp. 2d 150, 158-59 (D.D.C. 2007) (holding that prior disclosure of "similar information does not suffice" as waiver); NYC Apparel FZE v. U.S. Customs & Border Protection, 484 F. Supp. 2d 77,90-91 (D.D.C. 2007) (reiterating that prior disclosure of similar information does not establish waiver); Gilda Indus., Inc. v. U.S. Custom & Border Prot. Bureau, 457 F. Supp. 2d 6, 12 (D.D.C. 2006) (finding that availability of "same general type of information" not sufficient for waiver); Enviro Tech Int'l. Inc. v. EPA, No. 02-C-4650, slip op. at 15 (N.D. Ill. Mar. 11, 2003) (stating that "courts have refused to find that the discretionary disclosure of a document effectuates a waiver of other related documents"); Students Against Genocide v. Dep't of State, 50 F. Supp. 2d 20, 24-25 (D.D.C. 1999) (stating that "in a series of decisions, this Circuit" has held that "agencies lose FOIA exemptions only when they officially release information or when the exact information is otherwise in the public domain"); Schiller v. NLRB, No. 87-1176, slip op. at 7 (D.D.C. July 10, 1990) ("Discretionary release of a document pertains to that document alone, regardless of whether similar documents exist."), rev'd on other grounds, 964 F.2d 1205 (D.C. Cir. 1992).

[44] Mobil Oil, 879 F.2d at 701; see also Army Times v. Dep't of the Air Force, 998 F.2d 1067, 1068 (D.C. Cir. 1993) (articulating general principle of no waiver of exemption simply because agency released "information similar to that requested" in past).

> Surely this is an important consideration. The FOIA should not be construed so as to put the federal bureaucracy in a defensive or hostile position with respect to the Act's spirit of open government and liberal disclosure of information.[45]

As the District Court for the District of Columbia has phrased it: "A contrary rule would create an incentive against voluntary disclosure of information."[46] To find otherwise "would create the untenable result of discouraging the government" from making such disclosures.[47]

Waiver

In some circumstances the issue arises as to whether an exemption has been waived through some prior disclosure, or as the result of an express authorization from the party or parties affected by the disclosure. This inquiry requires a careful analysis of the specific nature and circumstances of the prior disclosure.[48]

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[45] Nationwide Bldg. Maint., Inc. v. Sampson, 559 F.2d 704, 712 n.34 (D.C. Cir. 1977).

[46] Mehl v. EPA, 797 F. Supp. 43, 47 (D.D.C. 1992); see also Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981) (reasoning that agency should not be penalized for declassifying and releasing documents during litigation; otherwise, there would be "a disincentive for an agency to reappraise its position and, when appropriate, release documents previously withheld"); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 23-24 (D.D.C. 1998) ("Penalizing agencies by holding that they waive their exhaustion defense if they make a discretionary document release after the time for an administrative appeal had expired would not advance the underlying purpose of the FOIA -- the broadest possible responsible disclosure of government documents."); Shewchun v. INS, No. 95-1920, slip op. at 8 (D.D.C. Dec. 10, 1995) (explaining that to find agency bad faith after agency conducted new search and released more information "would create a disincentive for agencies to conduct reviews of their initial searches"), summary affirmance granted, No. 97-5044, 1997 WL 404711 (D.C. Cir. June 5, 1997); Berg v. DOE, No. 94-0488, slip op. at 8 (D.D.C. Nov. 7, 1994) (stating that release of information after initial search does not prove inadequacy of search and that to hold otherwise would end "laudable agency practice of updating and reconsidering the release of information after the completion of the initial FOIA search"); Gilmore v. NSA, No. 92-3646, 1993 U.S. Dist. LEXIS 22027, at *29 (N.D. Cal. May 3, 1993) (following Military Audit and declining to penalize agency), aff'd on other grounds, 76 F.3d 386 (9th Cir. 1995) (unpublished table decision); Stone v. FBI, 727 F. Supp. 662, 666 (D.D.C. 1990) (reasoning that agencies should be free to make "voluntary" disclosures without concern that they "could come back to haunt" them in other cases).

[47] Ctr. for Biological Diversity, 2009 WL 1246690.

[48] See, e.g., Mobil Oil Corp. v. EPA, 879 F.2d 698, 700 (9th Cir. 1989) ("The inquiry into whether a specific disclosure constitutes a waiver is fact specific."); Carson v. DOJ, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980) ("[T]he extent to which prior agency disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed."); see also FOIA Update, Vol. IV, No. 2, at 6 ("The Effect of Prior Disclosure: Waiver of Exemptions") (providing guidance on approach to waiver questions by agencies).

Courts have established rules for determining whether an agency has waived its right to use FOIA exemptions to withhold requested information.[49] As a general rule, the government may not rely on an otherwise valid exemption to justify withholding information that officially has entered the public domain.[50] The Court of Appeals for the District of Columbia Circuit has adopted this rule because ordinarily an "exemption can serve no purpose once information . . . becomes public."[51] Thus, "official" disclosures have been found to waive an otherwise applicable FOIA exemption.[52] To have been "officially" disclosed, however,

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[49] See Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (explaining criteria for official agency acknowledgment of publicly disclosed information (citing Afshar v. Dep't of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983))); James Madison Project v. NARA, No. 98-2737, slip op. at 7 n.5 (D.D.C. Mar. 5, 2002) (collecting cases that describe elements of waiver), summary affirmance granted in pertinent part & remanded in part, No. 02-5089, 2002 WL 31296220 (D.C. Cir. Oct. 11, 2002).

[50] See, e.g., Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001) (emphasizing that "[f]or the public domain doctrine to apply, the specific information sought must have already been 'disclosed and preserved in a permanent public record'" (citing Cottone v. Reno, 193 F.3d 550, 554-55 (D.C. Cir. 1999))); Bullock v. FBI, 577 F. Supp. 2d 75, 78-79 (D.D.C. 2008) (explaining that audio tapes played in open court and admitted into evidence "cannot be withheld under any FOIA exemption" because such information is in public domain (citing Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999))); Am. Lawyer Media v. SEC, 2002 U.S. Dist. LEXIS 16940, at *4 (D.D.C. Sept. 6, 2002)(holding that agency did not waive right to withhold portions of training manual by permitting plaintiff's employee to review manual during public training conference because plaintiff had not shown that manual is in public domain); Callahan v. EOUSA, No. 98-1826, slip op. at 3 (D.D.C. Apr. 18, 2002) (ordering release of court-filed documents on basis that they already were in public domain).

[51] Cottone v. Reno, 193 F.3d 550, 555 (D.C. Cir. 1999) (stating that court "must be confident that the information sought is truly public and that the requester receives no more than what is publicly available"). But cf. Fitzgibbon, 911 F.2d at 766 (suggesting that the "'fact that [national security] information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations'"); see also Edmonds v. FBI, 272 F. Supp. 2d 35, 48 (D.D.C. 2003) (same).

[52] See Wolf v. CIA, 473 F.3d 370, 379-380 (D.C. Cir. 2007) (holding that agency waived ability to refuse to confirm or deny existence of responsive records pertaining to individual because agency head had discussed that individual during congressional testimony); Students Against Genocide, 257 F.3d at 836 (holding that government did not waive its right to "invoke . . . FOIA exemptions by displaying the withheld photographs to the delegates of . . . foreign governments . . . [because they] were not released to the general public"); Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., No. 6:02-CV-126, slip op. at 21 (M.D. Fla. Aug. 18, 2003) (ruling that agency waived deliberative process privilege when it shared results of draft audit report with subject of audit), rev'd on other grounds, 376 F.3d 1270 (11th Cir. 2004), cert. denied, 543 U.S. 1121 (2005); Starkey v. Dep't of the Interior, 238 F. Supp. 2d 1188, 1193 (S.D. Cal. 2002) (finding that public availability of documents filed with local government waived exemptions); Melendez-Colon v. U.S. Dep't of the Navy, 56 F. Supp. 2d 142, 145 (D.P.R. 1999) (finding in civil discovery dispute that because Navy previously disclosed

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information generally must have been disclosed under circumstances in which an authoritative government official allowed the information to be made public.[53] In addition, a release of information by one agency does not constitute an official release by another agency, i.e., to be an official disclosure, the release "must have been made by 'the agency from which the information is being sought.'"[54]

Further, courts have consistently held that it is the FOIA plaintiff who bears the burden

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[52](...continued)
document in question pursuant to FOIA, that prior disclosure waived Navy's privilege claim); Kimberlin v. DOJ, 921 F. Supp. 833, 835-36 (D.D.C. 1996) (holding exemption waived when material was released pursuant to "valid, albeit misunderstood, authorization"), aff'd in pertinent part & remanded in other part, 139 F.3d 944 (D.C. Cir. 1998); 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).

[53] See, e.g., Wolf, 473 F. 3d at 379-380 (holding that former CIA director's testimony before congressional subcommittee, which included reading from dispatch mentioning individual who was subject of request, waived CIA's ability to refuse to confirm or deny existence of responsive records pertaining to that individual); Afshar v. Dep't of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983) (books by former agency officials do not consititute "official and documented disclosure"); Armstrong v. Executive Office of the President, No. 89-142, slip op. at 16-17 (D.D.C. Aug. 29, 1995) (holding that book by former agency official containing information "substantially different" from documents sought is not official disclosure); Myles-Pirzada v. Dep't of the Army, No. 91-1080, slip op. at 6 (D.D.C. Nov. 23, 1992) (finding that privilege was waived when agency official read report to requester); Rush v. Dep't of State, 748 F. Supp. 1548, 1556 (S.D. Fla. 1990) (finding that author of agency documents, who had since left government service, did not have authority to waive Exemption 5 protection); cf. Fisher v. DOJ, 772 F. Supp. 7, 12 (D.D.C. 1991) (finding that even if some of withheld information has appeared in print, nondisclosure is proper because disclosure from official source would confirm unofficial information and thereby cause harm to third parties).

[54] Talbot v. CIA, 578 F. Supp. 2d 24, 29 (D.D.C. 2008) (quoting Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999)); see , e.g., Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (holding that "we do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought"); Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (finding that agency not required to confirm or deny accuracy of information released by other government agencies regarding its interest in certain individuals); Abbotts v. NRC, 766 F.2d 604, 607 (D.C. Cir. 1985) (holding agency estimates not waived by prior public estimates from other agencies); Nielsen v. BLM, 252 F.R.D. 499, 519 (D. Minn. 2008) ("This Court will not construe the release of the . . . unredacted email by the Forest Service as waiver of the deliberative process privilege by the BLM, considering that it was not the BLM that released the document."); Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 12-13 (D.D.C. July 31, 2000) (ruling that Exemption 1 can be waived only through official action of CIA, not by disclosure by other agencies or presence of related information in public domain); Van Atta v. Def. Intelligence Agency, No. 87-1508, 1988 WL 73856, at *2 (D.D.C. July 6, 1988) (same).

of demonstrating that the withheld information has been officially disclosed.[55] As the D.C. Circuit has observed: "It is far more efficient, and obviously fairer, to place the burden of

[55] See, e.g., Lopez v. DOJ, No. 03-5192, 2004 WL 626726 at *1 (D.C. Cir. Mar. 29, 2004) (ruling that plaintiff failed to demonstrate that specific information is in public domain); Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 60 (D.C. Cir. 2003) (holding that plaintiff must show that previous disclosure duplicates specificity of withheld material); Pub. Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) (reaffirming that burden is on requester to establish that specific record in public domain duplicates that being withheld (citing Afshar, 702 F.2d at 1133)); James Madison Project v. NARA, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (holding that a FOIA plaintiff "bears the burden of showing that the specific information at issue has been officially disclosed"); Nowak v. IRS, No. 98-56656, 2000 WL 60067, at *2 (9th Cir. Jan. 21, 2000) (holding that "[i]n order to establish a waiver, the [plaintiff must be able to demonstrate that the previous disclosure was] authorized and voluntary"); Cottone, 193 F.3d at 555 (holding that requester has burden of demonstrating "precisely which tapes . . . were played" in open court and that because trial transcript clearly indicated precise date and time of particular conversations in question, plaintiff had discharged his burden of production by pointing to those specific tapes); Isley v. EOUSA, No. 98-5098,1999 WL 1021934, at *4 (D.C. Cir. Oct. 21,1999) (holding that party may gain access to information on waiver basis only if it can point to specific information identical to information which is currently being withheld); Davoudlarian v. DOJ, No. 93-1787, 1994 WL 423845, at *3 (4th Cir. Aug. 15, 1994) (per curiam) (requester has burden of demonstrating that specific information was disclosed at trial); Pub. Citizen v. Dep't of State, 11 F.3d 198, 201 (D.C. Cir. 1993) (holding "plaintiffs cannot simply show that similar information has been released, but must establish that a specific fact already has been placed in the public domain"); Davis v. DOJ, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (concluding that plaintiff has burden of showing "permanent public record of the exact portions" of tapes played in court to establish waiver); Military Audit Project v. Casey, 656 F.2d 724, 741-45 (D.C. Cir. 1981) (finding that plaintiff asserting claim of prior disclosure must bear burden of pointing to specific information in public domain that duplicates information being withheld); Deglace v. DEA, No. 05-2276, 2007 WL 521896, at *11-12 (D.D.C. Feb. 15, 2007) (finding no waiver when plaintiff produced "criminal history [and] excerpts of transcripts," but not records themselves, as evidence that records were in public domain), aff'd per curiam, No. 07-5073, slip op at 1 (D.C. Cir. Nov. 30, 2007) (stating that "substance of the newspaper article submitted by appellant is subject to 'reasonable dispute'"); Bronx Defenders v. DHS, No. 04 CV 8576, 2005 WL3462725, at *3 (S.D.N.Y. Dec. 19, 2005) (finding that release of excerpts from document does not replicate whole document and create waiver); Edmonds, 272 F. Supp. 2d at 48-49 (noting that plaintiff has failed to show that this specific information has been released to public); Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 237 F. Supp. 2d 17, 20 (D.D.C. 2002) (holding that plaintiff failed to show that information was in public domain merely by pointing to similar publicly available documents that deal with same general subject); Am. Lawyer Media, 2002 U.S. Dist. LEXIS 16940, at *4 (holding that agency did not waive right to withhold portions of training manual by permitting plaintiff's employee to review manual during public training conference because plaintiff had not shown that manual is in public domain); Shores v. FBI, 185 F. Supp. 2d 77, 86-87 (D.D.C. 2002) (finding no waiver when plaintiff failed to demonstrate that specific information had entered public domain).

production on the party who claims that the information is publicly available."[56] In another case, the D.C. Circuit reasoned that the burden of production should fall upon the requester "because the task of proving the negative -- that the information has not been revealed -- might require the government to undertake an exhaustive, potentially limitless search."[57] When a record may be publicly available in theory, but is so hard to obtain that no objective disclosure or waiver arguably has occurred, the burden is on the requester to prove that the records are in fact obtainable.[58] If a plaintiff meets the burden of production, it is then "up to the government, if it so chooses, to rebut the plaintiff's proof" and demonstrate that the specific records are not publicly available.[59]

With regard to prior disclosure, courts have consistently held that the prior public disclosure must "match" the exempt information in question; otherwise, the difference between the two might itself be a sufficient basis for reaching the conclusion that no waiver has occurred.[60] For example, if the information that already is available to the public is less

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[56] Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) (reverse FOIA suit).

[57] Davis, 968 F.2d at 1279-82.

[58] See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989) (applying test of availability to contents of "rap sheets" scattered among different courthouses and police stations, and viewing requested "rap sheet" as unavailable to general public in spite of requester's claims to contrary); see also Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 251 (2d Cir. 2006) (applying availability test and distinguishing from record involved in Reporters Committee any record that could be obtained via single visit to single federal agency website).

[59] Cottone, 193 F.3d at 556.

[60] See, e.g., Wolf, 473 F. 3d at 379-380 (distinguishing official acknowledgment of record's existence from official acknowledgment of record's content and emphasizing that content needed to have been entered into public domain in order to be considered waived); Heeney v. FDA, 7 F. App'x 770, 772 (9th Cir. 2001) (concluding that "[b]ecause . . . FDA's previous disclosures involved unrelated files . . . the information [at issue] was properly withheld"); Nowak, 2000 WL 60067, at *2 (determining that in order for FOIA plaintiff to establish waiver of FOIA exemption, he must be able to establish that information in his possession originated from same documents as those released in prior disclosure); Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998) (holding that public acknowledgment of investigation and "vague reference to its conclusion" does not waive use of Exemption 7(C) to protect "details of the investigation"); Davis, 968 F.2d at 1280 (finding no waiver as plaintiff failed to demonstrate that "exact portions" of records sought are in public domain); Fitzgibbon, 911 F.2d at 766 (finding no waiver when withheld information "pertain[s] to a time period later than the date of the publicly documented information"); Afshar, 702 F.2d at 1132 (finding that "withheld information is in some material respect different" from that which requester claimed had been released previously); Grandison v. DOJ, 600 F. Supp. 2d 103, 117 (D.D.C. 2009) (holding that "excerpts produced" do not suffice to establish waiver; requester must show that "complete copies of the depositions and answers to interrogatories requested under the FOIA have been disclosed and are preserved in a permanent public court record"); Ctr. for Int'l Envtl. Law v.

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specific than that at issue, the agency still may properly invoke an exemption to protect the more detailed information.[61] Thus, because courts require that the prior disclosure match the documents at issue, they consistently have found that release of certain documents does not

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[60](...continued)
Office of the U.S. Trade Representative, 505 F. Supp. 2d 150, 159 (D.D.C. 2007) (holding that "'while the logic of FOIA postulates that an exemption can serve no purpose once information . . . becomes public, we must be confident that the information sought is truly public and that the requester receive no more than what is publicly available before we find a waiver'" (quoting Students Against Genocide, 257 F.3d at 836)); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 81-82 (D.D.C. 2003) (holding that "selective" disclosure of some withheld material does not waive use of exemptions to protect similar, but undisclosed, information); Enviro Tech Int'l, Inc. v. EPA, No. 02-C-4650, slip op. at 15 (N.D. Ill. Mar. 11, 2003) (holding that agency "summarization" disclosure of withheld information could waive use of exemptions only for limited information contained within summary, not for all related records), aff'd, 371 F.3d 370 (7th Cir. 2004); Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 10 (D.D.C. 2001) (holding that plaintiff had not demonstrated that information at issue matched documents previously disclosed or released by CIA under JFK Act), aff'd, 334 F.3d 55 (D.C. Cir. 2003); Nat'l Sec. Archive Fund, No. 99-1160, slip op. at 14 (D.D.C. July 31, 2000) (reiterating that CIA's of several declassified biographies of world leaders did not compel it to disclose whether it maintained other information on those world leaders); Pease v. U.S. Dep't of Interior, No. 1:99CV113, slip op. at 7 (D. Vt. Sept. 11, 1999) (disclosing similar records prior to enactment of Exemption 3 statute does not result in waiver of current records covered by that statute); 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); cf. Herrick v. Garvey, 200 F. Supp. 2d 1321, 1329 (D. Wyo. Dec. 12, 2000) (finding no waiver where corporation reversed its earlier decision to disclose materials and disputed items had not been released by FAA previously), aff'd, 298 F.3d 1184 (10th Cir. 2002). But see Comm. to Bridge the Gap v. Dep't of Energy, No. 90-3568, transcript at 2-5 (C.D. Cal. Oct. 11, 1991) (bench order) (distinguishing Mobil Oil and finding deliberative process privilege waived for draft order by prior voluntary disclosure of earlier draft order to interested party; agency ordered to release earlier draft order and all subsequent revisions), aff'd on other grounds, 10 F.3d 808 (9th Cir. 1993) (unpublished table decision).

[61] See, e.g., Assassination Archives & Research Ctr., 334 F.3d at 61 (holding that previous generalized disclosures did not result in waiver because they "did not precisely track the records sought to be released"); Edmonds, 272 F. Supp. 2d at 49 (holding that because withheld information is far more detailed than that in public domain, "its release could provide a composite picture, or at least additional information, that would be harmful to national security"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 966 (C.D. Cal. 2003) (rejecting requester's waiver argument because withheld information was "merely the same category of information, not the exact information" as that previously disclosed); Ctr. for Int'l Envtl. Law, 237 F. Supp. 2d at 23 (holding that public availability of "similar but not identical information" does not lead to waiver for all information on same subject); Kelly v. CIA, No. 00-2498, slip op. at 12 (D.D.C. Aug. 8, 2002) (holding that agency had not waived use of exemptions because prior public disclosure was less specific and detailed than information withheld); Baltimore Sun Co. v. U.S. Customs Serv., No. 97-1991, slip op. at 5 (D. Md. Nov. 21, 1997) (ruling that public disclosure of "a poor quality photograph" did not waive agency's ability to protect a clear copy where there was greater sensitivity in latter).

waive the use of exemptions "as to other documents."[62]

General or limited public discussion of a subject by agency officials usually does not lead to waiver with respect to specific information or records.[63] Courts ordinarily do not penalize agency officials for sharing information concerning government activities with the public in general terms.[64] Nevertheless, under some circumstances an agency can waive the

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[62] Mobil Oil, 879 F.2d at 701; see, e.g., Rockwell v. DOJ, 235 F.3d 598, 605 (D.C. Cir. 2001) (finding privilege not waived because "quoting portions of some attachments" is not inconsistent with desire to protect rest); Cooper v. Dep't of Navy, 594 F.2d 484 (5th Cir. 1979) (finding that Navy waived FOIA exemptions for portion of report that had been released, but portion not released was not waived); Enviro Tech, No. 02-C-4650, slip op. at 15 (N.D. Ill. Mar. 11, 2003) (stating that "courts have refused to find that the discretionary disclosure of a document effectuates a waiver of other related documents"); cf. Riquelme v. CIA, 453 F. Supp. 2d 103, 115 (D.D.C. 2006) (holding that declassification of records pertaining to Chilean and Argentinian involvement in regional intelligence initiative does not result in waiver as to possible Paraguayan involvement in same intelligence initiative); Wood v. FBI, 312 F. Supp. 2d 328, 344-45 (D. Conn. 2004) (ruling that agency official could not possibly have waived exemptions applicable to memorandum that he had not even seen), aff'd in pertinent part, 432 F.3d 78 (2d Cir. 2005); Heeney v. FDA, No. 97-5461, slip op. at 19 (C.D. Cal. Mar. 16, 1999) (holding that mere fact that withheld documents may contain information previously released is insufficient because context in which documents were previously released may differ from context in which documents are currently being withheld), aff'd, 7 F. App'x 770 (9th Cir. 2001).

[63] See, e.g., Kimberlin,139 F.3d at 949 (holding that agency's public acknowledgment of investigation and "vague reference to its conclusion" does not establish waiver; withholding of details proper); Goodman v. U.S. Dep't of Labor, No. 01-515, 2001 WL 34039487, at *4 (D. Or. Dec. 21, 2001) (finding no waiver because agency official was merely describing disputed documents, rather than releasing them); Billington v. DOJ, 11 F. Supp. 2d 45, 55 (D.D.C. 1999) (finding no waiver where requester failed to show that "exact activities" claimed to be in public domain "have been disclosed in these documents"), aff'd on other grounds, 233 F.3d 581 (D.C. Cir. 2000); Rothschild v. DOE, 6 F. Supp. 2d 38, 40-41 (D.D.C. 1998) (finding no waiver where requester failed to specify how public discussion of particular economic theory revealed agency deliberative process with respect to long-term, wide-ranging study); Marriott Employees' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478-A, 1996 WL 33497625, at *2 (E.D. Va. Dec. 24, 1996) (finding no waiver because "[a]lthough the existence and general subject of the investigations is known to the public, there is no evidence in the record indicating that specific information concerning these investigations has been shared with unauthorized parties"); Blazar v. OMB, No. 92-2719, slip op. at 11-12 (D.D.C. Apr. 15, 1994) (finding no waiver of Exemptions 1 and 3 when published autobiography refers to information sought but provides no more than general outline of it). But see Wash. Post Co. v. U.S. Dep't of the Air Force, 617 F. Supp. 602, 605 (D.D.C. 1985) (disclosure of document's conclusions waived privilege for body of document).

[64] See, e.g., Pub. Citizen, 11 F.3d at 201 (finding that an "agency official does not waive FOIA exemption 1 by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure"); see also Dow Jones & Co. v. DOJ, 880 F. Supp. 145, 151 (S.D.N.Y. 1995) (holding that agency's "limited, general and cursory discussions" of

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applicability of a FOIA exemption through the public discussion of information by an agency official;[65] however, even in some of these cases, the courts have limited waiver to only the portions disclosed.[66] Finally, in a civil litigation case, a court has held that the discussion of classified information with a plaintiff's uncleared counsel did not amount to waiver.[67]

Further, it is important to note that "[t]he fact that [a FOIA requester] can guess which names have been deleted from the released documents does not act as a waiver to disclosure."[68] This holds true even when a requester has personal knowledge of the facts,

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[64](...continued)
investigative subject matter during press conference did not waive Exemption 7(A)), vacated on other grounds, 907 F. Supp. 79 (S.D.N.Y. 1995).

[65] See, e.g., Wolf, 473 F. 3d at 379-380 (finding waiver of "Glomar" response where agency head had discussed subject of request in congressional testimony); Myles-Pirzada, No. 91-1080, slip op. at 6 (D.D.C. Nov. 23, 1992) (finding waiver when agency official read report to requester over telephone); Comm. to Bridge the Gap, No. 90-3568, transcript at 3-5 (C.D. Cal. Sept. 9, 1991) (bench order) (ruling that agency waived deliberative process privilege by voluntarily providing draft order to interested party); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (finding that "off-the-record" disclosure to press by agency official cannot be protected under Exemption 1), motion for reargument denied, No. 87-Civ-1115 (S.D.N.Y. May 23, 1990); see also Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 484 (2d Cir. 1999) (refusing to extend Exemption 5 protection to "[a] letter [which] appear[ed] to report matters that were aired at a public hearing"); Shell Oil Co. v. IRS, 772 F. Supp. 202, 211 (D. Del. 1991) (finding waiver when agency employee read aloud entire draft document at public meeting); cf. Catchpole v. DOT, No. 97-8058, slip op. at 5-7 (11th Cir. Feb. 25, 1998) (remanding to determine if official read memorandum to requester over telephone, thereby waiving privilege).

[66] See, e.g., Cooper, 594 F.2d at 489 (finding that prior disclosure of portions of aircraft accident investigation report did not constitute waiver of portions not disclosed); Myles-Pirzada, No. 91-1080, slip op. at 6 (D.D.C. Nov. 23, 1992) (limiting waiver to those portions actually made public).

[67] Edmonds v. DOJ, 405 F. Supp. 2d 23, 31 (D.D.C. Dec. 19, 2005) (finding that "[w]hatever revelations the DOJ made to the plaintiff's counsel[, those comments do not] hinder the DOJ's ability to assert Exemption 1 over the information" and further stating that to argue otherwise "is to ignore the factual record and the case law").

[68] Valencia-Lucena v. DEA, No. 99-0633, slip op. at 7 (D.D.C. Feb. 8, 2000) (citing Weisberg v. DOJ, 745 F.2d 1476, 1491 (D.C. Cir. 1984)); see also Schiffer v. FBI, 78 F. 3d 1405, 1411 (9th Cir. 1996) (explaining that requester's "personal knowledge" has no bearing on request); LaRouche v. DOJ, No. 90-2753, slip op. at 15-16 (D.D.C. July 5, 2001) (holding that mere fact that plaintiff purported that he was able to identify witness names from other sources did not diminish privacy interests held); LaRouche v. DOJ, No. 90-2753, slip op. at 11-12 (D.D.C. Nov. 17, 2000) (finding that Exemption 7(D) protection for confidential sources who provided information was not waived just because plaintiff might well identify sources from documents disclosed by different agency).

such as by observing or participating in the events detailed in government records.[69] Indeed, even if a requester could piece together information from different sources and potentially develop a complete picture of withheld facts, that does not compel waiver.[70]

Thus, courts have held that plaintiffs "must show three elements" in order to prove that an official public disclosure has occurred, i.e., the information requested (1) "'must be as specific as the information previously released,'" (2) "'must match the information previously disclosed,'" and (3) "'must have already have been made public through an official and documented disclosure.'"[71]

Courts have recognized that agencies ordinarily should be granted special latitude in matters of national security[72] and criminal law enforcement,[73] because of the inherent

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[69] See, e.g., Rubis v. DEA, No. 01-1132, slip op. at 7 (D.D.C. Sept. 30, 2002) (reaffirming that exemption is not waived by fact that plaintiff might well already know identities of individuals); Tanks v. Huff, No. 95-568, 1996 U.S. Dist. LEXIS 7266, at *10 (D.D.C. May 28, 1996) (holding that requester's knowledge of identities of informants who testified against him does not affect ability of agency to invoke exemption).

[70] See, e.g., Whalen v. U.S. Marine Corps, 407 F. Supp. 2d 54, 60 (D.D.C. 2005) (holding that government did not waive Exemptions 1 and 3 merely because plaintiff might well surmise what redacted information was by using knowledge obtained from nonfiction books written by private authors); see also Gilda Indus., Inc. v. U.S. Customs & Border Prot. Bureau, 457 F. Supp. 2d 6, 12 (D.D.C. 2006) (finding no waiver even though requester could compare two publicly available lists and deduce correlation bearing upon withheld information; information therefore was properly protected under Exemption 4).

[71] ACLU v. DOD, 584 F. Supp. 2d 19, 26 (D.D.C. 2008) (quoting Fitzgibbon, 911 F. 2d at 765); see also Afshar, 702 F. 2d at 1130-33 (same).

[72] See, e.g., Afshar, 70 F. 2d at 1131-33 (explaining that because "disclosure of the withheld information could cause damage not already caused by the information released," release of general comments is not waiver); Students Against Genocide, 257 F.3d at 835 (reiterating that sharing of classified information with foreign government does not result in waiver); Pub. Citizen, 11 F.3d at 201, 203 (noting that "[t]his court established the criteria for waiver of exemption 1 in Afshar" and holding "that this is a "high hurdle for a FOIA plaintiff to clear, but the government's vital interest in information relating to national security and foreign affairs dictates that it must be"); Edmonds, 405 F. Supp. 2d at 29 (finding that even agency's disclosure to plaintiff's counsel at meeting did not amount to affirmative step toward declassification action with regard to information withheld under Exemption 1); Nat'l Sec. Archive, No. 99-1160, slip op. at 12-13 (D.D.C. July 31, 2000) (ruling that Exemption 1 can be waived only through official action of CIA, not by disclosure by other agencies or presence of related information in public domain); Van Atta, 1988 WL 73856, at *2 (same).

[73] See Neely v. FBI, 208 F.3d 461, 466 (4th Cir. 2000) (holding that "public availability [does not] effect a waiver of the government's right" to invoke Exemption 7(D)); Isley,1999 WL 1021934, at *4 (finding that trial does not waive government's right to withhold specific information); Irons v. FBI, 880 F.2d 1446, 1456-57 (1st Cir. 1989) (en banc) (finding good public

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sensitivity of such activities and information. In the national security context, one appellate court held that the passage of time should properly be considered when determining whether public disclosure of national security information has resulted in waiver.[74]

In the law enforcement context, courts have routinely held that the mere fact that a confidential source testifies at a trial does not waive Exemption 7(D) protection for any source-provided information not actually revealed in public.[75] Further, courts have held that no

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[73](...continued)
policy reasons why public testimony by confidential source should not waive FBI's right to withhold information pursuant to Exemption 7(D)); Garcia v. DOJ, 181 F. Supp. 2d 356, 377 (S.D.N.Y. 2002) (finding that inadvertent disclosure of names of confidential sources does not waive government's right to invoke Exemption 7(D)); Doolittle v. DOJ, 142 F. Supp. 2d 281, 286 (N.D.N.Y. 2001) (declaring that limited disclosure at sentencing hearing should not constitute waiver).

[74] Bassiouni v. CIA, 392 F.3d 244, 247 (7th Cir. 2004) (rejecting plaintiff's argument that agency acknowledgment of existence of records fourteen years earlier waived FOIA protection), cert. denied, 545 U.S. 1129 (2005).

[75] See, e.g., Isley, 1999 WL 1021934, at *4 (finding that testimony at trial "only bars the government from withholding the testimony itself" and is not waiver "to all documents relating" to testimony); Housley v. DEA, No. 92-16946, 1994 WL 168278, at *2 (9th Cir. May 4, 1994) (fact that some information may have been disclosed at criminal trial does not result in waiver as to other information); see also Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (Exemption 7(D) "focuses on the source's intent, not the world's knowledge . . . . [H]old[ing] otherwise would discourage sources from cooperating with the FBI because of fear of revelation via FOIA."); Davoudlarian, 1994 WL 423845, at *3 (noting that requester must demonstrate that specific witness statements were disclosed at civil trial in order to show waiver); Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992) (holding that fact that local police department officer testified at length in court did not waive police department's status as confidential source under Exemption 7(D)); Parker v. DOJ, 934 F.2d 375, 379 (D.C. Cir. 1991) (finding that "government agency is not required to disclose the identity of a confidential source or information conveyed to the agency in confidence in a criminal investigation notwithstanding the possibility that the informant may have testified at a public trial"); Larouche v. DOJ, No. 90-2753, slip op. at 6 (D.D.C. Aug. 8, 2002) (noting that "[a]lthough the government may not withhold information that is in the public domain, it need not make a wholesale disclosure about an individual just because he is a publicly acknowledged FBI source"); Daniel v. DOJ, No. 99-2423, slip op. at 3-4 (D.D.C. Mar. 30, 2001) (finding Exemption 7(D)'s protection not waived regarding previously undisclosed information furnished by witnesses who testified at trial under grant of immunity); Coleman v. FBI, 13 F. Supp. 2d 75, 80 (D.D.C. 1998) (finding that "individual who testifies at trial does not waive this privacy interest beyond the scope of the trial[;] . . . [to] hold otherwise would discourage essential witness testimony"); cf. Johnston v. DOJ, No. 97-2173, 1998 WL 518529, at *1-2 (8th Cir. Aug. 10, 1998) ("'[T]he fact that an agent decided or was required to testify . . . does not give plaintiff a right under FOIA to documents revealing the fact and nature of [agent's] employment.'" (quoting Jones, 41 F.3d at 246-47)); Reiter v. DEA, No. 96-0378, 1997 WL 470108, at *6 (D.D.C. Aug. 13, 1997) ("An agency may . . . continue to invoke Exemption 7(D) in the (continued...)

waiver occurs when information is disclosed during a civil or criminal proceeding.[76]

By contrast, however, courts are more likely to find that waiver has occurred when the prior disclosure was "selective" and resulted in unfairness.[77] While "selective" disclosure does

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[75](...continued)
event that the requester learns of the source's identity and the information supplied by him through the source's open court testimony."), aff'd, No. 97-5246, 1998 WL 202247 (D.C. Cir. Apr. 27, 1998); Beck v. DOJ, No. 88-3433, slip op. at 2 (D.D.C. July 24, 1991) ("Exemption 7(C) is not necessarily waived where an individual has testified at trial."), summary affirmance granted in pertinent part & denied in part, No. 91-5292 (D.C. Cir. Nov. 19, 1992).

[76] See, e.g., Hronek v. DEA, 7 F. App'x 591, 592 (9th Cir. 2001) (rejecting contention that DEA waived claimed exemptions where documents at issue "relate[d] to documents released to [plaintiff during] the course of his criminal conviction"); Cottone, 193 F.3d at 556 (refusing to find waiver for wiretapped recordings provided to plaintiff's counsel as Brady material); Schiffer, 78 F.3d at 1410-11 (finding no waiver of FBI's right to invoke Exemption 7(C) for information made public during related civil suit); Housley, 1994 WL 168278, at *2 (explaining that even though some information may have been disclosed at criminal trial does not result in waiver as to other information); Lewis v. DOJ, 609 F. Supp. 2d 80, 85 (D.D.C. 2009) (finding no waiver for documents disclosed at criminal trial because compelled disclosure to single partly does not equal release into public domain); Grandison, 600 F.2d at 117 (finding no waiver because "excerpts produced" from depositions and answers to interrogatories do not suffice to establish that requested records are "preserved in a permanent court record"); Edmonds, 405 F. Supp. 2d at 32 (finding that disclosures made to plaintiff's counsel during investigation of plaintiff do not "hinder the DOJ's ability to assert Exemption 1 over the information"); Judicial Watch v. USPS, 297 F. Supp. 2d 252, 268 (D.D.C. 2004) (observing that a "disclosure to a third party that promotes the client's trial strategy and is consistent with maintaining secrecy against trial opponents does not waive the privilege"); Rashid v. HHS, No. 98-0898, slip op. at 7 (D.D.C. Mar. 2, 2000) (finding no waiver for memorandum disclosed to expert witnesses in anticipation of their testimony at trial); cf. Medera Cmty. Hosp. v. United States, No. 86-542, slip op. at 6-9 (E.D. Cal. June 28, 1988) (finding no waiver where memoranda sent to state auditor involved in enforcement proceeding); Erb v. DOJ ,572 F. Supp. 954, 956 (W.D. Mich. 1983) (upholding nondisclosure despite "limited disclosure" to defense attorney and state prosecutor).

[77] See, e.g., Natural Res. Def. Council v. DOD, 442 F. Supp. 2d 857, 865-66 (rejecting agency's leak argument where evidence of selective disclosure and preferential treatment was substantial); N.D. ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) (finding "selective disclosure" of record to one party in litigation to be "offensive" to FOIA and sufficient to prevent agency's subsequent invocation of Exemption 5 against other party to litigation); Nw. Envtl. Def. Ctr. v. U.S. Forest Serv., No. 91-125, slip op. at 12 (D. Or. Aug. 23, 1991) (magistrate's recommendation) (determining that agency waived deliberative process privilege as to portion of agency report that was discussed with "interested" third party), adopted, (D. Or. Feb. 12, 1992); Comm. to Bridge the Gap, No. 90-3568, transcript at 3-5 (C.D. Cal. Sept. 9, 1991) (bench order) (finding waiver of deliberative process privilege for draft order by prior voluntary disclosure of earlier draft order to interested party; selective disclosure is "offensive" to FOIA); Hopkins v. Dep't of the Navy, No. 84-1868, 1985 WL 17673, at *1 (D.D.C. Feb. 5, 1985) (while (continued...)

not always result in waiver, courts do consider the overall fairness of the prior disclosure in question, finding repeatedly that preferential treatment "waives any otherwise applicable FOIA exemption since 'FOIA does not permit selective disclosure of information only to certain parties.'"[78] "This principle is consistent with the Supreme Court's statement that 'once there is disclosure, the information belongs to the general public.'"[79] Furthermore, as recognized by the Supreme Court, there "is no mechanism under FOIA for a protective order allowing only the requester to see . . . the information."[80]

Although "selective disclosure" is of concern "with respect to those exemptions that protect the government's interest in non-disclosure of information," that concern is not implicated when an agency asserts Exemption 6 to protect personal information.[81]

While it is generally found that agency carelessness or mistake in permitting access to certain information is not equivalent to waiver,[82] on occasion courts have found waiver in such

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[77](...continued)
not technically applying doctrine of waiver, rejecting agency's privacy arguments on grounds that virtually the same information -- officers' reassignment stations -- had been published in Navy Times while names and addresses of 1.4 million service members had been disclosed to political campaign committee).

[78] Natural Res. Def. Council, 442 F. Supp. 2d at 866 (quoting Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F. 3d 1082, 1088 (9th Cir. 1997)); see also DOD v. FLRB, 510 U.S. 487, 495-97 (1994) (explaining that "all FOIA requesters have an equal, and equally qualified, right to information"); cf. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) (finding that requesters' rights to information are not increased by requesters' interest in subject matter).

[79] Natural Res. Def. Council, 442 F. Supp. 2d at 866 (quoting NARA v. Favish, 541 U.S. 157, 174 (2004)).

[80] NARA v. Favish, 541 U.S. 157, 174 (2004).

[81] Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 363 (5th Cir. 2001) ("only the individual whose informational privacy interests are protected by exemption 6 can effect a waiver of those privacy interests"); cf. McSheffrey v. EOUSA, No. 02-5239, 2003 WL 179840, at *1 (D.C. Cir. Jan. 24, 2003) (affirming that individuals who provided personal information to prison officials during visit with inmate did not waive personal privacy protection), reh'g denied, No. 02-5239 (D.C. Cir. May 1, 2003).

[82] See, e.g., Ford v. West, No. 97-1342, 1998 WL 317561, at *3 (10th Cir. June 12, 1998) (rejecting claim that defendant's inadvertent release of names constituted waiver: "[D]efendant's inadequate redactions do not operate to waive the personal privacy interests of the individuals discussed in the investigative file."); Cooper, 594 F.2d at 485 (explaining that unauthorized release from negligence does not mean that FOIA exemptions have been waived); Azmy v. DOD, 562 F. Supp. 2d 590, 605 n.12, 606 (S.D.N.Y. 2008) (explaining that "accidental or inadvertent disclosure of material that should have been withheld pursuant to exemption 1" does not declassify material; thus, such information need not be released); Hersh & Hersh v. HHS, No. C 06-4234, 2008 WL 901539, at *7 (N.D. Cal. Mar. 31 2008) (explaining that (continued...)

releases.[83] Similarly, an agency's failure to heed its own regulations regarding circulation of internal agency documents has been found sufficient to warrant a finding of waiver.[84]

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[82](...continued)
"documents made publicly available on the docketing system were inadvertently produced [and] cannot form the basis for a waiver argument"); Garcia, 181 F. Supp.2d at 377 (ruling that inconsistent redactions of names of confidential sources does not waive government's ability to invoke Exemption 7(D)); LaRouche, No. 90-2753, slip op. at 24 (D.D.C. July 5, 2001) (holding that inadvertent disclosure of information to another FOIA requester does not warrant disclosure of properly exempt information); Ponder v. Reno, No. 98-3097, slip op. at 6 (D.D.C. Jan. 22, 2001) (reaffirming principle that inadvertent disclosure does not constitute a waiver of Exemption 7(C)); Sinito v. DOJ, No. 87-0814, slip op. at 29-30 (D.D.C. July 12, 2000) (finding that documents inadvertently disclosed and briefly released to public did not "erase every vestige" of privacy interests at stake), summary affirmance granted, 22 F. App'x 1 (D.C. Cir. 2001); Fort Hall Landowners Alliance, Inc. v. Bureau of Indian Affairs, No. 99-00052, slip op. at 13-14 (D. Idaho Mar. 17, 2000) (noting that "agency's inadvertent or mistaken disclosure does not necessarily constitute a waiver"; thus, finding no waiver when agency recognized its error and took corrective action); Billington, 11 F. Supp. 2d at 66 (finding no waiver of Exemption 7(D) protection in case involving more than 40,000 documents where agency mistakenly released one withheld document to previous requester, and observing: "One document in such an enormous document request is merely a needle in a haystack. That one FBI agent may have redacted a document differently than another, or that the same FBI agent did not redact a document in precisely the same manner in different years, did not constitute bad faith."); Pub. Citizen Health Research Group v. FDA, 953 F. Supp. 400, 404-06 (D.D.C. 1996) (finding no waiver where material accidently released and information not disseminated by requester); Kay, 867 F. Supp. at 23-24 (explaining that inadvertent disclosure of documents caused entirely by clerical error has no effect on remaining material at issue); Nation Magazine v. Dep't of State, 805 F. Supp. 68, 73 (D.D.C. 1992) (dicta) ("[N]o rule of administrative law requires an agency to extend erroneous treatment of one party to other parties, 'thereby turning an isolated error into a uniform misapplication of the law.'" (quoting Sacred Heart Med. Ctr. v. Sullivan, 958 F.2d 537, 548 n.24 (3d Cir. 1992))); 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).

[83] See, e.g., Goodrich v. EPA, 593 F. Supp. 2d 184, 192 (D.D.C. 2009) (stating that "'courts will grant no greater protection to those who assert the privilege than their own precautions warrant'" and finding that "privilege is lost even if the disclosure is inadvertent" (quoting In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (non-FOIA case))); Natural Res. Def. Council, 442 F. Supp. 2d at 865-66 (rejecting government's argument that records were "leaked" because agency failed "to take affirmative steps to inhibit . . . further dissemination"); Haddam v. INS, No. 99-3371, slip op. at 5 (D.D.C. Feb. 15, 2001) (holding that INS's mistaken disclosure of document protected by attorney-client privilege to plaintiff's attorney waived that privilege for that document).

[84] Shermco Indus. v. Sec'y of the Air Force, 613 F.2d 1314, 1320 (5th Cir. 1980) (explaining that "[w]avier occurs when an agency makes its information more broadcast than is allowed by its own regulations"); see also Cooper, 594 F.2d at 485 (explaining that "Navy did not (continued...)

When an agency has been compelled to share information with Congress without making an official disclosure of information to the public, courts have ruled that this exchange of information does not result in waiver.[85] Especially for information relating to national security, disclosure in a congressional report has been found not to waive Exemption 1 applicability if the agency itself has never publicly acknowledged the information.[86] Significantly, in deference to the common agency practice of disclosing specifically requested information to a congressional committee,[87] or to the General Accounting Office (an arm of

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[84](...continued)
adhere to its own regulations pertaining to the dissemination of information," resulting in waiver for portions disclosed).

[85] See Rockwell, 235 F.3d at 604-05 (finding no waiver when agency secured promise of confidentiality from congressional subcommittee regarding disclosure of agency report defending prosecution of nuclear weapons plant operator); Fitzgibbon, 911 F.2d at 765 (holding that prior disclosure in a congressional report does not waive "information pertaining to a time period later than the date of the publicly documented information"); Murphy v. Dep't of the Army, 613 F.2d 1151, 1155-59 (D.C. Cir. 1979) (finding no waiver for internal legal memorandum when agency enclosed it in letter to congress, despite fact that Army made no request to keep memorandum confidential); see also Afshar, 702 F.2d at 1131-32 (finding no waiver when withheld information is in some respect materially different); Heggestad v. DOJ, 182 F. Supp. 2d 1, 12-13 (D.D.C. 2000) (finding no waiver of deliberative process or attorney work-product privileges where information was disclosed to congressman); cf. Heeney, No. 97-5461, slip op. at 19 (C.D. Cal. Mar. 16, 1999) (finding no waiver where documents at issue contained information that previously was released in different context).

[86] See Pub. Citizen, 11 F.3d at 201 (finding no waiver of classified information when agency official publicly discussed only general subject matter of documents in congressional testimony); ACLU, 584 F. Supp. at 25 (finding that "allegations or reproductions of documents contained in congressional reports do no[t] constitute official agency disclosure" of Exemption 1 material); Edmonds, 272 F. Supp. 2d at 49 (affirming that disclosure of classified material to congressional committee "does not deprive the [agency] of the right to classify the information under Exemption 1" (citing Fitzgibbon, 911 F.2d at 766)); Earth Pledge Found. v. CIA, 988 F. Supp. 623, 628 (S.D.N.Y. 1996) (explaining that "public disclosure in the Senate Report of some of the information" is different from agency itself making release; thus, classified information is "exempt from disclosure"), aff'd, 128 F.3d 788 (2d Cir. 1997); see also Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (holding that classified information in Senate report "cannot be equated with disclosure by the agency itself"); Military Audit Project, 656 F.2d at 744 (finding that publication of Senate report does not constitute official release of classified agency information); cf. Students Against Genocide, 50 F. Supp. 2d at 24-25 (finding "no authority for the proposition that the sharing of classified information with foreign governments effects a waiver under FOIA" when information disclosed to members of United Nations Security Council).

[87] See, e.g., Rockwell, 235 F.3d at 604 (finding no waiver for documents provided to congressional oversight subcommittee, in accordance with FOIA's specific congressional-disclosure provision, found at 5 U.S.C. § 552(d)); Fla. House of Representatives v. U.S. Dep't of Commerce, 961 F.2d 941, 946 (11th Cir. 1992) (holding no waiver of exemption due to court-
(continued...)

Congress),[88] such disclosures generally do not result in waiver.

In addition, when an agency has been compelled to disclose a document under limited and controlled conditions, such as under a protective order in an administrative proceeding, courts have found no waiver has occurred.[89]

Circulation of a document within an agency has also been found not to waive an

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[87](...continued)
ordered disclosure, involuntary disclosure to Congress, or disclosure of related information); Aspin v. DOD, 491 F.2d 24, 26 (D.C. Cir. 1973) (accepting that military criminal investigation records related to "My Lai Massacre," during Vietnam War, were exempt from disclosure, despite release to Armed Services Committees of both Houses of Congress); Edmonds, 272 F. Supp. 2d at 49 (affirming that disclosure of classified material to congressional committee "does not deprive the [agency] of the right to classify the information under Exemption 1" (citing Fitzgibbon 911 F.2d at 766)); Wash. Post Co. v. DOD, No. 84-2949, 1987 U.S. Dist. LEXIS 16108, at *25 n.9 (D.D.C. Feb. 25, 1987) ("unprincipled disclosure" by Members of Congress who had signed statements of confidentiality "cannot be the basis to compel disclosure" by agency).

[88] See, e.g., Shermco, 613 F.2d at 1320-21.

[89] See, e.g., Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 79 n.13 (2d Cir. 1979) (permitting OSHA to withhold records that it previously shared with consultant for decisionmaking purposes); Lewis, 609 F. Supp. 2d at 85 (finding no waiver for documents disclosed at criminal trial because compelled disclosure to single party does not equal release into public domain); Abrams v. Office of the Comptroller of the Currency, No. 3:05-CV-2433, 2006 WL 1450525 at *5 (N.D. Tex. May 25, 2006) (concluding that agency did not waive Exemption 8 protection when it released information to limited number of people for limited purpose of demonstrating authority to issue subpoenas), aff'd, 243 F. App'x 4 (5th Cir. 2007); Silverberg v. HHS, No. 89-2743, 1991 WL 633740, at *3 (D.D.C. June 14, 1991) (ruling that fact that individual who is subject of drug test by particular laboratory has right of access to its performance and testing information does not render such information publicly available), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); Allnet Commc'n Servs. v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (finding no waiver where information was disclosed under "strict confidentiality"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994).

exemption.[90] Similarly, disclosure among federal agencies,[91] or to advisory committees (even those including members of the public) has been permitted without a waiver consequence.[92] Further, properly controlled disclosures to state or local law enforcement officials,[93] or to state attorneys general, have been found not to waive FOIA exemption protection.[94] Additionally, courts have held that an agency does not waive its use of FOIA exemptions when an agency official mistakenly promises to make a disclosure.[95]

When disclosure of information is not attributable to the agency, i.e., when an agency employee has made an unauthorized disclosure or information was "leaked," courts have ruled

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[90] See, e.g., Direct Response Consulting Serv. v. IRS, No. 94-1156, 1995 WL 623282, at *5 (D.D.C. Aug. 21, 1995) (attorney-client privilege not waived when documents sent to other divisions within agency); Chemcentral/ Grand Rapids Corp. v. EPA, No. 91-C-4380, 1992 WL 281322, at *7 (N.D. Ill. Oct. 6, 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 them); Lasker-Goldman Corp. v. GSA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,125, at 81,322 (D.D.C. Feb. 27, 1981) (no waiver when document was circulated to management officials within agency); see also FOIA Update, Vol. IV, No. 2, at 6 ("The Effect of Prior Disclosure: Waiver of Exemptions").

[91] See, e.g., Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982) (agency does not automatically waive exemption by releasing documents to other agencies); Silber v. DOJ, No. 91-876, transcript at 10-18 (D.D.C. Aug. 13, 1992) (bench order) (distribution of manual to other agencies does not constitute waiver). But cf. Lacefield v. United States, No. 92-N-1680, 1993 WL 268392, at *6 (D. Colo. Mar. 10, 1993) (attorney-client privilege waived with respect to letter from City of Denver attorney to Colorado Department of Safety because letter was circulated to IRS).

[92] See, e.g., Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107-08 (D.C. Cir. 1976).

[93] See, e.g., Gen. Elec. Co. v. EPA, 18 F. Supp. 2d 138, 143 (D. Mass. 1998) (concluding that because EPA is obligated to consult with state agencies in formulating federal policy, disclosures made pursuant to that obligation do not constitute waiver of applicability of FOIA exemption); Kansi v. DOJ, 11 F. Supp. 2d 42, 44-45 (D.D.C. 1998) (stating that even if plaintiff had adduced evidence that information was actually disclosed to local prosecutor, such disclosure would not have waived Exemption 7(A) protection); Erb, 572 F. Supp. at 956 (holding that disclosure of FBI report to local prosecutor did not cause waiver of Exemption 7(A)).

[94] See Interco, Inc. v. FTC, 490 F. Supp. 39, 44 (D.D.C. 1979); see also FOIA Update, Vol. IV, No. 2, at 6 ("The Effect of Prior Disclosure: Waiver of Exemptions").

[95] See Hertzberg, 273 F. Supp. 2d at 82 (concluding that agency official's assurances that information would be released did not waive Exemption 5); Anderson v. U.S. Dep't of the Treasury, No. 98-1112, 1999 WL 282784, at *4 (W.D. Tenn. Mar. 24, 1999) (finding that mere promise of an IRS agent to disclose a document to a FOIA requester did not constitute waiver, because "[n]othing in [the] FOIA . . . make[s] such a statement binding and irrevocable").

that no waiver has occurred.[96] As one court has phrased it, finding waiver in such circumstances would only lead to "exacerbation of the harm created by the leaks."[97]

An individual's express disclosure authorization with respect to his own interests implicated in requested records can also result in a waiver.[98] By the same token, it has been held that "only the individual whose informational privacy interests are protected" can effect

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[96] See, e.g., Favish, 541 U.S. at 158 (accepting concept that unofficial leak and subsequent publication of death-scene photograph of body of presidential aide did not prevent agency from invoking Exemption 7(C) to protect privacy of surviving family members); see also Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286, 294 (4th Cir. 2004) (finding no waiver when attorney consulting for federal agency unilaterally released documents that he authored during course of attorney-client relationship between him and agency); Simmons v. DOJ, 796 F.2d 709, 712 (4th Cir. 1986) (finding that unauthorized disclosure does not constitute waiver); Medina-Hincapie v. Dep't of State, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983) (holding that official's ultra vires release does not constitute waiver); Edmonds, 272 F. Supp. 2d at 49 (holding that because information in public domain was leaked, agency may continue to withhold identical information because "'release would amount to official confirmation or acknowledgment of [its] accuracy'" (quoting Wash. Post v. DOD, 766 F. Supp. 1, 9 (D.D.C. 1991))); Trans-Pac. Policing Agreement v. U.S. Customs Serv., No. 97-2188, 1998 WL 34016806, at *4 (D.D.C. May 14, 1998) (finding no waiver from "isolated and unauthorized" disclosures that were not "in accordance with [agency] regulations or directions"), rev'd & remanded on other grounds, 177 F.3d 1022 (D.C. Cir. 1999); Harper v. DOJ, No. 92-462, slip op. at 19 (D. Or. Aug. 9, 1993) ("alleged, unauthorized, unofficial, partial disclosure" in private publication does not waive Exemption 1), aff'd in part, rev'd in part & remanded on other grounds sub nom. Harper v. DOD, 60 F.3d 833 (9th Cir. 1995) (unpublished table decision); LaRouche v. DOJ, No. 90-2753, 1993 WL 388601, at *7 (D.D.C. June 25, 1993) (explaining that fact that some aspects of grand jury proceeding were leaked to press has "no bearing" on FOIA litigation); Laborers' Int'l Union v. DOJ, 578 F. Supp. 52, 58 n.3 (D.D.C. 1983) (finding that unauthorized disclosure of document "resembling" one at issue does not waive invocation of exemptions), aff'd, 772 F.2d 919, 921 n.1 (D.C. Cir. 1984) (noting that disclosure would "enable the [plaintiff] to verify whether the report in its possession is an authentic copy"); Safeway Stores, Inc. v. FTC, 428 F. Supp. 346, 347-48 (D.D.C. 1977) (finding no waiver where congressional committee leaked report to press).

[97] Murphy v. FBI, 490 F. Supp. 1138, 1142 (D.D.C. 1989). But cf. In re Engram, No. 91-1722, 1992 WL 120211, at *5 (4th Cir. June 2, 1992) (per curiam) (permitting discovery as to circumstances of suspected leak).

[98] See, e.g., Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 567 (1st Cir. 1992) (source statements not entitled to Exemption 7(D) protection when individuals expressly waived confidentiality); Blanton v. DOJ, 63 F. Supp. 2d 35, 47 (D.D.C. 1999) (finding that FBI confidential sources waive their privacy interests where they extensively publicize their status as confidential sources); Schwartz v. DOJ, No. 94-7476, 1995 WL 675462, at *8 (S.D.N.Y. Nov. 14, 1995) (requester waived privacy interest in presentence report by voluntarily disclosing it in court filings), aff'd, 1996 WL 335757 (2d Cir. 1996); Key Bank of Me., Inc. v. SBA, No. 91-362, 1992 U.S. Dist. LEXIS 22180, at *25-26 (D. Me. Dec. 31, 1992) (finding that subject has specifically waived any privacy interest she might have in requested information, agency has not demonstrated that release of information would harm any privacy interest) (Exemption 6).

a waiver of those privacy interests "when they are threatened" by a FOIA request."[99] "The Supreme Court has explained that the privacy at stake in FOIA analysis belongs to the individual, not the agency holding the information."[100]

[99] Sherman, 244 F.3d at 363-64; see also Wiley v. VA, 176 F. Supp. 2d 747, 753 (E.D. Mich. 2001) (finding that "[t]he case law on this subject, though extremely limited, indicates that an individual can waive the privacy interest that the [Privacy Act] is meant to safeguard by . . . disclosing otherwise confidential information"); Wayne's Mech. & Maint. Contractor, Inc. v. U.S. Dep't of Labor, No. 1:00-CV-45, slip op. at 18 (N.D. Ga. May 7, 2001) (reiterating that "[o]nly the witness, not the Department of Labor or OSHA, has the power to waive Exemption 7(D)'s protection of confidentiality"); Judicial Watch v. Reno, No. 00-0723, 2001 WL 1902811, at *7 (D.D.C. Mar. 30, 2001) (holding that privacy interest belongs to individual whose interest is at stake and agency cannot surrender that interest). But see Iowa Citizens for Cmty. Improvement v. USDA, 256 F. Supp. 2d 946, 955 (S.D. Iowa Aug. 13, 2002) (noting that "common sense dictates that prior disclosure -- either by the government, the news media or private individuals -- does lessen an individual's expectation of privacy").

[100] Sherman, 244 F.3d at 363 (citing Reporters Comm., 489 U.S. at 765-65).