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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15838
D.C. No. 2:16-cv-00906-JCM-GWF

[Filed June 14, 2018]

PETER JANANGELO,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, an agency of the United States,	)
	)
Defendant-Appellee.	)

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted June 11, 2018[**]
San Francisco, California

Before: SCHROEDER, GOULD, and DIAZ,[***] Circuit Judges.

Peter Janangelo appeals the district court's order granting summary judgment to the Treasury Inspector General for Tax Administration ("TIGTA") and denying Janangelo's cross-motion for summary judgment. We review the district court's order *de novo*, *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 988 (9th Cir. 2016) (en banc), and we affirm.

TIGTA did not waive its ability to make a so-called *Glomar* response, which neither confirmed nor denied the existence of the report that Janangelo's Freedom of Information Act ("FOIA") request seeks. Our rule is clear that an agency may not make a *Glomar* response when the existence of the requested information has already been "officially acknowledged." *Pickard v. Dep't of Justice*, 653 F.3d 782, 786 (9th Cir. 2011). A fact has been "officially acknowledged" if information that precisely matches the information requested was previously disclosed. *Id.*

But here the existence or non-existence of the report Janangelo seeks has not been "officially acknowledged." Agent Moller's email telling Janangelo that he "will

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[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Albert Diaz, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

have to file a FOIA request for the information" does not amount to an affirmative admission that the requested report exists. Nor does attorney Daphne Levitas's ambiguous declaration, which contradicts itself by stating that she could not confirm or deny the report's existence but also says that she was "familiar with the document plaintiff seeks." In context, however, Levitas said that she was familiar only with the type of document Janangelo seeks. Because these statements do not precisely match an admission that the requested report exists, TIGTA was entitled to make a *Glomar* response to Janangelo's FOIA request.

Further, TIGTA's *Glomar* response is fully justified under FOIA Exemption 6. That provision exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Janangelo does not dispute that the report of investigation he seeks would qualify as "personnel and medical files and similar files." *Id.* Instead, he contends that disclosure of the report's existence *vel non* would not "constitute a clearly unwarranted invasion of personal privacy." *Id.* Evaluating this issue requires "a balancing of the public interest in disclosure against the possible invasion of privacy caused by the disclosure." *Hunt v. FBI*, 972 F.2d 286, 287 (9th Cir. 1992).

On balance, the requested disclosure would constitute a "clearly unwarranted" invasion of Janangelo's former boss's personal privacy. Because the alleged public interest is in showing "that responsible officials acted negligently or otherwise improperly in the performance of their duties," Janangelo "must

establish more than a bare suspicion in order to obtain disclosure." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). "Rather, [Janangelo] must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* But Janangelo has produced no such evidence, and instead we have mere allegations and conjecture. On the other hand, Janangelo's lewd claims implicate "[s]ignificant privacy interests," *Hunt*, 972 F.2d at 290, because "association of [Janangelo's former boss's] name with allegations of sexual and professional misconduct could cause [her] great personal and professional embarrassment," *id.* at 288. And we "place[] emphasis on the employee's position in her employer's hierarchical structure," giving greater weight to the privacy interests of "lower level officials" like Janangelo's former boss. *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008).

We agree with the district court that Janangelo's FOIA request falls within Exemption 6, and so we need not consider whether it is also covered by Exemption 7(C).[1]

AFFIRMED.

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[1] Because TIGTA's *Glomar* response was proper, the agency was not required to produce a *Vaughn* index to describe the documents in its possession. *See Minier v. CIA*, 88 F.3d 796, 804 (9th Cir. 1996).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:16-CV-906 JCM (GWF)

[Filed March 29, 2017]

PETER JANANGELO, JR.,

Plaintiff(s),

v.

TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION,

Defendant(s).

ORDER

Presently before the court is defendant Treasury Inspector General for Tax Administration's ("TIGTA") motion for summary judgment. (ECF No. 12). Plaintiff Peter Janangelo, Jr. ("Janangelo") filed a response (ECF No. 13), to which TIGTA replied (ECF No. 17).

Also before the court is Janangelo's motion for summary judgment. (ECF No. 14). TIGTA filed a response (ECF No. 18), to which Janangelo replied (ECF No. 23).

I. Background

The present case stems from a letter Janangelo filed with TIGTA on November 3, 2015, detailing a Freedom of Information Act ("FOIA") request. (ECF No. 12). The FOIA request sought "a copy of the TIGTA Report concerning . . . TIGTA Complaint #55-1409-0099-C." (ECF No. 12-2 at 6).[1]

The TIGTA complaint #55-1409-0099-C ("TIGTA complaint") came as a result of a congressional inquiry from Representative Joseph Heck ("Heck"). (ECF No. 12-2 at 2). Janangelo prompted Heck's inquiry by representing to him alleged misconduct of an IRS employee, Debra W. Thompson ("Thompson"). (ECF No. 12-2 at 6).

On December 9, 2015, TIGTA responded to Janangelo's FOIA request with a *Glomar* response, which stated that "[t]o the extent you are requesting documents pertaining to a third-party, TIGTA can neither admit nor deny the existence of responsive records." (ECF No. 12-2 at 7). TIGTA asserted this *Glomar* response because the "request seeks access to

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[1] TIGTA complaints, investigations, and reports are terms of art that describe specific internal TIGTA documents. (ECF No. 12-1 at 2). A TIGTA complaint refers to "an allegation of criminal or administrative misconduct." (ECF No. 12-1 at 2). Once received, the TIGTA complaint is assigned to a special agent who gathers evidence in order to make a "determination whether the information supports the need to convert the complaint into an investigation." (ECF No. 12-1 at 2). If an investigation is warranted, the special agent will continue collecting evidence and create a report, which includes a summary of the investigation and a list of evidentiary support to prove or disprove the allegations. (ECF No. 12-1 at 3).

the types of documents for which there is no public interest that outweighs the privacy interests established and protected by the FOIA (5 U.S.C. §§ 552(b)(7)(C) and (b)(6))." (ECF No. 12-2 at 7).

On December 29, 2015, Janangelo appealed TIGTA's *Glomar* response and asserted that he "require[d] a copy of TIGTA's Report of TIGTA Complaint#: 55-1409-009-C to defend [himself] against Debra W. Thompson's July 13, 2015 proposal to terminate [his] employment with the Internal Revenue Service." (ECF No. 12-2 at 11). Janangelo argued that the § 522(b)(6) exception was inapplicable because the FOIA request did not seek personnel files. (ECF No 12-2 at 12). Janangelo also argued that the § 522(b)(7)(C) exception was similarly inapplicable because the FOIA request sought "a copy of TIGTA's Report" regarding the TIGTA complaint—a document not compiled for law enforcement purposes. (ECF No. 12-2 at 12).

On February 5, 2016, TIGTA affirmed its original denial of Janangelo's FOIA request, again citing the § 522 (b)(6) and (b)(7)(C) exemptions. (ECF No. 12-2 at 13).

Janangelo filed the underlying complaint on April 20, 2016, asserting one claim for violation of FOIA. (ECF No. 1).

II. Legal Standard & Discussion

A. Summary Judgment in FOIA Cases

Because the facts are rarely in dispute in FOIA cases, courts need not analyze whether a genuine issue of material fact exists to grant summary judgment. *Minier v. Central Intelligence Agency*, 88 F.3d 796, 800

(9th Cir. 1996). Rather, the court views the facts in a light most favorable to the requestor and applies a two-step inquiry whereby it must (1) determine whether the agency has conducted a search "reasonably calculated to uncover all relevant documents," and (2) examine whether the withheld information falls within one of the nine FOIA exemptions. *Zemansky v. U.S. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985) (quotation marks and citation omitted). "The agency resisting disclosure of requested information has the burden of proving the applicability of an exemption." *Minier*, 88 F.3d at 800 (citing *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1979)).

Moreover, a government agency may refuse to confirm or deny the existence of records through a *Glomar* response if the claimed "exemption would itself preclude the acknowledgment of such documents." *Id.* (citing *Hunt v. Central Intelligence Agency*, 981 F.2d 1116, 1118 (9th Cir. 1992)).

B. Reasonably Calculated Search

For an agency to have satisfied its initial burden, the court must find that an adequate search was conducted. *Zemansky*, 767 F.2d at 571. "In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith." *Id.* (citing *Weisberg v. U.S. Dept. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The court must give "substantial weight" to agency affidavits so long as the "justifications for nondisclosure 'are not controverted by contrary evidence in the record or by evidence of [the agency's]

bad faith.'" *Minier*, 88 F.3d at 800 (quoting *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984)).

However, the adequacy of a search is "irrelevant to [a] 'Glomar' response because the issue is whether the [a]gency has given sufficiently detailed and persuasive reasons for taking the position that it will neither confirm nor deny the existence or non-existence of any responsive records." *Wheeler v. C.I.A.*, 271 F. Supp. 2d 132, 141 (D.D.C. 2003). In circumstances where the agency offers a *Glomar* response, the court need only examine the affidavits which explain the agency's refusal. *Phillippi v. Central Intelligence Agency*, 546 F.2d 1009, 1018 (D.C. Cir. 1976).

Here, TIGTA gave a *Glomar* response to Janangelo's FOIA request. (ECF No. 12-2 at 7). TIGTA argues that its *Glomar* response was necessary to protect Thompson's privacy interest in connection with a criminal or administrative investigation. (ECF No. 12 at 7). Janangelo contests TIGTA's *Glomar* response, claiming that TIGTA has already acknowledged the existence of a TIGTA report. (ECF No. 13 at 10). The court disagrees.

Janangelo claims TIGTA acknowledged the report on two separate occasions; however, the court finds neither instance a valid acknowledgment. The first instance is an email chain between Janangelo and special agent Ronald Moller. (ECF No. 13-2 at 19). Janangelo requests that Moller "send [him] a copy of TIGTA's report to U.S. Rep. Joe Heck, D.O. concerning [his] above referenced TIGTA Complaint (#55-1409-0099-C)." (ECF No. 13-2 at 19). In response, Moller states that he "won't be able to provide the information directly to [Janangelo]." (ECF No. 13-2 at 19). The

court disagrees with Janangelo's interpretation that the phrase, "the information," is an acknowledgment of an existing report. Rather, as is the case here, "the information" is that a privacy interest is at issue and cannot be disclosed barring an outweighing public interest.

The second instance is contained in Daphne S. Levitas' declaration in support of TIGTA's motion for summary judgment, wherein she states that she is "familiar with the document plaintiff seeks and issues in this lawsuit." (ECF No. 12-2 at 1). The declaration continues to detail the process by which TIGTA conducts investigations and compiles reports. (ECF No. 12-2 at 2). The context within which Levitas' statement is made tends to support TIGTA's position that it was not acknowledging the existence of a particular report, but rather it was acknowledging the existence of TIGTA reports generally. This is clarified in Levitas' second declaration, wherein she states, in relevant part, that she "intended to merely convey that [she is] generally familiar with the purpose and nature of TIGTA Reports of Investigations. The statement . . . was not meant to state that [she] was familiar with the specific [report] sought in this case, to the extent that such [a report] exists." (ECF No 17-1 at 1–2).

Accordingly, the court finds that neither of these instances constitute an acknowledgement by TIGTA regarding the existence of a report. Because the requested information's existence has not yet been acknowledged, a *Glomar* response would be valid so long as it sufficiently details a persuasive reason for claiming the FOIA exemptions.

C. FOIA Exemptions

TIGTA argues that disclosure of the sought documents would be an invasion of personal privacy without sufficient public interest and is exempt pursuant to 5 U.S.C. § 552(b)(6) and (b)(7)(C). (ECF No. 12 at 11). To satisfy its burden, the agency may rely on detailed affidavits showing that the information "logically falls within the claimed exemptions." *Hunt*, 981 F.2d at 1119.

To fall within the § 552(b)(6) exemption, TIGTA must show (1) that the information is contained in "personnel and medical files and similar files," and (2) that disclosure of that information would be a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Records that contain information about a particular individual satisfy the first requirement. *Forest Serv. Emp. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008) (citing *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 728 F.2d 1270, 1273 (9th Cir. 1984) (quotation omitted)).

In determining whether the invasion of personal privacy invokes the protections of an exemption, the personal privacy interest at stake must be weighed against the public interest in disclosure. *Hunt*, 972 F.2d at 287. "[T]he *only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Bibles v. Nat. Desert Ass'n*, 519 U.S. 355, 355–56 (1997) (per curium) (citing *Dep't of Defense v. FLRA*, 510 U.S. 487, 497 (1994)).

Government employees have a privacy interest in "any file that reports on an investigation that could lead to the employee's discipline or censure." *Hunt*, 972 F.2d at 287 (citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 376–77 (1976)). Allegations of sexual and professional misconduct, that are associated with the employee's name, can cause "great personal and professional embarrassment." *Id.*

Here, because the TIGTA complaint involved Thompson individually, any further investigation or report would necessarily be a personnel or similar file. *See Forest Serv. Emp. for Envtl. Ethics*, 524 F.3d at 1024.

For the personnel or similar file to be exempt, it must contain information that is a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The TIGTA complaint alleges that Thompson "provid[ed] sexual service to [her current husband] while she was married to another man, in a quid pro quo agreement to advance her IRS career." (ECF No. 12-2 at 11). The complaint revolves around Janangelo's allegations of Thompson's sexual and professional misconduct.

Though these are the specific circumstances the law seeks to protect in providing an exemption for personnel and similar files that contain private, personal information, the court must weigh the privacy interest against the public interest. Janangelo argues that the public has interest in exposing criminal activity including nepotism and retaliation for whistle blowing, and a "scandal worthy" story of discrimination from superiors at the IRS. The court disagrees.

In Janangelo's initial FOIA request letter and in his administrative appeal, he sought the report "to defend [him]self against [Thompson's] . . . proposal to terminate [his] employment with the Internal Revenue Service." (ECF No. 12-2 at 11). Personal interests are given no weight in the balancing of public interest. *See Cameranesi v. Dep't of Defense*, 839 F.3d 751, 765 (9th Cir. 2016).

The remaining allegations of public interest do not suffice to preclude exemption. Exposing criminal activity, including nepotism and retaliation for whistle blowing, is one of the functions of TIGTA. (ECF No. 12-2 at 2). Approving Janangelo's FOIA request based on the stated public interests, which seem pretextual, would bypass the function of internal criminal investigations that allow for protections from unwarranted allegations. Moreover, the privacy interest at stake here is great as the allegations are of a single individual and regard intimate topics which, if disclosed, could cause severe professional and personal embarrassment. *See Hunt*, 972 F.2d at 287.

Because the balance of interests weighs heavily in favor of Thompson's privacy interest, the court finds TIGTA's application of the § 552(b)(6) exemption to be warranted.

III. Conclusion

In sum, the court finds that TIGTA's denial of Janangelo's FOIA request was appropriate under 5 U.S.C. § 552(b)(6). TIGTA's *Glomar* response was similarly appropriate in its effort to protect the privacy interest and apply § 552(b)(6). The claimed public interest does not outweigh the great private interest;

therefore, the exemption applies. Further, the court will dismiss the complaint with prejudice because any amendment to the complaint or claims brought would be futile as the exemption applies to the document and not to Janangelo individually.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant TIGTA's motion for summary judgment (ECF No. 12) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that plaintiff Janangelo's motion for summary judgment (ECF No. 14) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that plaintiff Janangelo's complaint (ECF No. 1) be, and the same hereby is, DISMISSED with prejudice.

The clerk is instructed to enter judgment accordingly and close the case.

DATED March 29, 2017.

/s/James C. Mahan
UNITED STATES DISTRICT JUDGE

APPENDIX C

AO450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case Number: 2:16-cv-00906-JCM-GWF

[Filed March 29, 2017]

Peter Janangelo	)
	)
Plaintiff,	)
	)
v.	)
	)
Treasury Inspector General for Tax Administration, an agency of the United States	)
	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered in favor of Defendant and against Plaintiff, pursuant to Order #24 entered March 29, 2017.

March 29, 2017	/s/ Debra K. Kempi
Date	Clerk
	/s/ M. Morrison
	(By) Deputy Clerk

APPENDIX D

5 U.S.C.
United States Code, 2011 Edition
Title 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I - THE AGENCIES GENERALLY
CHAPTER 5 - ADMINISTRATIVE PROCEDURE
SUBCHAPTER II - ADMINISTRATIVE PROCEDURE
Sec. 552 - Public information; agency rules, opinions, orders, records, and proceedings
From the U.S. Government Publishing Office, www.gpo.gov

§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
(C) administrative staff manuals and instructions to staff that affect a member of the public;

> (D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, 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; and
> (E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or

promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

> (i) it has been indexed and either made available or published as provided by this paragraph; or
> (ii) the party has actual and timely notice of the terms thereof.

> (3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of

public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

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

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that

work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall

include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service

upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98–620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after

investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public

> holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
> (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

> (I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or
> (II) if necessary to clarify with the requester issues regarding fee

assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.
(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an

alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this

subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a

request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(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; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) 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;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) 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; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any 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. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under

each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a

determination within a period greater than 300 days and less than 401 days; and
(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;
(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;
(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;
(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;
(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;
(N) the total amount of fees collected by the agency for processing requests; and
(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.
(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.
(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of

Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(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 non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

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

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

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

(2) 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;

(3) 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;

(4) 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;

(5) 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; and
(6) designate one or more FOIA Public Liaisons.

(*l*) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90–23, §1, June 5, 1967, 81 Stat. 54; Pub. L. 93–502, §§1–3, Nov. 21, 1974, 88 Stat. 1561–1564; Pub. L. 94–409, §5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95–454, title IX, §906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. 98–620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357; Pub. L. 99–570, title I, §§1802, 1803, Oct. 27, 1986, 100 Stat. 3207–48, 3207–49; Pub. L. 104–231, §§3–11, Oct. 2, 1996, 110 Stat. 3049–3054; Pub. L. 107–306, title III, §312, Nov. 27, 2002, 116 Stat. 2390; Pub. L. 110–175, §§3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8–10(a), 12, Dec. 31, 2007, 121 Stat. 2525–2530; Pub. L. 111–83, title V, §564(b), Oct. 28, 2009, 123 Stat. 2184.)