APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of December, two thousand eighteen.

Present:

AMALYA L. KEARSE,
DEBRA ANN LIVINGSTON,
SUSAN L. CARNEY,
Circuit Judges.

WILLIAM F. SORIN,
Plaintiff-Appellant,

v.

18-99-cv
UNITED STATES
DEPARTMENT OF JUSTICE,
Defendant-Appellee.

For Plaintiff-Appellant:

WILLIAM F. SORIN, *pro se*, New York, NY.

For Defendant-Appellee:

PETER ARONOFF, Assistant United States Attorney

(Christopher Connolly, Assistant United States Attorney, *on the brief*), *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY.Appeal from a judgment of the United States District Court for the Southern District of New York (Gorenstein, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant William Sorin ("Sorin") seeks documents related to his 2006 criminal prosecution and guilty plea in the United States District Court for the Eastern District of New York. In August 2015, Sorin filed suit pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), in the United States District Court for the Southern District of New York, seeking production of those documents by Defendant-Appellee United States Department of Justice ("DOJ"). On November 29, 2017, the district court (Gorenstein, *M.J.*) granted summary judgment to DOJ, holding that all of the documents that DOJ had withheld from Sorin fell within three of FOIA's statutory exemptions from disclosure. Sorin appealed. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

This Court reviews a district court's grant of summary judgment de novo. E.g., Ctr. for Constitutional Rights v. C.I.A., 765 F.3d 161, 166 (2d

Cir. 2014). Summary judgment is appropriate only "'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Sousa v. Marquez, 702 F.3d 124, 127 (2d Cir. 2012) (quoting Fed. R. Civ. P. 56(a)). FOIA requires public disclosure of federal agencies' records unless the requested documents fall within one of FOIA's nine enumerated exemptions (the "FOIA Exemptions"). 5 U.S.C. § 552(a), (b)(1)-(9); see also Wood v. F.B.I., 432 F.3d 78, 82–83 (2d Cir. 2005). "In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994) (citing 5 U.S.C. § 552(a)(4)(B)). To fulfill that burden, the agency may offer affidavits or declarations "giving reasonably detailed explanations why any withheld documents fall within an exemption," the allegations in support of which "are accorded a presumption of good faith." Id. (internal quotation marks omitted).

Sorin does not dispute the adequacy of DOJ's search, but only the applicability of the claimed FOIA Exemptions to the documents DOJ withheld. We agree with the magistrate judge that all documents withheld by DOJ fall within at least one of the FOIA Exemptions.

FOIA Exemption 3

FOIA Exemption 3 ("Exemption 3") permits nondisclosure of matters that are "specifically

exempted from disclosure" by another statute, if that statute "(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Federal Rule of Criminal Procedure 6(e) ("FRCRP 6(e)"), concerning the secrecy of grand jury matters, qualifies as a withholding statute under Exemption 3. *See John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 109 (2d Cir. 1988) (FRCRP 6(e) "is incorporated into the FOIA by" Exemption 3), *reversed on other grounds*, 493 U.S. 146 (1989). FRCRP 6(e) "covers not only the evidence actually presented to that body but also anything that may tend to reveal what transpired before it." *United States v. E. Air Lines, Inc.*, 923 F.2d 241, 244 (2d Cir. 1991).

DOJ described the documents it withheld from Sorin under Exemption 3 as: (1) communications from a law firm to federal prosecutors, accompanying the production of documents requested by grand jury subpoena and discussing the contents of specific subpoenas; and (2) communications from those federal prosecutors to that law firm referencing specific grand jury subpoenas. Because these documents "tend to reveal what transpired before" the grand jury, *id.* at 244, the district court properly held that they fall within Exemption 3 and that DOJ was not required to disclose them.

FOIA Exemption 5

FOIA Exemption 5 ("Exemption 5") permits non-disclosure of "inter-agency or intraagency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "This exemption encompasses traditional discovery privileges, such as the attorney-client and work-product privileges." *Wood*, 432 F.3d at 83. The work-product privilege shields from discovery materials that are "prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(A); *see also In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007). A document is "prepared in anticipation of litigation" if it may "fairly be said to have been prepared or obtained *because of* the prospect of litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (internal quotation marks omitted) (emphasis in original).

DOJ described the documents it withheld from Sorin under Exemption 5 as: (1) emails sent between various federal law enforcement officials concerning the details of a then-ongoing criminal investigation and associated legal theories and litigation strategies; and (2) attorney-written notes, memoranda, and drafts regarding that investigation and the associated planned prosecutions. These documents fall within the work-product privilege as communications within and among federal law enforcement agencies created in anticipation of a criminal prosecution and for the purpose of furthering that prosecution. *See* 5 U.S.C. § 552(b)(5); *Adlman*, 134 F.3d at 1202. Accordingly, the district court properly held that these documents fall

within Exemption 5 and that DOJ was not required to disclose them.

FOIA Exemption 7(C)

FOIA Exemption 7(C) ("Exemption 7(C)") exempts from disclosure "records or information compiled for law enforcement purposes" to the extent that their disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). "Exemption 7(C) requires a court to balance the public interest in disclosure against the privacy interest Congress intended the Exemption to protect." *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 284 (2d Cir. 2009) (internal quotation marks and brackets omitted). The privacy interests considered in this balancing are "broad" and include the "individual's control of information concerning his or her person." *Wood*, 432 F.3d at 88; *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 166 (2004) (noting "special reason" to protect personal data in the context of Exemption 7(C) because law enforcement documents "often contain information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance"). These privacy interests are balanced against "the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 177 (2d Cir. 2014) (internal quotation marks, alterations, and emphasis omitted). "[T]he identity of the

requesting party has no bearing on the merits of his or her FOIA request." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989). Moreover, a requester asserting that disclosure is warranted to uncover government wrongdoing "must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Favish*, 541 U.S. at 174.

All of the documents that DOJ withheld under Exemption 7(C) are memoranda describing interviews conducted by a private law firm during the course of an internal investigation of Sorin's company. These documents were acquired by federal prosecutors in the course of a criminal investigation, maintained in a criminal case file, and related to the subject matter of a criminal prosecution. They were therefore "compiled for law enforcement purposes," *John Doe*, 850 F.2d at 109, although not created by public officials.

The documents include the identities of potential witnesses in a criminal investigation—including their professional and educational histories and financial information—along with similar information about employees not interviewed in the internal investigation. The privacy interests involved are therefore substantial. See Favish, 541 U.S. at 166. Sorin asserts a public interest in accessing these documents to "assur[e] the accuracy" of a manuscript he prepared regarding his prosecution. Sorin Br. 6. But the particular use that Sorin intends for the requested documents is not relevant. *See Reporters Comm.*, 489 U.S at 771. Furthermore, Sorin has failed

to "produce evidence that would warrant a belief by a reasonable person that [any] alleged Government impropriety might have occurred." *Favish*, 541 U.S. at 174. Accordingly, the district court properly held that these documents fall within Exemption 7(C) and that DOJ was not required to disclose them.

Other Arguments

Sorin additionally argues that all of these FOIA Exemptions are inapplicable after passage of the FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538 (2016) ("Improvement Act"). Sorin quotes language from a 2009 presidential memorandum announcing a policy that the government not keep information confidential "merely because public officials might be embarrassed by disclosure." Sorin Br. 9 (emphasis omitted) (quoting Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683, 4,683 (Jan. 21, 2009)). But that language does not establish a principle that no embarrassing documents can fall within the ordinary FOIA Exemptions. As discussed above, DOJ had sound reasons for withholding these documents other than preventing embarrassment. Moreover, even by its own terms, that memorandum "does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party." Memorandum, 74 Fed. Reg. at 4,683.

Finally, to the extent that Sorin argues that DOJ should release redacted documents rather than withholding the documents in full, his argument fails. With respect to the documents withheld under

Exemption 5, work-product privilege protects the entirety of the withheld documents. With respect to the documents withheld under Exemption 7(C), DOJ asserted that redaction could not adequately protect the identity of witnesses because their testimony concerned their specific roles at the company under investigation. With respect to the documents withheld under Exemption 3, DOJ asserted that redaction would have left no meaningful information to be disclosed. Those assertions are entitled to a presumption of good faith, which Sorin has not attempted to rebut. *See Carney*, 19 F.3d at 812. Under these circumstances, FOIA permits withholding the documents in their entirety. *See Cook*, 758 F.3d at 178 ("A court may . . . decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." (alterations omitted)).

* * *

We have considered all of Sorin's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM F. SORIN,:
Plaintiff,

OPINION
AND
ORDER

-v.-

15 Civ.
6774
(GWG)

U.S. DEPARTMENT OF JUSTICE,
Defendant.

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GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

Plaintiff William F. Sorin has brought this suit under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), against the United States Department of Justice ("DOJ") to obtain records relating to Sorin's prosecution by the United States Attorney's Office for the Eastern District of New York ("EDNY") in 2006 and 2007. DOJ has moved for summary judgment. [1] The parties have

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[1] See Notice of Motion for Summary Judgment,filed May 24, 2017

consented to disposition of the case by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). For the reasons stated below, DOJ's motion is granted.

I. BACKGROUND

Sorin's FOIA request seeks documents from 2006 to 2007 relating to Sorin's own prosecution and guilty plea in connection with a scheme to backdate options. See Sorin Attachment at 1, 6. As Sorin describes it, options backdating occurs when a company offers an employee stock options as part of

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(Docket # 38); Defendant's Memorandum of Law in Support of Motion for Summary Judgment, filed May 24, 2017 (Docket # 39) ("Def. Mem."); Declaration of David Luczynski, filed May 24, 2017 (Docket # 40) ("Luczynski Decl."); Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, filed June 26, 2017 (Docket # 44) ("Pl. Mem."); Attachment to Plaintiff's Memorandum in Opposition to Defendant's the [sic] Motion for Summary Judgment (annexed to Pl. Mem.) ("Sorin Attachment"); Defendant's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment, filed July 17, 2017 (Docket # 45); Plaintiff's Reply Memorandum in Opposition to Defendant's Motion for Summary Judgment, filed Aug. 1, 2017 (Docket # 46) ("Pl. Reply").

The declaration of David Luczynski includes an index of documents designed to provide "a summary of the government's withholdings." Luczynski Decl. ¶ 33; id. Ex. I. Such an index is commonly referred to as a "Vaughn Index" after the case of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); see John Doe Agency v. John Doe Corp., 493 U.S. 146, 149 n.2 (1989) (A Vaughn Index "usually consists of a detailed affidavit, the purpose of which is to permit the court system effectively and efficiently to evaluate the factual nature of disputed information.") (internal quotation marks and citation omitted).

that employee's compensation package, but "backdates" the grant date of that option to a date on which the company's stock was a lower price. See Sorin Attachment at 1 n.1. When the recipient employee exercises his option to buy the stock, he does so at the lower price and thus realizes a greater monetary gain than if the grant date was accurate. See id. According to Sorin, this charge arose from his employment as the "main lawyer" of Comverse Technology Inc. ("Comverse"), a "supplier of equipment and software to most of world's largest telephone companies." See id. at 1. Sorin has annexed a 31-page attachment to his brief which asserts that, notwithstanding his guilty plea, EDNY engaged in wrongdoing in prosecuting him. See Sorin Attachment. Sorin states that his FOIA requests are intended to discover information that "may either support or conflict" with Sorin's views regarding the alleged improprieties that occurred during his prosecution. Pl. Mem. at 1.

On November 18, 2014, the Executive Office for United States Attorneys ("EOUSA") received an email from Sorin requesting "[a]ll documentary and other communications . . . relating to the prosecution captioned United States v. Sorin, 06 CR 723 (NGG) that commenced in 2006 in the Eastern District of New York." See Luczynski Decl. ¶ 4; see also Email from William F. Sorin to USAEO-FOIA Requests (annexed as Ex. A to Luczynski Decl.). This email was forwarded to Dorla Henriquez at EDNY. Luczysnki Decl. ¶ 6. Henriquez searched EDNY's records. Id. ¶ 6. As part of this search, Henriquez used the "LIONS" system, a computer system used

"to track cases and to retrieve files pertaining to cases and investigations," to find records relating to Sorin's request. Id. ¶ 7. "LIONS" allows users to search records by "a defendant's name, the United States' Attorney's Office internal administrative number[], and the district court case number for any court cases." Id.

After identifying responsive files through the "LIONS" system, Henriquez recovered the archived paper file for Sorin's criminal prosecution. Id. ¶¶ 7-8. Henriquez sent the contents of this file to EOUSA, which reviewed the contents, and on May 29, 2015, sent six pages of documents from this file to Sorin. Id. ¶ 8; see also Letter from Susan B. Gerson to William Sorin (annexed as Ex. B to Luczynski Decl.). After Sorin filed the instant complaint on August 26, 2015, see Complaint for Injunctive Relief, filed Aug. 26, 2015 (Docket # 1), Henriquez conducted an additional search of this file and provided EOUSA for release to Sorin an additional 29 pages while withholding 23 pages of responsive records pursuant to several FOIA exemptions.[2] See Luczynski Decl. ¶ 9; see also Second Letter from Susan B. Gerson to William Sorin (annexed as Ex. C to Luczynski Decl.). Henriquez also searched EDNY's electronic records for archived emails containing the word "Sorin," but uncovered no responsive records. See Luczynski Decl. ¶ 10. The IT department explained that because the Assistant U.S. Attorney ("AUSA")

[2] The claimed FOIA exemptions, and their applicability to the documents withheld in this case, are discussed in greater detail in Section III.B below.

assigned to prosecute Sorin's case left in December 2013, only those emails generated in the five years prior to her departure were archived. See id. As such, no emails relating to Sorin's prosecution, which ended in 2007, remained. See id.; Sorin Attachment at 1.

In March 2016, Henriquez identified 36 boxes of documents relating to the prosecution of Sorin's co-defendant, Jacob "Kobi" Alexander. See Luczynski Decl. ¶¶ 11-12. Alexander's prosecution was still ongoing at that time because Alexander had fled to Namibia after his indictment. See id. ¶ 11. Due to the voluminous nature of these documents, and the fact that a preliminary inspection revealed that many of these documents were not relevant to Sorin's FOIA request, DOJ and Sorin agreed to narrow DOJ's search of these documents. See id. ¶ 12-13; Stipulation Modifying FOIA Request (annexed to the Letter from Peter Aronoff to the Court, filed Mar. 18, 2017 (Docket # 34)) ("Stipulation"). Under the Stipulation, the parties agreed that DOJ would search the physical and electronic case files for the criminal cases of Sorin and Alexander — as well as emails from the AUSAs who worked on the cases — for documents created between March 1, 2006, and August 31, 2017. See Luczynski Decl. ¶¶ 14-15; Stipulation ¶¶ 2, 4. In addition, the Stipulation provided that, in lieu of Sorin's original request, DOJ would search for documents falling into only the following categories:

> Communications between EDNY prosecutors and Dickstein Shapiro,

> counsel for the Special Committee of the board of Comverse, Inc . . . [d]ocuments showing an alleged admission of guilt by Sorin to internal investigators . .[d]ocuments showing an attorney proffer by members of the firm Skadden, Arps, Meagher & Flom LLP. . .[c]ommunications among the staff of law enforcement agencies about the prosecution of Sorin's criminal case . . . [and n]otes of law enforcement meetings about the prosecution of Sorin's criminal case.

Luczynski Decl. ¶ 16 (internal quotation marks and citations omitted); see also Stipulation ¶ 5.

Following entry into the stipulation, Henriquez conducted additional searches that revealed more responsive documents. With respect to "[c]ommunications between EDNY prosecutors and Dickstein Shapiro," Henriquez manually searched portions of the Alexander file that were likely to contain documents relating to this topic, and found approximately 500 pages of potentially responsive documents. See id. ¶ 18. On October 14, 2016, the EOUSA released 28 pages of these documents and withheld 482 pages on the grounds that they would either violate grand jury secrecy or interfere with Alexander's then ongoing criminal proceeding. See id. ¶¶ 18-20; see also Letter from Peter Aronoff to William F. Sorin (annexed as Ex. D to Luczynski Decl.); Letter from Thomas Anderson to William Sorin (annexed as Ex. E to Luczynski Decl.). On April 17, 2017, after Alexander's criminal

conviction became final, DOJ released an additional 165 documents that were previously withheld due to Alexander's ongoing criminal proceeding, and withheld 203 pages. See Luczynski Decl. ¶ 30; Letter from Kevin Krebs to William Sorin (annexed as Ex. H to Luczynski Decl.).

With respect to "[d]ocuments showing an alleged admission of guilt by Sorin to internal investigators . . . [and d]ocuments showing an attorney proffer by members of the firm Skadden, Arps, Meagher & Flom LLP," an AUSA assigned to Alexander's criminal case searched the portions of Alexander's file that the AUSA believed were most likely to contain relevant materials, and found "notes of Sorin's own interview with internal investigators," which DOJ released in full on January 17, 2017. Luczynski Decl. ¶ 21; see also Second Letter from Thomas Anderson to William Sorin (annexed as Ex. F to Luczynski Decl.).

With respect to "[c]ommunications among the staff of law enforcement agencies about the prosecution of Sorin's criminal case . . . [and n]otes of law enforcement meetings about the prosecution of Sorin's criminal case," Henriquez searched both Sorin's and Alexander's case files and located two sets of responsive documents in Alexander's file that were within the stipulated date range. See Luczynski Decl. ¶ 23. DOJ withheld all of these documents pursuant to several claimed exemptions to the FOIA statute. See id.; see also Second Letter from Kevin Krebs to William F. Sorin (annexed as Ex. G to Luczynski Decl.).

DOJ also searched electronic records, including the archived emails and archived nonemail electronic files of the AUSA assigned to Sorin's case. See Luczynski Decl. ¶¶ 24-29. With respect to the archived non-email electronic files, an AUSA searched for files and folders in the stipulated date range containing the words "Comverse" or "Sorin," as well as for documents that "did not obviously relate solely to another defendant" or "were otherwise obviously responsive to the request as modified by the Stipulation." See id. ¶ 28-29. These searches yielded a copy of Sorin's plea agreement, which had already been produced, and eight documents that were withheld in full pursuant to claimed FOIA exemptions. See id. ¶¶ 28-29. EDNY states that "no additional searches are likely to yield responsive documents." See id. ¶ 32.

II. LAW GOVERNING FOIA ACTIONS

FOIA's general purpose is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (citations omitted); accord Nat'l Archives & Record Admin. v. Favish, 541 U.S. 157, 171 (2004) (explaining that the purpose of FOIA is to allow the general public to learn "what their Government is up to") (internal quotation marks and citation omitted); Associated Press v. U.S. Dep't of Def., 554 F.3d 274, 283 (2d Cir. 2009) ("[FOIA] was designed to pierce the veil of administrative secrecy

and to open agency action to the light of public scrutiny.") (internal quotation marks and citation omitted). FOIA favors broad disclosure and "any member of the public is entitled to have access to any record maintained by a federal agency, unless that record is exempt from disclosure under one of the Act's nine exemptions." A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 143 (2d Cir. 1994); accord Bloomberg, L.P. v. Bd. of Governors of the Fed.Reserve Sys., 601 F.3d 143, 147 (2d Cir. 2010); Associated Press, 554 F.3d at 283; Garcia v. U.S. Dep't of Justice, 181 F. Supp. 2d 356, 369 (S.D.N.Y. 2002). Federal courts conduct a de novo review of an agency's decision to withhold records requested under FOIA, Bloomberg, 601 F.3d at 147, and all statutory exemptions must be construed narrowly, id.; see also Associated Press, 554 F.3d at 283. Materials falling within the terms of a FOIA exemption, however, need not be disclosed. See, e.g., Associated Press, 554 F.3d at 283-84; Halpern v. FBI, 181 F.3d 279, 287 (2d Cir. 1999).

To prevail on a motion for summary judgment in a FOIA action, the government "has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994); accord U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989); Bloomberg, 601 F.3d at 147; Associated Press, 554 F.3d at 283. Summary judgment may be granted on the basis of affidavits or declarations "supplying facts . . . giving reasonably detailed explanations why any withheld

documents fall within an exemption." Carney, 19 F.3d at 812; accord Associated Press v. U.S. Dep't of Justice, 549 F.3d 62, 65 (2d Cir. 2008). Allegations contained in such an affidavit must be provided a "presumption of good faith." Carney, 19 F.3d at 812 (internal quotation marks and citation omitted).

III. APPLICATION

We begin by assessing the adequacy of DOJ's search. We then discuss whether DOJ has properly asserted the exemptions it claims.

A. Adequacy of Search

The Second Circuit has held that "[w]hen a plaintiff questions the adequacy of the search an agency made in order to satisfy its FOIA request, the factual question it raises is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) (quoting SafeCard Servs., Inc. v. Sec. & Exch. Comm'n, 926 F.2d 1197, 1201 (D.C. Cir. 1991)). "This standard does not demand perfection, and thus failure to return all responsive documents is not necessarily inconsistent with reasonableness." Adamowicz v. IRS, 552 F. Supp. 2d 355, 361 (S.D.N.Y. 2008). As already noted, the adequacy of this search may be established by "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search." Carney, 19 F.3d at 812 (footnote omitted).

Here, Sorin states that he "has not disputed the adequacy of the search performed by Defendant," though he qualifies this statement by noting that he "has not requested production of such information as would be necessary to ascertain whether the search was either adequate or inadequate." See Pl. Reply at 1. Sorin does not indicate any additional sources of information or search methods that DOJ could have used to locate responsive documents.

In any event, the Luczynski Declaration describes in detail DOJ's procedures for locating sources of responsive documents, including using the LIONS computer system. See Luczynski Decl. ¶¶ 6-8. It describes the methods used to search these sources and the documents those methods retrieved. See id. ¶¶ 9-13, 17-30. The declaration describes the search parameters to which Sorin stipulated and DOJ's efforts to comply with these parameters. See id. ¶¶ 13-30. We find that the Luczynski Declaration shows that DOJ's searches were "reasonably calculated to discover the requested documents." Grand Cent. P'ship, Inc., 166 F.3d at 489.

Summary judgment is therefore granted on the reasonableness of DOJ's search, and DOJ is not required to search for any additional documents. See Garcia, 181 F. Supp. 2d at 366 ("If an agency demonstrates that it has conducted a reasonable search for relevant documents, it has fulfilled its obligations under FOIA and is entitled to summary judgment on this issue.") (citation omitted).

B. Withholdings

1. Exemption 3

DOJ asserts that it may withhold 43 documents pursuant to 5 U.S.C. § 552(b)(3) ("Exemption 3").

Exemption 3 allows an agency to withhold documents that are "specifically exempted from disclosure by statute" as long as the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld."[3] "The sole issue for decision regarding the applicability of FOIA Exemption [3] . . . 'is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.'" Florez v. Cent. Intelligence Agency, 829 F.3d 178, 192 (2d Cir. 2016).

The relevant "statute" here is Federal Rule of Criminal Procedure 6(e). Rule 6(e) provides that "an attorney for the government," among others, "must not disclose a matter occurring before the grand jury." See Fed. R. Crim. P. 6(e)(2)(vi). While Rule 6(e) was not enacted as legislation, it is well-settled

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[3] Exemption 3 also requires that if the statute pursuant to which documents are being withheld was enacted after the "OPEN FOIA Act of 2009," then it must "specifically cite[] to this paragraph." 5 U.S.C. § 552(b)(3)(B). Because Rule 6(e) was enacted before 2009, this aspect of Exemption 3 does not apply.

that the Rule is considered a "statute" within the meaning of Exemption 3. See, e.g., Garcia, 181 F. Supp. 2d at 378 (collecting cases). Rule 6(e) "covers not only the evidence actually presented to [the grand jury] but also anything that may tend to reveal what transpired before it, such as summaries of grand jury testimony." United States v. E. Air Lines, Inc., 923 F.2d 241, 244 (2d Cir. 1991). Thus, the Second Circuit has upheld a government agency's withholding of "grand jury subpoenas, information identifying grand jury witnesses, information identifying records subpoenaed by the grand jury, and the dates of grand jury testimony." Peltier v. FBI, 218 F. App'x 30, 32 (2d Cir. 2007).

Documents 1-30, 32, 34, and 36-41 are letters from Dickstein Shapiro to EDNY that accompanied productions of documents requested by grand jury subpoenas, referred to specific grand jury subpoenas, and "include discussions of both what material was sought by the grand jury and what material was produced." Luczynski ¶ 51; see also Vaughn Index. Similarly, documents 44-45, 72, 94, and 98 are all letters or emails from prosecutors at EDNY to Dickstein Shapiro that refer to "specific grand jury subpoenas [and] to specific parties and discuss which particular documents were sought." Luczynski ¶ 52; see also Vaughn Index. Because these documents accompanied grand jury subpoenas and discuss the particular documents being sought, the disclosure of any of these documents would reveal "information identifying records subpoenaed by the grand jury." See Peltier, 218 F. App'x at 32. Thus, DOJ was

permitted to withhold these documents pursuant to Exemption 3.

Additionally, DOJ was permitted to withhold these documents in full. FOIA generally requires that "[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 under this section." 5 U.S.C. § 552(b). However, "courts have held that disclosure is not required when, after segregation, all that is left is 'a few nuggets of non-intertwined' information." Am. Civil Liberties Union v. U.S. Dep't of Justice, 252 F. Supp. 3d 217, 227 (S.D.N.Y. 2017) (quoting Lead Indus. Ass'n, Inc. v. OSHA, 610 F.2d 70, 88 (2d Cir. 1979)). According to DOJ, the only substantive content contained in these short letters are "descriptions of information sought by or produced to the grand jury." See Def. Mem. at 22; Luczynski Decl. ¶ 73. In other words, after redaction of the exempt material, nothing of substance would remain. This statement is entitled to a "presumption of good faith," Carney, 19 F.3d at 812 (internal quotation marks and citation omitted), and Sorin has not rebutted that presumption. Accordingly, we find that no information contained in these documents was "reasonably segregable," and DOJ was entitled to withhold these documents in full.

While Sorin does not directly explain how Exemption 3 was improperly asserted, we note that throughout his submissions, Sorin alleges that his prosecution was wrongful in various ways. For

example, Sorin alleges that EDNY placed "irresponsible reliance on the law firm [Dickstein Shapiro] hired by the special committee of the Board of Directors of Comverse in contriving the premises of the Prosecution." Pl. Mem. at 1. Thus, Sorin alleges that his "FOIA request is for information demonstrating the existence and scope of such improper deputization of lawyers neither hired by nor responsible to the government, and the prosecutors' benighted acceptance without minimal diligence of information given them by obviously compromised sources." Pl. Mem. at 3. Indeed, Sorin has annexed to his brief a lengthy attachment in which he alleges misconduct by DOJ and Dickstein Shapiro. See Sorin Attachment. Given Sorin's pro se status, we will liberally construe these allegations to challenge DOJ's withholdings when misfeasance and other wrongful acts may present a basis for requiring the disclosure of certain documents that are otherwise exempt from FOIA requests. See McLeod v. Jewish Guild for the Blind, 864 F.3d 154, 156 (2d Cir. 2017) (per curiam) (briefs submitted by pro se litigants must be read to "raise the strongest arguments they suggest") (internal quotation marks and citation omitted).

With respect to Exemption 3, Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) states that grand jury materials may be disclosed at "the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." While there is case law casting doubt on whether this exception can be used to overcome an otherwise proper withholding

pursuant to Exemption 3, see Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 868 (D.C. Cir. 1981) (noting that Rule 6(e)'s "ban on disclosure is for FOIA purposes absolute"), Sorin's allegations of DOJ misfeasance as they relate to these documents do not turn on matters that occurred "before" the grand jury, but instead concern the allegedly improper relationship between DOJ and law firm Dickstein Shapiro. See Sorin Attachment at 3-6, 13-24. Thus, even if this exception applied in the FOIA context, it would not bar the Government from withholding the documents pursuant to Exemption 3.

2. Exemption 5

DOJ has withheld 47 documents pursuant to 5 U.S.C. § 552(b)(5) ("Exemption 5").

Exemption 5 permits an agency to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." Under Exemption 5, "[t]he question at issue regarding the intra- or inter-agency requirement is whether the document either originated from or was provided to an entity that is not a federal government agency, in which case the document is not protected by the exemption." Tigue v. U.S. Dep't of Justice, 312 F.3d 70, 77 (2d Cir. 2002). The Exemption protects from disclosure, "agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules." Id. at 76 (internal

quotation marks omitted). Thus, "Courts have interpreted Exemption 5 to encompass traditional commonlaw privileges against disclosure, including the work-product doctrine." Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350, 356 (2d Cir. 2005).[4]

The work product privilege is codified in part in Federal Rule of Civil Procedure 26(b)(3), which protects from discovery "documents and tangible things" if they are prepared "in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A). A party seeking to protect documents under the work product privilege must demonstrate that the document "(1) was prepared in anticipation of litigation and (2) was prepared by or for a party, or by his representative." Wultz v. Bank of China Ltd., 304 F.R.D. 384, 393 (S.D.N.Y. 2015) (internal quotation marks and citation omitted). The "in anticipation of litigation" element requires a showing that "the document can fairly be said to have been prepared or obtained because of the prospect of litigation." United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998) (emphasis in original) (internal quotation marks and citation omitted). This privilege may protect factual material, "including the result of a factual investigation" — so-called fact work product — as

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[4] Because all of the documents withheld pursuant to Exemption 5 constitute work product, we do not reach DOJ's contention that many of these documents may also be withheld under Exemption 5 because of the attorney-client privilege. See Def. Mem. at 15-17.

well as material that "reveals the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative'" — so-called opinion work product. In re Grand Jury Subpoena Dated July 6, 2005, 510 F.3d 180, 183 (2d Cir. 2007), cert. denied, 553 U.S. 1094 (2008).

DOJ contends that it withheld 10 documents (documents 62-71 in the Vaughn Index) pursuant to Exemption 5. These documents were all sent by EDNY AUSAs — or in one case, an SEC attorney — to other government personnel working on the Comverse matter, including EDNY AUSAs, FBI agents, and IRS agents. See Luczynski Decl. ¶ 39-40. DOJ states that these emails "relate to a then-ongoing criminal investigation and discuss litigation strategy, legal theories, proper investigatory steps based on findings in the investigation, and issues that might arise over the course of potential prosecutions." Id. ¶ 39. DOJ also states that document 62 contains "a witness interview, recording the mental impressions of SEC attorneys" and document 66 is an email chain containing an email concerning litigation strategy in the Comverse case. Id. ¶¶ 39-40. DOJ states that "[n]one of these documents were sent to third parties outside of the government or to government personnel who were not directly involved in the Comverse investigation." Id. ¶ 39.

These documents were properly withheld pursuant to Exemption 5. Because they were communications among AUSAs, SEC attorneys, FBI agents, and IRS agents, they were "interagency or

intra-agency memorandums or letters," Exemption 5, and prepared "by or for [a] party or its representative" to Sorin's federal prosecution in 2006 and 2007, see Fed. R. Civ. P. 26(b)(3)(A). Also, inasmuch as these documents discuss "litigation strategy, legal theories, proper investigatory steps based on findings in the investigation, and issues that might arise over the course of potential prosecutions," Luczynski Decl. ¶ 39, as well as the fact that all of these emails were sent in 2006 when Sorin's prosecution was ongoing, see id. ¶¶ 4, 14, 39, the Government has shown that the documents were prepared "because of" Sorin's prosecution. Adlman, 134 F.3d at 1203. We note that the fact that the SEC was a party to one of these communications does not prevent the assertion of the work product privilege because "communications between federal prosecutors and federal administrative agencies involved in parallel investigations and litigation regarding the same parties are also within the scope of Rule 26(b)(3)(A)." United States v. Acquest Transit LLC, 319 F.R.D. 83, 97 (W.D.N.Y. 2017) (citations omitted).

DOJ also withheld 75 pages of notes, memoranda, and drafts found in electronic form and the physical case files DOJ searched. See Luczynski ¶ 41. DOJ states that the authorship of some of these documents cannot be determined from the documents themselves. See id. ¶ 42. However, DOJ notes that because these records contain information regarding legal strategies, "refer directly to meetings among the AUSAs by using the names or initials of the prosecutors," and were found in the Sorin and

Alexander case files, it is clear "they were written by EDNY AUSAs who were working on the Comverse matter in 2006 and 2007." Id. In light of these circumstances, we conclude that the DOJ has satisfied its burden of establishing that these notes were authored either by EDNY AUSAs or their agents and thus are within the ambit of the work product privilege. See Fed. R. Civ. P. 26(b)(3)(A).

DOJ puts these 75 pages of documents into four categories. The first category (documents 148-155) were found in Sorin's criminal case file and include draft letters and handwritten notes recording conversations with attorneys and potential witnesses, and describing other matters related to the case. See Luczysnki Decl. ¶ 43. For example, documents 148 and 149 are drafts of letters written by the AUSA assigned to Sorin's case, and documents 150 through 154 are handwritten notes that "record conversations between attorneys; note potential witnesses; make financial calculations relevant to the case; set out topics for discussion at meetings; record AUSAs' impressions of meetings with other attorneys and witnesses; and highlight potentially important facts." Id. Document 155 is an interview memorandum which contains markings indicating important passages. See id. The second category (documents 7391) comes from the Alexander file, and includes "information on financial calculations related to Comverse . . . notes highlighting specifics facts of interest to the case . . . [and] questions about how certain facts, if proved or if found impossible to prove, might affect the case." Id. ¶ 44. The third category (documents 92 and 93)

comes from the Alexander file and consists of a handwritten record containing "views about investigative steps and legal strategy, as well as impressions of the evidence gathered at that point," and an "electronic printout" of "an agenda of a meeting of law enforcement personnel." Id. ¶ 45. The documents in the fourth category (documents 94-101) were found in the electronic files of the AUSA assigned to Sorin's case, and include outlines prepared by that AUSA "of the investigative steps taken in the case. . . . [and] of the outstanding legal and factual issues in the case to date." Id. ¶ 46. One of these documents is a redline draft of "an internal EDNY memorandum about the Comverse case prepared by" several AUSAs. Id. This draft discusses the investigation's progress and contains legal analysis of the case. See id.

In light of these descriptions, we find that these documents were prepared "because of" Sorin's or Alexander's prosecution, Adlman, 134 F.3d at 1203, and thus constitute work product, see id. Thus, these documents may be withheld pursuant to Exemption 5. See Tigue, 312 F.3d at 76.

Sorin argues that DOJ has improperly asserted the work-product protection, and thus withheld documents pursuant to Exemption 5, with respect to communications between government agencies and Dickstein Shapiro. See Pl. Reply at 2. Exemption 5 generally will be found inapplicable if the withheld materials were previously disclosed under circumstances "inconsistent with the maintenance of secrecy from the disclosing party's

adversary." Rockwell Int'l Corp. v. U.S. Dep't of Justice, 235 F.3d 598, 605 (D.C. Cir. 2001); accord United Techs. Corp. v. NLRB, 632 F. Supp. 776, 784 (D. Conn.) ("Exemption 5 work product privilege is not automatically waived by disclosure of the work product to a third party. Courts considering whether the work product privilege has been waived have looked to whether the transferor and transferee share common interests in litigation, and to whether the disclosure is consistent with maintaining secrecy against opponents.") (internal quotation marks and citation omitted), aff'd, 777 F.2d 90 (2d Cir. 1985); see also In re Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) (finding waiver of work-product privilege upon disclosure of memorandum to entity that "stood in an adversarial position"). Here, however, DOJ has not asserted that any correspondence with Dickstein Shapiro is work product that may be withheld pursuant to Exemption 5. To the extent that the drafts identified as documents 94 and 98 were addressed to Dickstein Shapiro, the drafts were not actually sent and thus no disclosure occurred. See Luczynski Decl. ¶ 46. Case law makes clear that drafts of documents not actually disclosed to an adversary are generally protected as work product. See, e.g., Inst. for Dev. of Earth Awareness v. People for Ethical Treatment of Animals, 272 F.R.D. 124, 125 (S.D.N.Y. 2011) ("The lawyer's drafts [of affidavits], which have not been adopted or executed by the non-party witness, do not lose their character as work product because a final executed version has been

affirmatively used in the litigation."). Thus, the documents were properly withheld.[5]

Sorin briefly argues that the materials at issue should not have been withheld in full. Pl. Mem. at 3. As already noted, FOIA provides that "[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 under this subsection." 5 U.S.C. § 552(b). Generally, however, "[a]ny part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under exemption 5." Am. Civil Liberties Union, 252 F. Supp. 3d at 227 (internal quotation marks

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[5] It is unclear if Sorin is arguing that his allegations of misconduct by DOJ during his prosecution have any bearing on the legal issues applicable to FOIA. To the extent Sorin's brief could be construed as suggesting that the crime/fraud exception should apply, it is unclear whether a court construing FOIA could properly order disclosure based on the applicability of that exception. See, e.g., FTC v. Grolier Inc., 462 U.S. 19, 28 (1983) ("Only by construing the exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered"); contra Nat'l Immigration Project of Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 2014 WL 6850977, at *5 (S.D.N.Y. Dec. 3, 2014). In any event,"[a] party seeking to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed — or has been attempted — and that the communications in question were in furtherance of the fraud or crime." See Amusement Indus., Inc. v. Stern, 293 F.R.D. 420, 426 (S.D.N.Y. 2013) (internal quotation marks and citations omitted). Nothing in Sorin's allegations shows that a "crime" or "fraud" was committed by the EDNY.

omitted) (alteration in original) (quoting Tax Analysts v. IRS, 117 F.3d 607, 620 (D.C. Cir. 1997)). For the reasons already stated, the documents DOJ has withheld were created in anticipation of Sorin's prosecution, and thus constitute work product in their entirety.

3. Exemptions 6 and 7(C)

DOJ has withheld 45 interview memoranda generated by the law firm Dickstein Shapiro pursuant to the exemptions contained in 5 U.S.C. §§ 552(b)(6) ("Exemption 6") and (b)(7)(C) ("Exemption 7(C)").

Exemption 6 provides that the government may withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 7(C) permits DOJ to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." "Exemption 7(C) is more protective of privacy than Exemption 6" because it requires only that the disclosure "could reasonably be expected to constitute" an "unwarranted" invasion of privacy, whereas Exemption 6 bars disclosures that "would constitute" a "clearly unwarranted" invasion of privacy. U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 496 n.6 (1994) (emphasis added); see also N.Y. Times Co. v. U.S. Dep't of Homeland Sec., 959 F. Supp. 2d 449, 452 (S.D.N.Y. 2013) (Exemption 7(C)

"has a lower threshold for what invasion of privacy will trigger the exemption"). Because we find that all of DOJ's withholdings were justified under Exemption 7(C), it is not necessary to address Exemption 6.

As a threshold matter, the materials compiled to support the investigation and prosecution of Sorin's unlawful options backdating activities were "records or information compiled for law enforcement purposes" under Exemption 7(C). See, e.g., Wolfson v. United States, 672 F. Supp. 2d 20, 31-32 (D.D.C. 2009) (records "compiled in connection with a criminal investigation into violations of federal law involving [inter alia] . . .securities fraud" were compiled for law enforcement purposes) (internal quotation marks and citation omitted). Even though Dickstein Shapiro originally created many of these documents, Exemption 7(C) applies to documents "compiled" by the government regardless of their original source. See John Doe Agency, 493 U.S. at 153 ("A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents") (citations omitted); see also Fedders Corp. v. FTC, 494 F. Supp. 325, 328 (S.D.N.Y.) (unsolicited complaint letters directed to the Federal Trade Commission were compiled for "law enforcement purposes" under Exemption 7(A) when, at the time of the FOIA request, the letters constituted "an important element in the record of an active investigation"), aff'd, Fedders Corp. v. FTC, 646 F.2d 560 (2d Cir. 1980).

Where records are compiled for law enforcement purposes, a "two-part test" governs the application of Exemption 7(C). N.Y. Times, 959 F. Supp. 2d at 452. "First, the court determines 'whether there is any privacy interest in the information sought.'" Id. (quoting Associated Press, 554 F.3d at 284). Then the Court must "balance the public interest in disclosure against the [privacy] interest Congress intended the Exemption to protect." Reporters Comm. for Freedom of Press, 489 U.S. at 776; accord Associated Press, 554 F.3d at 284.

The privacy interest protected by this exemption "encompass[es] the individual's control of information concerning his or her person." Reporters Comm. for Freedom of Press, 489 U.S. at 763; accord Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs, 958 F.2d 503, 510 (2d Cir. 1992). "It is well established that identifying information such as names, addresses, and other personal information falls within the ambit of privacy concerns under FOIA." Associated Press, 554 F.3d at 285. Moreover, "witnesses . . . have a privacy interest in not being associated with a law enforcement investigation, and in protecting the details of their statements given in the course of such investigations." Conti v. U.S. Dep't of Homeland Sec., 2014 WL 1274517, at *18 (S.D.N.Y. Mar. 24, 2014) (citations omitted).

Against this privacy interest, the Court must balance the public's interest in obtaining such information. This generally requires "show[ing] that

the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake" and also that "the information is likely to advance that interest." Favish, 541 U.S. at 172. When the requester asserts that he is requesting documents to reveal government impropriety, then "the requester must establish more than a bare suspicion in order to obtain disclosure," but must instead "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Favish, 541 U.S. at 174; accord Associated Press, 554 F.3d at 285.

DOJ withheld in full 45 interview memoranda generated by Dickstein Shapiro's internal investigation into the options backdating scheme. See Luczynski ¶¶ 57-58. DOJ states that these notes "contain the identities of individuals who are potential witnesses in a criminal investigation," "personal information about the interviewed individuals' professional and educational history," "financial information about individuals [including] . . . information about how and when they received specific forms of incentive compensation," as well as information about individuals who worked at Comverse but were not interviewed or prosecuted. Id. ¶¶ 6164. Such information may be used to identify the interviewees, and thus "falls within the ambit of privacy concerns under FOIA." Associated Press, 554 F.3d at 285. Additionally, these notes relate to the criminal case against Sorin and "summarize witness responses to questions about stock options backdating, including how the scheme

began, when it began, how it operated, who was involved in designing and perpetrating it, who knew about the scheme, and the amounts of money participants gained." Luczynski Decl. ¶ 59. The notes also "reveal potential witnesses to the fraudulent conduct and provide a strong indication of what various individuals knew about the backdating scheme." Id.

The Supreme Court has noted that "what constitutes identifying information regarding a subject [] must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar." Dep't of Air Force v. Rose, 425 U.S. 352, 380 (1976). Thus, courts in this district have noted that a subject has a privacy interest not just in personally identifying information, but also in information that, if revealed, might lead to the subject's identification by someone familiar with the subject matter. See, e.g., Human Rights Watch v. Dep't of Justice Fed. Bureau of Prisons, 2015 WL 5459713, at *6 (S.D.N.Y. Sept. 16, 2015) ("even though the information sought does not identify an inmate by name or number, a reader could put together the mosaic of information about each inmate, identify them, and learn other personal information about them"), reconsidered on other grounds, 2016 WL 3541549 (S.D.N.Y. June 23, 2016). Here, DOJ notes that the information each interviewee provided was "based on [his or] her specific roles with Comverse." See Luczynski Decl. ¶ 74. Thus, someone "with knowledge of the company's operations" might be able to identify the interviewees based on the information the

interviewees provided, even if all explicit identifying information was redacted. See Def. Mem. at 22-23; Luczynski Decl. ¶ 74. This statement is sufficient to show that the privacy interest DOJ seeks to protect extends not just to the explicit identifying information but also to the substantive statements actually given by the witnesses.

With respect to the public's interest in obtaining this information, Sorin asserts that these documents may help him demonstrate "whether [EDNY] acted responsibly, in good faith, and in accordance with their obligations as attorneys and public servants, in pursuing [Sorin's] prosecution." See Pl. Reply at 1. Sorin focuses mostly on his assertion that EDNY placed "improper reliance . . . on lawyers engaged by a committee of the Comverse Technology board of directors." See Pl. Reply at 2. But this allegation does not show any "Government impropriety" sufficient to outweigh the privacy interests at stake. Favish, 541 U.S. at 174. While Sorin finds it improper that DOJ used witness interviews conducted by a private law firm to further its criminal investigation, the Court is not aware of any bar to DOJ considering such witness interviews in deciding whether to investigate or prosecute, or in using them to seek a plea from a potential defendant. Nor has Sorin pointed to any case so suggesting. Because Sorin has not shown a strong public interest in obtaining this information, the balance required by Exemption 7(C) is easily struck in favor of preserving the personal privacy of the interviewees.

To the extent Sorin argues that there exists segregable non-exempt material, we do not so find. It is true that "Exemption 7(C) ordinarily permits the Government to withhold only the specific information to which it applies, not the entire page or document in which the information appears; any non-exempt information must be segregated and released." Sussman v. U.S. Dep't of Justice, 2008 WL 2946006, at *9 (E.D.N.Y. July 29, 2008) (quoting Mays v. DEA, 234 F.3d 1324, 1327 (D.C. Cir. 2000)). However, we have already noted that what constitutes identifying information must be assessed "from the vantage of those who would have been familiar." Rose, 425 U.S. at 380. On this basis, courts have permitted witness interviews to be withheld in full pursuant to Exemption 7(C) after noting the danger that even redacted witness statements might facilitate the speaker's identification. For example, in Alirez v. NLRB, 676 F.2d 423 (10th Cir. 1982), the court permitted the National Labor Relations Board to withhold in full "informant statements" relating to an unfair labor practice charge that the FOIA plaintiff filed against his employer. Id. at 425, 428. These informants' statements contained allegations of "assaultive conduct" on the plaintiff's part, as well as other improper workplace behavior. Id. at 425. The Court found the "deletion of names and other identifying data" inadequate to prevent invasions of privacy because "[t]he requested documents relate[d] to a few incidents involving about a dozen people," and thus their disclosure would enable the recipient "to identify readily the informant and persons discussed in each document." Id. at 427-28. Other courts have

similarly held with respect to witness interview memoranda arising from criminal investigations. See, e.g., Boyd v. Exec. Office for United States Attorneys, 161 F. Supp. 3d 1, 12 (D.D.C. 2015) (withholding witness memoranda pursuant to Exemption 7(C) after finding "a fair possibility that plaintiff would be able to identify the parties based on other information in the documents"), aff'd, 2016 WL 6237850 (D.C. Cir. Sept. 16, 2016), cert. denied, 2017 WL 2189412 (Oct. 2, 2017).

The Luczynski Declaration establishes with sufficient detail the likelihood that any statement recorded in these memoranda might facilitate a potential witness's or third party's identification. As already noted, these interviews relate to the witnesses' knowledge regarding the stock options backdating scheme for which Sorin was prosecuted. See Luczysnki Decl. ¶¶ 61-64. The information provided was therefore dependent on each witness's role within the organization. See id. ¶ 74. Anyone who worked at a high level at Comverse — such as Sorin himself — would have significant insight into the identity of the speaker behind each interview. See id. ¶ 74. By contrast, Sorin has not provided this Court with any reason to believe that any portion of these interview memoranda may be segregable. Based on these considerations, the interview memoranda are sufficiently similar to the "informant statements" in Alirez for the DOJ to withhold these documents in full.

Finally, we do not believe that in camera review of the interview memoranda, as permitted by

5 U.S.C. § 552(a)(4)(B), is warranted. Although in camera review "is appropriate when agency affidavits are not sufficiently detailed to permit meaningful assessment of the exemption claims," it is "generally disfavored." PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 252-53 (D.C. Cir. 1993). We have already concluded that the Luczynski Declaration is sufficiently detailed for the Court to determine that DOJ was justified in withholding the interview memoranda in full. Moreover, in camera review would be of dubious utility under the circumstances. As observed by another court, "lacking the knowledge of an insider, the Court is not in a position to make line-by-line determinations of which statements from a witness interview would expose the witness's identity." Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs., 849 F. Supp. 2d 13, 31 (D.D.C. 2012). Because the Court is not familiar with Comverse's day-to-day operations, "it is doubtful whether the court could select which portions to release with the degree of certainty required adequately to protect the interests of employees who wish to avoid identification." Alirez, 676 F.2d at 428 (citation omitted). Thus, we find there is no reason to conclude that in camera review of the witness memoranda is required, or that any portion of the witness interviews are segregable.

IV. CONCLUSION

The defendant's motion for summary judgment (Docket# 38) is granted and the case is dismissed. The Clerk is requested to enter judgment and to close this case.

SO ORDERED.

Dated: November 27, 2017
New York, New York

GABRIEL W. GORENSTEIN

United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of January, two thousand and nineteen,

Before: Amalya L. Kearse
Debra Ann Livingston
Susan L. Carney,
Circuit Judges.

William F. Sorin,
Plaintiff - Appellant,
v.
United States
Department of Justice,
Defendant - Appellee.

ORDER
Docket No. 18-99

Appellant having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX D

FOIA IMPROVEMENT ACT OF 2015

FEBRUARY 23, 2015.—Ordered to be printed

Mr. GRASSLEY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with
ADDITIONAL VIEWS

[To accompany S. 337]
[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 337), the FOIA Improvement Act of 2015, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

CONTENTS

I. BACKGROUND AND PURPOSE OF THE FOIA IMPROVEMENT ACT OF 2015

A. BACKGROUND AND THE NEED FOR LEGISLATION

In 1966, the Federal Government established a policy of openness toward information within the control of the Executive Branch, and a presumption that such records should be accessible to the American public with the enactment of the Freedom of Information Act (FOIA). Under FOIA, any member

of the public may request access to Government information, and FOIA requesters do not have to show a need or reason for seeking information. The Freedom of Information Act is used by researchers, historians, journalists, educators, and the public at large to gain access to Government-held information affecting public policy, consumer safety, the environment, and public health, among other things. It has become an indispensable tool for ensuring our Government remains transparent and accountable to the people. The Supreme Court aptly observed that the "[p]urpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption.'[1]

The public's statutory right to access information held by the Executive Branch, however, is not absolute. The Freedom of Information Act defines which agency records are subject to disclosure and outlines mandatory disclosure procedures. The Freedom of Information Act also includes, however, nine exemptions to disclosure and three law enforcement record exclusions that protect some records from disclosure to the public.

Since its enactment, FOIA has been amended multiple times in an effort to improve both transparency and efficiency. Notably, under the OPEN Government Act of 2007, Congress created the Office of Government Information Services (OGIS). OGIS was designed to serve as the FOIA ombudsman—a resource for information and assistance for FOIA requesters—and it was tasked

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[1] *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

with helping to resolve disputes between Federal agencies and FOIA requesters. OGIS was also charged with reviewing FOIA policies and procedures, monitoring agency compliance, and providing findings and recommendations to Congress with respect to improving the administration of FOIA.

Notwithstanding the many improvements to the original legislation, more needs to be done to ensure that FOIA remains the nation's premier transparency law. In Fiscal Year 2013, the Federal Government received over 700,000 FOIA requests, an 8% increase from the previous fiscal year.[2] As the number of requests grows, so does the backlog of agency responses. A response to a FOIA request is considered to be backlogged if it has been pending with a Federal agency longer than the statutorily prescribed deadline to respond. At the end of Fiscal Year 2013, more than 95,000 responses to FOIA requests were backlogged with a Federal agency—a 33% increase from Fiscal Year 2012.[3]

In addition to the growing backlog, there are concerns that some agencies are overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure. Pursuant to FOIA, Federal agencies may only withhold documents, or portions of documents, sought if they

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[2] U.S. Department of Justice, *Office of Information Policy, Summary of Annual FOIA Reports for Fiscal Year 2013* at 2, July 23, 2014, *available at* http://www.justice.gov/sites/*default/files/oip/legacy/2014/07/23/fy2013-annual-report-summary.pdf.*

[3] *Id.* at 8.

fall within one or more of nine categories of exemptions established by the statute. While some FOIA exemptions leave no discretion to an agency in determining whether or not the information may be disclosed, other exemptions allow for discretionary disclosures permitting agencies to release the requested information even if it meets the technical requirements of the exemption.[4] There is a growing and troubling trend towards relying on these discretionary exemptions to withhold large swaths of Government information, even though no harm would result from disclosure. For example, according to the *Open Government.org 2013 Secrecy Report*, Federal agencies used Exemption 5, which permits nondisclosure of information covered by litigation privileges such as the attorney-client privilege, the attorney work product doctrine, and the deliberative process privilege, more than 79,000 times in 2012—a 41% increase from the previous year.

During the Clinton Administration, Attorney General Janet Reno instructed agencies to make discretionary disclosures to FOIA requesters, and to withhold records only if a reasonably foreseeable harm existed from that release.[5] In 2001, the George W. Bush Administration reversed this policy with a memorandum from Attorney General John Ashcroft that encouraged agencies to limit discretionary disclosures of information, and stated that the

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[4] U.S. Department of Justice, *Guide to the Freedom of Information Act, 2009 Edition,* at 686– 692 (2009).

[5] Attorney General Janet Reno, Attorney General, *Memorandum for Heads of Departments and Agencies, Subject: The Freedom of Information Act* (Oct. 4, 1993).

Department of Justice (DOJ) would defend decisions to withhold information from requesters unless those decisions "lack[ed] a sound legal basis."[6] When President Obama took office in 2009, agencies again were instructed to take a more open approach to FOIA, and to deny a FOIA request only if the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions.[7] This ever-changing guidance is undoubtedly confusing to FOIA processors and requesters alike, and agencies need clearer guidance regarding when to withhold information covered by a discretionary FOIA exemption. Codification of this policy also makes clear that FOIA, under any administration, should be approached with a presumption of openness.

Finally, while OGIS has been largely successful in carrying out its mission and serving as a bridge between Federal agencies and FOIA requesters, it is hampered in one of its most fundamental duties. Under the OPEN Government Act of 2007, OGIS is charged with reviewing agency compliance with FOIA, reviewing policies and procedures of administrative agencies under the FOIA, and

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[6] Attorney General John Ashcroft, Attorney General, *Memorandum for Heads of All Federal Departments and Agencies, Subject: The Freedom of Information Act* (Oct. 12, 2001).

[7] Attorney General Eric Holder, *Memorandum for Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (March 19, 2009).

recommending policy changes to Congress and the President to improve the administration of FOIA. Since its inception, however, DOJ has required OGIS to submit its findings and recommendations to several executive agencies for final approval before receiving permission to deliver its findings to Congress. This process runs contrary to Congress's intent in creating OGIS, and raises questions about its independence, as well as with the timeliness with which Congress and the President can expect to receive its findings and recommendations.

B. THE FOIA IMPROVEMENT ACT OF 2015

The FOIA Improvement Act of 2015 ("the FOIA Improvement Act") takes a bipartisan approach to building upon the successes of previous FOIA reforms and aims to further modernize the law. Most importantly, this measure codifies the policy established in January 2009 by President Obama for releasing Government information under FOIA. The bill mandates that an agency may withhold information only if it reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law. This is commonly referred to as the "presumption of openness." As President Obama noted when he issued his guidance, information may not be withheld "merely because public officials might be embarrassed by disclosure, because errors and

failures might be revealed, or because of speculative or abstract fears."[8]

Further, the bill adds a sunset provision to limit the applicability to Exemption 5 to documents created less than 25 years ago. This provision is consistent with the fundamental goals of FOIA: encouraging both transparency and accountability. Nevertheless, FOIA has long sought to strike the proper balance between achieving its goals and avoiding unintended consequences that might chill internal decision-making between government employees. The sunset provision continues to strike the proper balance between these two concerns. The provision ensures government records be made available to the public for their educational and historic value, while providing sufficient time for agencies to protect against the disclosure of their deliberative processes. The world can change significantly over the span of 25 years, and the public benefits derived from access to historical records should continue to be given special consideration when weighted against the government's interest in withholding information.

The FOIA Improvement Act also strengthens the role of the Office of Government Information Services. First, it restores Congress's original intent, contained in the OPEN Government Act of 2007, that OGIS not be required to obtain the prior approval or comment of any agency before submitting its findings and

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[8] President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (Jan. 21, 2009).

recommendations to Congress and the President. Second, the measure requires agencies to notify requesters of the right to seek dispute resolution services from OGIS or the agency's FOIA public liaison. This is designed to encourage alternative dispute resolution in lieu of expensive and time-consuming litigation. Third, it provides OGIS with the authority to issue advisory opinions at its own discretion following the completion of mediation services, which will provide guidance for similar disputes going forward.

The FOIA Improvement Act also enhances the public's ability to access information by requiring that certain records and reports be made available in an electronic format, as well as requiring the public posting of documents that have been released under FOIA on three or more occasions. It additionally mandates that agencies make proactive disclosure of documents of general interest or use to the public an ongoing component of their records management program. The legislation clarifies FOIA's fee structure by prohibiting agencies from charging search or duplication fees when the agency fails to meet the notice requirements and time limits set by existing law, unless a request is considered voluminous.

The FOIA Improvement Act mandates the creation of a Chief FOIA Officers Council to develop recommendations for increasing agency FOIA compliance and efficiency, disseminate information about agency best practices, and coordinate initiatives to increase transparency and open

government. The Council is modeled after the currently existing Chief Information Officers Council.

The FOIA Improvement Act requires the Director of the Office of Management and Budget (OMB) to consult with the Attorney General to ensure the operation of a consolidated online request portal. This portal will allow the public to submit a FOIA request to any agency from a single website. Currently, most federal agencies will accept an electronic FOIA request via the web. However, requesters must either visit a particular agency's website to determine how to submit a request or access *www.foia.gov* and search for a specific agency's details when submitting an online request. A consolidated online request portal will remove this burden and confusion. Moreover, the legislation provides that the new consolidated online request portal does not prohibit any agency from creating or maintaining an independent online portal for receiving requests. Finally, the legislation ensures that agencies retain the flexibility needed to process requests once received from the consolidated online request portal. Specifically, the Director of OMB is required to establish standards for interoperability between the consolidated online request portal and the software agencies currently use to process requests. This requirement recognizes the different needs and resources of agencies in processing and responding to requests.

Finally, the FOIA Improvement Act enhances agency reporting requirements under FOIA to ensure that Federal agencies provide data needed to understand the frequency of the use of exemptions.

Under the legislation, Federal agencies must include in their reports to Congress the number of instances that an exemption was used to withhold documents, the number of instances the agency made voluntary disclosures, and the number of times the agency engaged in dispute resolution with the OGIS or with the FOIA public liaison.

The FOIA Improvement Act is supported by more than 50 organizations ranging from librarians to public interest organizations, including the American Association of Law Libraries, the American Civil Liberties Union, the American Library Association, the American Society of News Editors, the Association of Research Libraries, the Center for Effective Government, Government Accountability Project, the National Freedom of Information Coalition, the National Security Archive, the National Security Counselors, OpenTheGovernment.org, People for the American Way, Project On Government Oversight, Reporters Committee for Freedom of the Press, Society of Professional Journalists, the Sunlight Foundation, and the Sunshine in Government Initiative.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

A. HEARING

In the 113th Congress, Chairman Leahy convened on March 11, 2014, an oversight hearing entitled "Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for

the Digital Age." During the hearing, witnesses from the FOIA and open government community testified about the numerous challenges facing the Government in fulfilling its promises of transparency under FOIA. Witnesses in attendance included Miriam Nesbit, Director, Office of Government Information Services, National Archives and Records Administration; Melanie Pustay, Director, the Office of Information Policy, Department of Justice; Amy Bennett, Assistant Director, OpenTheGovernment.org; Dr. David Cuillier, Director, Associate Professor, University of Arizona School of Journalism and President of the Society of Professional Journalists; and Daniel J. Metcalfe, Adjunct Professor of Law and Executive Director, Collaboration on Government Secrecy, American University Washington College of Law.

The hearing examined legislative proposals that would reform FOIA and address impediments to the public's ability to obtain Government information under that law. Several witnesses raised concerns regarding the growing use of FOIA exemptions by Federal agencies to withhold information from the public, and that some Federal agencies had failed to promulgate FOIA regulations—even though the Attorney General issued guidelines instructing them to do so in 2009. The hearing also explored the question of making OGIS more independent and allowing it to make recommendations on improving the FOIA process directly to Congress rather than having to submit the findings to a review process through OMB and DOJ.

B. INTRODUCTION OF THE BILL

After numerous stakeholder meetings and obtaining feedback from Government agencies, then-Chairman Leahy (D–VT) and Senator John Cornyn (R–TX) introduced the FOIA Improvement Act of 2014, S. 2520, on June 24, 2014, in the 113th Congress. The bill was referred to the Committee on the Judiciary. Senators Grassley (R–IA), Hirono (D–HI), Johanns (R–NE), Coons (D–DE), Markey (D–MA), Ayotte (R–NH) and Tester (D–MT) later joined as cosponsors of the legislation.

The Committee reported S. 2520, as amended by a substitute amendment, favorably to the Senate by voice vote on November 20, 2014. The substitute amendment, offered by then-Chairman Leahy and Senator Cornyn, eliminated the balancing test to Exemption 5 originally proposed in the bill as introduced; clarified that the "presumption of openness" applies only to the discretionary exemptions of FOIA; and provided that Federal agencies may not charge fees if they miss the statutory deadline for responding to a FOIA request, unless the request requires a response of more than 50,000 pages. The substitute amendment was accepted by unanimous consent.

S. 2520 then passed the Senate by unanimous consent without amendment on December 8, 2014.

The FOIA Improvement Act of 2015, S. 337, is a continuation of the efforts in the 113th Congress. It was introduced on February 2, 2015, by Senator

Cornyn (R–TX), Chairman Grassley (R–IA), and Ranking Member Leahy (D–VT). Senators Fischer (R–NE) and Coons (D–DE) were later added as cosponsors. S. 337 is nearly identical to S. 2520. One technical correction was made to Section 2(1)(A)(ii), which changed "not less than 3 times" to "3 or more times" for additional clarity. The language was otherwise unchanged from S. 2520.

C. COMMITTEE CONSIDERATION

The Committee considered the FOIA Improvement Act of 2015 on February 5, 2015, and voted to report the bill favorably to the Senate by voice vote. S. 337 was then reported to the full Senate on February 9, 2015.

III. SECTION-BY-SECTION ANALYSIS OF THE BILL

Section 1. Short title

This section provides that the legislation may be cited as the "FOIA Improvement Act of 2015."

Section 2. Amendments to FOIA

This section details the changes made by the FOIA Improvement Act to 5 U.S.C. § 552, the Freedom of Information Act (FOIA).

Electronic Accessibility—The FOIA Improvement Act amends the existing requirements that certain records and reports be made available for public

inspection to mandate that records available for public inspection be made available in an electronic format in order to ease public access.

Frequently Requested Records—The current law requires that Federal agencies post "frequently requested" records sought under FOIA online. The FOIA Improvement Act clarifies that "frequently requested" documents include any document that has been released under FOIA and has been requested three or more times.

Fees Clarification—The FOIA Improvement Act clarifies that agencies may not charge search or duplications fees when the agency fails to meet the notice requirements and time limits set by existing law, unless a request is considered voluminous. Agencies have been prohibited from charging fees in cases where the agency failed to meet the notice requirement and time limits since the passage of the OPEN Government Act of 2007. However, ambiguity in the language allowed agencies to continue to charge fees in cases where they have not in fact met the notice requirements and time limits for responding to a FOIA request.

The changes in this section remove that ambiguity and make clear that agencies may not charge search and duplication fees unless more than 50,000 pages are necessary to respond to a single request.

Presumption of Openness—The FOIA Improvement Act codifies the policy established for releasing Government information under FOIA by President

Obama when he took office in January 2009 and confirmed by Attorney General Holder in a March 19, 2009, Memorandum to all Executive Departments and Agencies. The standard mandates that an agency may withhold information only if it *reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law.* This standard is commonly referred to as the "Foreseeable Harm" standard, or the "Presumption of Openness." President Obama's guidance on this standard states:

> The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.[9]

Under this standard, the content of a particular record should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and character, would harm an interest

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[9] President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (Jan. 21, 2009).

protected by the applicable exemption. Agencies should note that mere "speculative or abstract fears," or fear of embarrassment, are an insufficient basis for withholding information.

It is the intent of Congress that agency decisions to withhold information relating to current law enforcement actions under the foreseeable harm standard be subject to judicial review for abuse of discretion.

The foreseeable harm standard applies only to those FOIA exemptions under which discretionary disclosures can be made. Several FOIA exemptions by their own existing terms cover information that is prohibited from disclosure or exempt from disclosure under a law outside the four corners of FOIA.[10] Such information is not subject to discretionary disclosure and is therefore not subject to the foreseeable harm standard.

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[10] *See* U.S. Department of Justice, *Guide to the Freedom of Information Act, 2009 Edition*, at 687–689 (2009) (explaining that classified information, information protected from disclosure by the Trade Secrets Act, information protected by the Privacy Act, and information protected from disclosure under an Exemption 3 statute are not appropriate subjects of discretionary disclosure). Exemption 3 exempts from disclosure information that is "specifically exempted from disclosure by statute (other than section 552b of this title), if that statute" contains a non-discretionary disclosure prohibition or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. §552(b)(3)(A). In addition, a statute enacted after the date of enactment of the OPEN FOIA Act of 2009 can only serve as an Exemption 3 statute if it "specifically cites" to the Exemption 3 statute. *Id.* §552(b)(3)(B).

For example, classified information is protected from disclosure by Exemption 1, *see* 5 U.S.C. §552(b)(1), and Federal criminal statutes make it unlawful to disclose classified information, *see e.g.*, 18 U.S.C. §798. Moreover, Exemption 6 was "intended to cover detailed Government records on an individual which can be identified as applying to that individual."[1112] Such information is protected if disclosure "would constitute a clearly unwarranted invasion of personal privacy." And Exemption 7(C)—"the law enforcement counterpart to Exemption 6"[13]—protects information compiled for law enforcement purposes the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Much of the information covered by these privacy exemptions is subject to a disclosure prohibition in the Privacy Act.[14]

Other narrowly-drawn exemptions for information compiled for law enforcement purposes within Exemption 7 already incorporate a reasonable foreseeability of harm standard within the text of the exemption. This legislation is not meant to displace these exemptions. Among other things, these exemptions protect against infringement of a

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[11] *See* H.R. Rep. No. 89–1497, at 11, *quoted in Dep't of State* v. *Wash. Post. Co.*, 456 U.S. 595, 602 (1982).

[12] U.S.C. §552(b)(6).

[13] U.S. Department of Justice, *Guide to the Freedom of Information Act, 2009 Edition*, at 561 (2009).

[14] [15]5 U.S.C. §552(b)(7)(C).

defendant's right to a fair trial, circumvention of the law, and risks to confidential sources. As with the privacy exemptions, some such information may be subject to a disclosure prohibition or other exemption. These prohibitions or exemptions by their express terms apply a standard equal to, or greater than, reasonable foreseeability with respect to the harms they are meant to protect against.

Extreme care should be taken with respect to disclosure under Exemption 8 which protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[15]Currently, financial regulators rely on

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[15] As the Supreme Court explained in *Department of Defense* v. *Federal Labor Relations Auth.*, 510 U.S. 487, 494–95 (1994), information protected by the Privacy Act's disclosure prohibition (5 U.S.C. §552a(b)) cannot be disclosed unless an exemption under the Privacy Act applies. One of those exemptions is for disclosure that is "required under Section 552," referring to disclosure required by FOIA. 5 U.S.C. §552a(b)(2). Thus, unless another Privacy Act exemption applies, the Privacy Act itself prohibits disclosure of information that is both (a) protected by the Privacy Act, and (b) exempt from FOIA disclosure, such as under Exemptions 6 or 7(C). *FLRA*, 510 U.S. at 494 ("[U]nless FOIA would require release of the addresses, their disclosure is 'prohibited by law,' and the agencies may not reveal them."); *see also Dep't of Defense* v. *Federal Labor Relations Auth.*, 964 F.2d 26, 30–31 n.6 (D.C. Cir. 1992) ("[I]n responding to a FOIA request for personal information about its employees, a federal agency can only disclose information that it would be required to disclose under the FOIA. For an agency to do otherwise would violate the prohibition on disclosure in the Privacy Act."). In addition, as with other subparts of Exemption 7, the texts of Exemption 7(C) and 6 incorporate a reasonable harm standard that this

Exemption 8, and other relevant exemptions in Section 552(b), to protect sensitive information received from regulated entities, or prepared in connection with the regulation of such entities, in fulfilling their goals of ensuring safety and soundness of the financial system, compliance with federal consumer financial law, and promoting fair, orderly, and efficient financial markets.

Exemption 8 was intended by Congress, and has been interpreted by the courts, to be very broadly construed to ensure the security of financial institutions and to safeguard the relationship between the banks and their supervising agencies.[16] The D.C. Circuit has gone so far as to state that in Exemption 8 Congress has provided "absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports."[17] Nothing in this legislation shall be interpreted to compromise the stability of any financial institution or the financial system, disrupt the operation of

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legislation is not meant to displace.

[20] 5 U.S.C. §552(b)(8).

[16] *See, e.g., Consumers Union* v. *Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978) (identifying the primary reason for Exemption 8 was to "ensure the security of financial institutions" against the possibility that "disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks might undermine public confidence and cause unwarranted runs on banks," and the secondary purpose was to "safeguard the relationship between the banks and their supervising agencies," because banks would be less likely to cooperate with federal authorities if "examinations were made freely available to the public and to banking competitors.").

[17] *Gregory* v. *Federal Deposit Insurance Corporation*, 631 F.2d 896, 898 (D.C. Cir. 1980).

financial markets or undermine consumer protection efforts due to the release of confidential information about individuals or information that a financial institution may have, or encourage the release of confidential information about individuals. This legislation is not intended to lessen the protection under Exemption 8 created by Congress and traditionally afforded by the courts.

Exemption 5—The FOIA Improvement Act amends Exemption 5 to include a sunset provision, which would limit the application of Exemption 5 to documents created less than 25 years ago. Exemption 5 permits agencies to withhold from disclosure inter- and intra-agency documents that would be exempt from discovery in civil or criminal litigation. This includes but is not limited to the attorney-client privilege, the attorney work product doctrine, and deliberative process documents.

The amendment to Exemption 5 is consistent with the unique relationship that government employees have with executive branch agencies, as well as the duty imposed on government employees to act in the public interest. The actions of government lawyers, for example, are subject to a degree of public scrutiny and review that is unknown within the context of a private attorney and her private citizen—or even corporate entity—client.[18]

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[18] See, for example, *In re Witness Before Special Grand Jury 2000–2*, 288 F.3d 289, 293 (7th Cir. 2002) ("First, government lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients—even those engaged in wrongdoing—from criminal

Office of Government Information Services Independence—The FOIA Improvement Act provides additional independence for the Office of Government Information Services, created by the Open Government Act of 2007. It gives OGIS the ability to report directly to the Congress and the President without prior approval from any other agency, including the DOJ or the OMB. The bill also provides OGIS with the authority to issue advisory opinions at its discretion at the completion of mediation between a FOIA requester and an agency. The Committee expects OGIS to use its full authority to issue advisory opinions, particularly in instances where OGIS notices a particular pattern of non-compliance with the law.

Dispute Resolution Services—The FOIA Improvement Act requires agencies to notify FOIA requesters of the right to seek dispute resolution services from OGIS or the agency's FOIA public liaison.

Government Accountability Office—The FOIA Improvement Act requires the GAO, in addition to its current responsibility of auditing agency compliance with the FOIA, to catalog and report on the statutory exemptions to FOIA that exist outside of 5 U.S.C. §552 (as incorporated into FOIA through Exemption 3),[24] including the frequency with which the exemptions are invoked. Furthermore, the bill

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charges and public exposure, government lawyers have a higher, competing duty to act in the public interest.").

requires the GAO to examine and report on the use of Exemption 5 and examine the manner in which those exemptions have been used by agencies.

Chief FOIA Officers Council—The FOIA Improvement Act mandates creation of a council to develop recommendations for increasing agency FOIA compliance and efficiency by Federal agencies, disseminate information about agency best practices, and coordinate initiatives to increase transparency and open government. The Council is modeled after the currently existing Chief Information Officers Council. The Committee believes meetings of the Council and all materials generated in preparation for or as a result of the Council's work should be as open to the public as possible.

FOIA Reports—The FOIA Improvement Act requires agencies to include in their annual FOIA reports (a) the number of times documents have been exempted from disclosure as part of an ongoing criminal investigation under 5 U.S.C. §552(c); (b) the number of times the agency has engaged in dispute resolution with OGIS or the FOIA public liaison; and (c) the number of records the agency proactively discloses as required by 5 U.S.C. §552(a)(2).

Consolidated Online Request Portal—The FOIA Improvement Act requires the Director of OMB, in consultation with the Attorney General, to ensure the operation of a consolidated online request portal that allows the public to submit a FOIA request to any agency from a single website. The legislation provides that this requirement shall not be construed to alter

any other agency's power to create or maintain an independent online portal for the submission of a FOIA request. Further, the Director of OMB is instructed to establish standards for interoperability between the new consolidated online request portal and other request processing software used by agencies subject to this section.

Section 3. Revision and issuance of regulations

This section requires agencies to review and issue regulations on the procedures for disclosure of records under section 552 of title 5, including procedures for dispute resolution and engaging with the Office of Government Information Services.

Section 4. Proactive disclosure through records management

This section amends section 3102 of title 44 of the United States Code to make proactive disclosure an ongoing part of agency record management by requiring the heads of agencies to include in an agency's records management system procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for making such records publicly available in an electronic format.

Section 5. No additional funds authorized

No additional funds are authorized to carry out the requirements of this Act and the amendments made

by this Act. Such requirements shall be carried out using amounts otherwise authorized or appropriated.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 337, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

FEBRUARY 17, 2015.

Hon. CHUCK GRASSLEY,
Chairman, Committee on the Judiciary, U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 337, the FOIA Improvement Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact for this estimate is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 337—FOIA Improvement Act of 2015

Summary: S. 337 would amend the Freedom of Information Act (FOIA) and aims to provide easier access to government documents. FOIA generally allows any person to obtain records from federal agencies. Specifically, the legislation would: establish a single website for making FOIA requests; direct agencies to make records available in an electronic format; reduce the number of exemptions agencies can use to withhold information from the public; clarify procedures for handling frequently requested documents and charging fees; establish the Chief FOIA Officers Council; and require agencies to prepare additional reports for the Congress on FOIA matters.

CBO estimates that implementing S. 337 would cost $20 million over the 2015–2020 period, assuming appropriation of the necessary amounts. Enacting S. 337 could affect direct spending by agencies not funded through annual appropriations (such as the Tennessee Valley Authority). Therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net changes direct spending by those agencies would not be significant. Enacting the bill would not affect revenues.

S. 337 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 337 is shown in the following table. The costs of this legislation fall within all budget functions that contain salaries and expenses.

By fiscal year, in millions of dollars—

CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
2015	2016	2017	2018	2019	2020	2015—2020
Estimated Authorization Level						
2	4	4	5	5	5	25
Estimated Outlays						
1	3	4	4	4	4	20

Basis of the estimate: For this estimate, CBO assumes that the bill will be enacted in fiscal year 2015, that the necessary amounts will be appropriated for each year, and that spending will follow historical patterns for FOIA activities.

Enacted in 1966, FOIA was designed to enable anyone to request, without explanation or justification, copies of existing, identifiable, and unpublished records from the executive branch. The Office of Management and Budget (OMB) issues guidelines to agencies on what fees to charge for providing information, while the Department of Justice (DOJ) oversees agency compliance with FOIA.

In 2013, federal agencies (excluding the Social Security Administration) received more than 704,000 FOIA requests. In addition, DOJ reports that in fiscal year 2013, agencies employed about 4,200 full-time staff to fulfill requests and spent $446 million on related activities.

Some of the provisions of the bill would codify and expand current practices related to FOIA. Presidential memoranda and DOJ guidelines have directed agencies to provide more FOIA information to the public on a timely basis. Under the bill, CBO expects that OMB would expand the use of existing websites that are currently used to fulfill FOIA requests.

CBO anticipates that the workloads of most agencies would increase slightly to carry out the bill's new reporting requirements. We also expect that agencies would incur additional costs to organize and hold an annual FOIA meeting and to establish a Chief FOIA Officers Council to review and improve the FOIA process. Based on the costs of developing and maintaining similar electronic filing systems and websites and a review of the annual reports on FOIA activities submitted by 15 major agencies over the past five years, which provide information on FOIA-related costs, CBO estimates that implementing S. 337 would eventually cost $5 million annually—a 1 percent increase in the governmentwide cost of administering FOIA. We expect that most federal agencies would face additional costs of significantly less than $0.5 million per year.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Enacting S. 337 could affect net direct spending for agencies not funded through the appropriations process, but CBO estimates that such effects would not be significant in any year.

Intergovernmental and private-sctor impact: S. 337 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal costs: Matthew Pickford; Impact on state, local, and tribal governments: Jon Sperl; Impact on private sector: John Rodier.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 337.

VI. CONCLUSION

Passage of the FOIA Improvement Act will ensure FOIA remains our nation's premier transparency law. Codification of the presumption of openness is long

overdue, and will reaffirm our commitment to promoting transparency and an open government. Improvements to OGIS will help ensure that it serves as a much- needed bridge between Federal agencies and FOIA requesters, as well as a resource to Congress and the President as we continue to evaluate and improve FOIA administration. The passage and enactment of this important legislation furthers the notions that government accountability, best achieved through a strong commitment to transparency laws, is in the interests of both the Government and its citizenry alike.

VII. ADDITIONAL VIEWS
ADDITIONAL VIEWS FROM SENATOR SESSIONS

Since the Freedom of Information Act was first passed in 1966, it has been an invaluable tool for promoting government accountability and transparency—"ensur[ing] an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[19][20] The Committee is now recommending a bill to the Senate that seeks to build on these worthy goals. However, I am concerned that a provision in this legislation could cause a decline in the effectiveness of decisionmaking by government officials by chilling lawyers from presenting in writing various options and concerns.

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[19] *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

[20] U.S.C. 552(b)(5).

The historic strength, even sanctity, of the attorney-client relationship has been a valued part of the American legal tradition since the nation's founding. To allow a breach of that private communication without specific cause and merely upon the passage of time through FOIA is an enormous alteration of this long-established principle.

Specifically, the bill would change the law so that government documents that are currently covered by FOIA Exemption 5 could potentially be disclosed after 25 years. FOIA Exemption 5 provides that executive agencies do not have to make public any "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[2] Interpreting this language, the Supreme Court has "construe[d] Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context."[21] As such, Exemption 5 is broad in its scope, "encompassing both statutory privileges and those commonly recognized by case law,"[22] including both the attorney-client and attorney work-product privileges.

By subjecting such documents to potential disclosure, this legislation could chill government

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[21] *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

[22] Office of Information Policy, "Guide to the Freedom of Information Act," pg. 357, Dep't of Justice, Jul. 23, 2014, *available at:* http://www.justice.gov/sites/default /files/oip/legacy/2014/ 07/23/exemption5—1.pdf.

lawyers from offering candid advice and invite criminal defendants and their attorneys to re-open and re-litigate long-resolved cases. As the Supreme Court stated in *Upjohn Co.* v. *United States:*

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[23]

These same goals and needs exist in the executive agency context to the same extent that they exist in any other legal context, which is why the Supreme Court has also recognized "that an agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the [attorney-client] privilege.."[24] Agency lawyers rely on "full and frank communication" with their executive branch clients in order to provide "sound legal advice or advocacy." I am concerned that "full and frank communication" may be chilled by the knowledge that all such communications could become a matter of

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[23] *Upjohn Co.* v. *United States,* 449 U.S. 383, 389 (1981) (internal citations omitted).

[24] *Coastal States Gas Corp.* v. *Department of Energy,* 617 F.2d 854, 863 (D.C. Cir. 1980).

public record within a relatively short time period. As the Supreme Court stated in *United States* v. *Nixon*, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."[25] Attorneys who have prepared legal opinions in the past have felt free to discuss credibility issues, unproven facts, character judgments, and the like on the assumption that they would be considered in the process but never suspecting they would be made public on the mere showing of passage of time. This concern is magnified by the fact that many government lawyers' careers span well over 25 years. It would be unfortunate if a young lawyer withheld sound legal advice, sanitizing or reducing the content of his writings, for fear that he might be criticized for such advice later on, or if an agency official withheld information from lawyers out of similar concern.

In addition, litigation can often last well beyond 25 years. At the very least, this legislation raises the question of whether documents related to ongoing litigation could be disclosed to the public. There would be little certainty, as the question of disclosure in such scenarios would presumably be decided by a judge.

Finally, I am informed by both the Department of Justice and the National Association of Assistant

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[25] *United States* v. *Nixon*, 418 U.S. 683, 705 (1974).

United States Attorneys that the 25-year sunset provision on Exemption 5 could invite defendants and their lawyers to use FOIA as an alternative discovery tool in attempts to re-open closed cases. FOIA was designed by Congress as a public accountability measure and not as an instrument of litigation. Preliminary opinions, early research, and comments made before facts are fully known when considered years later can create unfounded issues resulting in prolonged re-litigation of cases concluded on clear evidence.

While I support the overall purpose of the legislation, I believe that these issues should be studied more closely. I look forward to working with the sponsors and discussing these matters to ensure potential unintended consequences do not frustrate the bill's purpose. I applaud the Committee for its continued efforts to ensure the transparent and accountable governance that is so critical to the health of any democracy.

JEFF SESSIONS.

VIII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that it is necessary to dispense with the requirement of paragraph 12 to expedite the business of the Senate.

APPENDIX E

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Freedom of Information Act

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.

Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and

in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the *Federal Register*.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the *Federal Register*.

BARACK OBAMA

APPENDIX F

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the fourth day of January, two thousand and sixteen

To improve the Freedom of Information Act.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "FOIA Improvement Act of 2016".

SEC. 2. AMENDMENTS TO FOIA.

Section 552 of title 5, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (2)—

(i) in the matter preceding subparagraph (A), by striking "for public inspection and copying" and inserting "for public inspection in an electronic format";

(ii) by striking subparagraph (D) and inserting the following:

"(D) copies of all records, regardless of form or format—

"(i) that have been released to any person under paragraph (3); and

"(ii) (I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

"(II) that have been requested 3 or more times; and"; and

(iii) in the undesignated matter following subparagraph (E), by striking "public inspection and copying current" and inserting "public inspection in an electronic format current";

(B) in paragraph (4)(A), by striking clause (viii) and inserting the following:

"(viii) (I) Except as provided in subclause (II), an agency shall not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) under this subparagraph if the agency has failed to comply with any time limit under paragraph (6).

"(II) (aa) If an agency has determined that unusual circumstances apply (as the term is defined in

paragraph (6)(B)) and the agency provided a timely written notice to the requester in accordance with paragraph (6)(B), a failure described in subclause (I) is excused for an additional 10 days. If the agency fails to comply with the extended time limit, the agency may not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees).

"(bb) If an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) if the agency has provided a timely written notice to the requester in accordance with paragraph (6)(B) and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with paragraph (6)(B)(ii).

"(cc) If a court has determined that exceptional circumstances exist (as that term is defined in paragraph (6)(C)), a failure described in subclause (I) shall be excused for the length of time provided by the court order.";

(C) in paragraph (6)—

(i) in subparagraph (A)(i), by striking "making such request" and all that follows through "determination;

and" and inserting the following: "making such request of—

"(I) such determination and the reasons therefor;

"(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

"(III) in the case of an adverse determination—

"(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

"(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and"; and

(ii) in subparagraph (B)(ii), by striking "the agency." and inserting "the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services."; and

(D) by adding at the end the following:

"(8) (A) An agency shall—

"(i) withhold information under this section only if—

"(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

"(II) disclosure is prohibited by law; and

"(ii) (I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

"(II) take reasonable steps necessary to segregate and release nonexempt information; and

"(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).";

(2) in subsection (b), by amending paragraph (5) to read as follows:

"(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;"; and

(3) in subsection (e)—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A), by inserting "and to the Director of the Office of Government Information Services" after "United States";

(ii) in subparagraph (N), by striking "and" at the end;

(iii) in subparagraph (O), by striking the period at the end and inserting a semicolon; and

(iv) by adding at the end the following:

"(P) the number of times the agency denied a request for records under subsection (c); and

"(Q) the number of records that were made available for public inspection in an electronic format under subsection (a)(2).";

(B) by striking paragraph (3) and inserting the following:

"(3) Each agency shall make each such report available for public inspection in an electronic format. In addition, each agency shall make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format, which shall be made available—

"(A) without charge, license, or registration requirement;

"(B) in an aggregated, searchable format; and

"(C) in a format that may be downloaded in bulk.";

(C) in paragraph (4)—

(i) by striking "Government Reform and Oversight" and inserting "Oversight and Government Reform";

(ii) by inserting "Homeland Security and" before "Governmental Affairs"; and

(iii) by striking "April" and inserting "March"; and

(D) by striking paragraph (6) and inserting the following:

"(6) (A) The Attorney General of the United States shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President a report on or before March 1 of each calendar year, which shall include for the prior calendar year—

"(i) a listing of the number of cases arising under this section;

"(ii) a listing of—

"(I) each subsection, and any exemption, if applicable, involved in each case arising under this section;

"(II) the disposition of each case arising under this section; and

"(III) the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4); and

"(iii) a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

"(B) The Attorney General of the United States shall make—

"(i) each report submitted under subparagraph (A) available for public inspection in an electronic format; and

"(ii) the raw statistical data used in each report submitted under subparagraph (A) available for public inspection in an electronic format, which shall be made available—

"(I) without charge, license, or registration requirement;

"(II) in an aggregated, searchable format; and

"(III) in a format that may be downloaded in bulk.";

(4) in subsection (g), in the matter preceding paragraph (1), by striking "publicly available upon request" and inserting "available for public inspection in an electronic format";

(5) in subsection (h)—

(A) in paragraph (1), by adding at the end the following: "The head of the Office shall be the Director of the Office of Government Information Services.";

(B) in paragraph (2), by striking subparagraph (C) and inserting the following:

"(C) identify procedures and methods for improving compliance under this section.";

(C) by striking paragraph (3) and inserting the following:

"(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a nonexclusive alternative to litigation and may issue advisory opinions at the discretion of the Office or upon request of any party to a dispute."; and
(D) by adding at the end the following:

"(4) (A) Not less frequently than annually, the Director of the Office of Government Information Services shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President—

"(i) a report on the findings of the information reviewed and identified under paragraph (2);

"(ii) a summary of the activities of the Office of Government Information Services under paragraph (3), including—

"(I) any advisory opinions issued; and

"(II) the number of times each agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison; and

"(iii) legislative and regulatory recommendations, if any, to improve the administration of this section.

"(B) The Director of the Office of Government Information Services shall make each report submitted under subparagraph (A) available for public inspection in an electronic format.

"(C) The Director of the Office of Government Information Services shall not be required to obtain the prior approval, comment, or review of any officer or agency of the United States, including the Department of Justice, the Archivist of the United States, or the Office of Management and Budget before submitting to Congress, or any committee or subcommittee thereof, any reports, recommendations, testimony, or comments, if such submissions include a statement indicating that the views expressed therein are those of the Director and

do not necessarily represent the views of the President.

"(5) The Director of the Office of Government Information Services may directly submit additional information to Congress and the President as the Director determines to be appropriate.

"(6) Not less frequently than annually, the Office of Government Information Services shall conduct a meeting that is open to the public on the review and reports by the Office and shall allow interested persons to appear and present oral or written statements at the meeting.";

(6) by striking subsections (j) and (k), and inserting the following:

"(j) (1) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

"(2) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

"(A) have agency-wide responsibility for efficient and appropriate compliance with this section;

"(B) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

"(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

"(D) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

"(E) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply;

"(F) offer training to agency staff regarding their responsibilities under this section;

"(G) serve as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy; and

"(H) designate 1 or more FOIA Public Liaisons.

"(3) The Chief FOIA Officer of each agency shall review, not less frequently than annually, all aspects of the administration of this section by the agency to ensure compliance with the requirements of this section, including—

"(A) agency regulations;

"(B) disclosure of records required under paragraphs (2) and (8) of subsection (a);

"(C) assessment of fees and determination of eligibility for fee waivers;

"(D) the timely processing of requests for information under this section;

"(E) the use of exemptions under subsection (b); and

"(F) dispute resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison.

"(k) (1) There is established in the executive branch the Chief FOIA Officers Council (referred to in this subsection as the 'Council').

"(2) The Council shall be comprised of the following members:

"(A) The Deputy Director for Management of the Office of Management and Budget.

"(B) The Director of the Office of Information Policy at the Department of Justice.

"(C) The Director of the Office of Government Information Services.

"(D) The Chief FOIA Officer of each agency.

"(E) Any other officer or employee of the United States as designated by the Co-Chairs.

"(3) The Director of the Office of Information Policy at the Department of Justice and the Director of the Office of Government Information Services shall be the Co-Chairs of the Council.

"(4) The Administrator of General Services shall provide administrative and other support for the Council.

"(5) (A) The duties of the Council shall include the following:

"(i) Develop recommendations for increasing compliance and efficiency under this section.

"(ii) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section.

"(iii) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section.

"(iv) Promote the development and use of common performance measures for agency compliance with this section.

"(B) In performing the duties described in subparagraph (A), the Council shall consult on a

regular basis with members of the public who make requests under this section.

"(6) (A) The Council shall meet regularly and such meetings shall be open to the public unless the Council determines to close the meeting for reasons of national security or to discuss information exempt under subsection (b).

"(B) Not less frequently than annually, the Council shall hold a meeting that shall be open to the public and permit interested persons to appear and present oral and written statements to the Council.

"(C) Not later than 10 business days before a meeting of the Council, notice of such meeting shall be published in the Federal Register.

"(D) Except as provided in subsection (b), the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by the Council shall be made publicly available.

"(E) Detailed minutes of each meeting of the Council shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council. The minutes shall be redacted as necessary and made publicly available."; and

(7) by adding at the end the following:

"(m) (1) The Director of the Office of Management and Budget, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website. The portal may include any additional tools the Director of the Office of Management and Budget finds will improve the implementation of this section.

"(2) This subsection shall not be construed to alter the power of any other agency to create or maintain an independent online portal for the submission of a request for records under this section. The Director of the Office of Management and Budget shall establish standards for interoperability between the portal required under paragraph (1) and other request processing software used by agencies subject to this section.".

SEC. 3. REVIEW AND ISSUANCE OF REGULATIONS.

(a) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the head of each agency (as defined in section 551 of title 5, United States Code) shall review the regulations of such agency and shall issue regulations on procedures for the disclosure of records under section 552 of title 5, United States Code, in accordance with the amendments made by section 2.

(b) REQUIREMENTS.—The regulations of each agency shall include procedures for engaging in dispute resolution through the FOIA Public Liaison and the Office of Government Information Services.

SEC. 4. PROACTIVE DISCLOSURE THROUGH RECORDS MANAGEMENT.

Section 3102 of title 44, United States Code, is amended—

(1) by redesignating paragraphs (2) and (3) as paragraphs (3) and (4); and

(2) by inserting after paragraph (1) the following:

"(2) procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format;".

SEC. 5. NO ADDITIONAL FUNDS AUTHORIZED.

No additional funds are authorized to carry out the requirements of this Act or the amendments made by this Act. The requirements of this Act and the amendments made by this Act shall be carried out using amounts otherwise authorized or appropriated.

SEC. 6. APPLICABILITY.

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply to any request for records under section 552 of title 5, United States Code, made after the date of enactment of this Act.