ORAL ARGUMENT NOT YET SCHEDULED

No. 15-5314

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM S. PRICE,
Plaintiff – Appellant pro se,

v.

U.S. DEPARTMENT OF JUSTICE ATTORNEY OFFICE, et al.,
Defendant – Appellees.

Appeal from the United States District Court
for the District of Columbia, No. 1:14-cv-00847-RJL
(Hon. Richard J. Leon)

OPENING BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF APPELLANT WILLIAM S. PRICE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As called for by Circuit Rule 28, *Amicus Curiae* states:

A. Parties and *Amici*

The parties to this proceeding and in the proceedings before the district court are the plaintiff-appellant William S. Price and the defendants-appellees U.S. Department of Justice U.S. Attorney Office, Executive Office for the United States Attorneys, Federal Bureau of Investigation, and the Office of Information Policy. This Court appointed Steven H. Goldblatt, Director of the Appellate Litigation Program of the Georgetown University Law Center, as *Amicus Curiae* to present arguments in support of Price in this proceeding only.[1]

B. Rulings Under Review

Price appeals a July 3, 2012 Order entered by the Honorable Richard J. Leon of the United States District Court for the District of Columbia granting Appellees' motion for summary judgment. JA224.

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[1] Price has informed *Amicus* that he joins this brief in full.

C. Related Cases

This case has not previously been before this or any court on review. No related cases are currently pending before this or any court of which *Amicus* is aware.

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GLOSSARY OF ABBREVIATIONS

DOJ: Department of Justice

EOUSA: Executive Office for United States Attorneys

FOIA: Freedom of Information Act

FBI: Federal Bureau of Investigations

OIP: Office of Information Policy

STATEMENT OF JURISDICTION[1]

William Price filed this action in the United States District Court for the District of Columbia against the Department of Justice and its components the Executive Office for United States Attorneys, the Federal Bureau of Investigation, and the Office of Information Policy, challenging those agencies' denial of Price's Freedom of Information Act requests. JA8–11. The district court had jurisdiction under 5 U.S.C. § 552(a)(4)(B).

The district court granted defendants' motion for summary judgment and issued a final appealable order dismissing the action on August 25, 2015. JA224–29. Price timely noticed this appeal on October 23, 2015. JA241. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Whether the statutory right to request executive agency records under the Freedom of Information Act can be waived by the terms of a plea agreement.

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[1] The pertinent FOIA provisions are set out in the attached Addendum to this brief. *See, infra*, at 46–52.

II. Assuming the FOIA waiver is valid, whether the district court erred in finding that the waiver covered all of Price's FOIA requests without first inspecting the withheld documents *in camera* or requiring the Government to describe them with sufficient specificity to establish that the waiver covered the requested information.

STATEMENT OF THE CASE

This is an appeal from an order granting summary judgment for the Department of Justice in a Freedom of Information Act ("FOIA") action. Through a FOIA request, Price sought information pertaining to his ex-wife and his federal criminal case. The Government, however, opposed the request, claiming Price waived his FOIA rights—via a guilty plea in his criminal case—to access all the information he requested. The district court agreed and granted the Government's motion for summary judgment. The question of whether FOIA rights can be waived is an issue of first impression before this Court.

A. Price's Guilty Plea

Price pled guilty on March 22, 2007 in the Western District of Missouri to violating 18 U.S.C. § 2251(a) (knowingly attempting to induce a minor to engage in sexually explicit conduct for producing visual depictions of such conduct) and 18 U.S.C. § 2251(a)(2) (knowingly

receiving visual depictions of minors engaged in sexual conduct). JA122–41.

The guilty plea included a term entitled "Waiver of FOIA Request," which provided:

> "[T]he defendant waives all of his rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case including, without limitation, any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a."

JA138.

B. The FBI Denies FOIA Request Numbers 1177991 and 1187604

On October 21, 2011, Price transmitted a FOIA request to David Hardy, Chief of the FBI's Record/Information Dissemination Section. JA143–45. The request was for "any and all records" regarding Tami Lynn Price (Price's ex-wife), including documents in case file 305-KC-89543 (Price's case file); the initial contact form regarding FBI Special Agent Kurt Lipanovich and Ms. Price; records of communications between DOJ attorneys and FBI investigators; printouts of various indices and search result screens produced in responding to these requests; and any records indicating the physical location of the search,

the databases searched, and the search terms used in responding to the request. JA143–45. Price included in his request a Form DOJ-361 Privacy Act release signed by Ms. Price. JA146. This request was designated Request No. 1177991.

Hardy rejected Price's request for index printouts and records of search procedure. He first cited FOIA exemption 7(E), which protects files that, if disclosed, would risk circumvention of the law through disclosure of law enforcement techniques or procedures. JA148. Hardy next contended that the FOIA waiver in Price's plea agreement barred Price's substantive requests (the case file information, contact form, and records of communications regarding Ms. Price). JA148–49. Hardy then asserted that the requested material did not exist in a "readily accessible format" and, because agencies are not required to create records, the material was not subject to disclosure. JA149.

Price appealed to the DOJ Office of Information Policy ("OIP"). JA151. He argued that exemption 7(E) does not provide a "blanket exemption" for the withholding of records; that the subject of his request was not embraced by his waiver; and that his request did not implicate the creation of new records. JA151–52.

While awaiting the result of his appeal, Price filed another FOIA request with the FBI, Request No. 1187604, for documents and communications made in responding to his first FOIA request. JA93.

C. EOSUA and OIP Respond to FOIA Request No. 11-3818

On October 25, 2011 (the same day Price sent the first FBI FOIA request) Price sent a FOIA request to the DOJ Executive Office of United States Attorneys ("EOUSA"). JA81. This request was designated Request No. 11-3818. Like the FBI request, Price sought "any and all records, whether main or reference, regarding: Tami Lynn Price." JA81. He also sought printouts from several indices searched in response to the request. JA81–82. The EOUSA responded that a search had revealed no responsive records. JA83. In late December, Price appealed that determination to OIP, asserting that EOUSA's search was inadequate. JA33. OIP remanded to EOUSA for further review. JA35.

On August 22, 2012, EOUSA sent Price a search screen printout in a supplemental release. JA36–37. Price again appealed EOUSA's search as inadequate. JA38. EOUSA then sent Price a single document in a supplemental release—a handwritten complaint form naming Tami Price as a defendant. JA40–41. OIP indicated that this second

supplemental release rendered EOUSA's search adequate and represented DOJ's final action on Request No. 11-3818. JA40.

D. DOJ Office of Information Policy Upholds Denial of FBI Requests

On July 23, 2012, OIP ruled that FOIA's statutory provisions are presumptively subject to waiver by voluntary agreement, that Congress had exhibited no intent to preclude the waiver of FOIA rights, and that Price's waiver was thus valid. JA161. Finding that "all of the records concerning Ms. Price relate to [Price's] criminal prosecution," OIP upheld the FBI's refusal to process Price's request. JA161. OIP also upheld the invocation of exemption 7(E) to refuse disclosure of "various screen search printouts," but made no mention of Hardy's assertion that Price's request would require the creation of new records. JA161. OIP separately upheld the FBI response to Request No. 1187604 (the request for documents created in responding to the first request). JA172.

E. Price Files a Civil Action in District Court

On May 2, 2014, Price filed a complaint *pro se* in the district court challenging OIP's adjudication of his FBI and EOUSA requests. JA7. Price asserted that the FOIA waiver contained in his plea agreement did not encompass records predating his criminal investigation/prosecution;

and that records created prior to the initiation of his investigation had been wrongfully withheld. JA16–18.

Price alternatively urged the district court to invalidate the FOIA waiver because FOIA rights cannot be waived as a matter of law. In his "Motion to Disregard and Disallow the FOIA waiver," JA213, he argued that "Congress has expressed their intent that no additional limitation [beyond the statutory exemptions in § 552(d)] be placed on public access to agency records, such as the FOIA waiver in Plaintiff's plea agreement." JA215.

F. The District Court Grants Defendants' Motion for Summary Judgment

The district court determined that "the validity of the FBI's denial of plaintiff's FOIA requests turns on whether the waiver of his rights under the FOIA contained in his plea agreement is binding." JA228. Noting that the Supreme Court has allowed criminal defendants to waive important constitutional rights via guilty plea, the court ruled that it "would be hard-pressed to find a reason to prohibit a defendant from waiving a purely statutory right." JA229. The court thus concluded that Price's waiver of his FOIA rights was enforceable and that his FOIA requests

were barred by the terms of his plea agreement. JA229.[2] Although it dismissed the action altogether, the district court did not address Price's claim that some information was not subject to the plea waiver and should be disclosed even if the waiver was enforceable. This appeal followed. JA241.

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[2] The district court granted summary judgment and dismissed Price's FOIA claims in their entirety. Although the court did not directly address the EOUSA requests, those requests were presumably, or at least implicitly, dismissed on the same grounds as the FBI requests. JA228. Both sets of requests are before this Court.

SUMMARY OF ARGUMENT

I. The district court erred when it concluded that FOIA rights may be waived as a condition of a plea agreement in a federal criminal case. Although statutory rights are presumptively waivable, that presumption is overcome either by an affirmative expression of congressional intent to preclude waiver or when waiver contravenes public policy. *United States v. Mezzanatto*, 513 U.S. 196, 200–01 (1995); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 712 (1945). Both grounds for rebutting the presumption of waivability are present here.

A. Through FOIA, Congress broadly required the Government to produce all information solicited by private citizens, unless withholding is permitted by one of nine specifically enumerated exemptions. 5 U.S.C. § 552(a), (b). These carefully crafted exemptions are exclusive, and the Government may not add to them. *See* 5 U.S.C. § 552(d) (FOIA "does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section*.") (emphasis added); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Waiver operates as a tenth exemption. And because Congress expressly prohibited agencies from creating additional FOIA exemptions, FOIA

waivers in plea agreements are unenforceable.

FOIA's legislative history and Congress's consistent rebuke of persistent Executive attempts to resist disclosure establish that the Government cannot employ artful waivers to target a group of citizens to cut off from using FOIA. Both the House and Senate Committee Reports state that the Executive must disclose requested information unless disclosure falls under the specific § 552(b) exemptions. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). And in 1974 and 1996, Congress rebuffed the Executive's attempts, like the waiver here, to expand the § 552(b) exemptions. *See, infra*, at 21–25.

The waiver is also at odds with the fundamental principle that a FOIA requester's identity has no bearing on the propriety of a request. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975). If upheld, waivers would render the requester's identity of paramount importance and diminish the requester's informational access vis-à-vis other members of the public. Such an anomalous result cannot be reconciled with FOIA's text and legislative history.

B. Public policy considerations also weigh heavily against the presumption of waivability even if the FOIA text is not controlling. FOIA guilty plea waivers undermine FOIA's central statutory policy of broad public disclosure, introduce perverse incentives into the plea-bargaining process, and undermine judicially crafted limitations on other waivers.

FOIA guilty plea waivers are particularly troublesome because of the important role FOIA plays in criminal cases. In most criminal cases, only the defendant has the requisite knowledge and interest to lodge a FOIA request. So disrupting FOIA's natural mechanism for uncovering official conduct—requests by those with the most incentive to make them—is likely to stymie public oversight in an area where it is most needed. Given that the modern criminal justice system relies so heavily on guilty pleas, public oversight is especially important to ensure fairness in the plea-bargaining process.

FOIA waivers also undermine the public interest served by *Brady v. Maryland*, 373 U.S. 83 (1963), and proper review of ineffective assistance of counsel claims. FOIA requests are an important tool for discovering undisclosed *Brady* material. *See Monroe v. Angelone*, 323 F.3d 286, 294 (4th Cir. 2003). FOIA similarly plays a role in discovering evidence of

ineffective assistance of counsel. *See Hare v. United States*, 688 F.3d 878, 880 (7th Cir. 2012). Uncovering *Brady* material and evidence of ineffectiveness serves the public interest independently of its benefits to any individual defendant. *See Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1176 (D.C. Cir. 2011). By cutting off access to potential *Brady* material and evidence of counsel ineffectiveness, the Government undermines the public interest embodied by FOIA.

FOIA waivers offer a tempting avenue for government officials to insulate convictions by concealing a violation of the accused's rights. Under *Brady*, prosecutors must determine whether evidence is both exculpatory and material. *United States v. Bagley*, 473 U.S. 667, 674–75 (1985). With prosecutors making difficult determinations about the hypothetical usefulness of evidence, there is a powerful temptation to insulate decisions to withhold evidence by extracting FOIA waivers. In the same vein, FOIA waivers allow individual prosecutors to shield themselves from the professional and criminal consequences that accompany revelations of misconduct.

FOIA waivers also undermine limitations on the use of waivers of appeal or collateral attack rights that routinely are conditions of federal

guilty pleas. Waivers of appeal or collateral review are not enforceable if the waiver was involuntary or obtained with constitutionally ineffective assistance of counsel. *See United States v. Guillen*, 561 F.3d 527, 530–31 (D.C. Cir. 2009); *Hurlow v. United States*, 726 F.3d 958, 966–67 (7th Cir. 2013). Of course, one may wonder how a criminal defendant will obtain the necessary information to make such a claim. One obvious answer is FOIA, but if that avenue is cut-off, there is little likelihood that a miscarriage of justice will ever see the light of day.

Nor does the Government have a compelling interest in preserving FOIA waivers. To be sure, FOIA waivers could conserve resources by cutting down the number of FOIA requests. But requests by convicted defendants comprise a small subset of all FOIA requests, and even those costs are offset in part by fees. § 552(a)(4)(A)(i). Moreover, Congress already balanced the financial toll of processing and litigating such requests when it created FOIA and its nine exemptions. *See Rose*, 425 U.S. at 361–62.

II. Even if valid, Price's FOIA waiver only covers records pertaining to his criminal case. David Hardy, the Government's declarant, averred in the district court that all responsive documents fall within the scope

of Price's waiver. But Hardy failed to describe the withheld documents in any detail, notwithstanding the Government's burden to justify its denial by more than mere vague or conclusory statements. *See Quinon v. F.B.I.*, 86 F.3d 1222, 1227 (D.C. Cir. 1996). Nor did he purport to speak for the EOUSA; the Government offered no declaratory support at all for the proposition that the EOUSA records are within the purview of Price's waiver.

Hardy's declaration is also inconsistent with the record. Investigators discovered Price's crimes on June 9, 2006 at the earliest. Yet a criminal investigation into Ms. Price for a seemingly unrelated offense is dated June 1, 2006. Since the investigation into Tami Price predates that of Mr. Price by eight days, it is unclear how the two investigations are related, and Hardy made no attempt to explain this variance between the factual record and his conclusory and sweeping claims. Given this discrepancy and the inadequacy of Hardy's declaration, the district court erred in granting the Government summary judgment as to that FOIA request.

Because the Government's declaration was conclusory and its assertions contradicted by the record, the court also abused its discretion in failing to order the Government to describe the documents with

enough specificity to establish that Price's FOIA waiver encompasses Price's EOUSA request, or, at the very least, in failing to conduct *in camera* review. *See Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 392 (D.C. Cir. 1987).

STANDARD OF REVIEW

On review of a grant of summary judgment, this Court views the evidence in the light most favorable to the requester. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983).

Whether a statutory right may be waived in a plea agreement is a question of law that is reviewed *de novo*. *Guillen*, 561 F.3d at 531. The district court's refusal to conduct *in camera* review is reviewed for abuse of discretion. *Mobley v. C.I.A.*, 806 F.3d 568, 588 (D.C. Cir. 2015).

ARGUMENT

I. THE DISTRICT COURT ERRED IN ENFORCING A FREEDOM OF INFORMATION ACT WAIVER CONTAINED IN A PLEA AGREEMENT BECAUSE CONGRESS HAS EXPRESSLY PROHIBITED, AND PUBLIC POLICY DOES NOT PERMIT, A WAIVER OF FOIA RIGHTS

The court below joined several other trial courts here and elsewhere in enforcing voluntary FOIA waivers in plea agreements. *See Thyer v. U.S. Dep't of Justice*, 2013 WL 140244, at *4 (D.D.C. Jan. 11, 2013); *Boyce v. United States*, 2010 WL 2691609, at *1 (W.D.N.C. July 6, 2010); *Caston v. Exec. Office for U.S. Attorneys*, 572 F. Supp. 2d 125, 129 (D.D.C. 2008); *Patterson v. F.B.I.*, 2008 WL 2597656, at *2 (E.D. Va. Jun. 27, 2008). The Fourth Circuit has suggested the same result in *dicta* in an unpublished opinion. *See United States v. Lucas*, 141 F. App'x 169, 170 (4th Cir. 2005). These decisions, like that of the court below, rest on the syllogism that because constitutional rights are waivable, so too are statutory rights. JA229; *Thyer*, 2013 WL 140244, at *4 (same); *Caston*, 572 F. Supp. 2d at 129 (same).

But that reasoning is flawed. The Supreme Court has clearly held that statutory rights are not necessarily subject to waiver. *See, e.g.*, *Zedner v. United States*, 547 U.S. 489, 503 (2006) (statutory right to a speedy trial cannot be prospectively waived); *Crosby v. United States*, 506

U.S. 255 (1993) (Rule 43 right to be present is unwaivable); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (FLSA minimum wage claims are unwaivable); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 712 (1945) (FLSA liquidated damages provision is unwaivable). Because statutory rights are not necessarily waivable, the lower court's analysis fails at the outset; it speaks neither to whether a particular right may be waived nor, if it may, to the waiver's limitations.

The Supreme Court has provided the proper analytical framework by which to judge whether statutory rights are waivable. *See United States v. Mezzanatto*, 513 U.S. 196, 200–01 (1995). Statutory rights are *presumptively* waivable, but that presumption is overcome by an affirmative expression of congressional intent to preclude waiver, *id*. at 201, or when allowing waiver contravenes the public policy the statutory right serves, *Brooklyn Sav. Bank*, 324 U.S. at 704; *Barrentine*, 450 U.S. at 740; *United States v. Burch*, 156 F.3d 1315, 1321 (D.C. Cir. 1998).

The presumption of waivability is overcome here first by Congress's expressed intent to preclude FOIA waivers. Congress carefully created nine exemptions to its otherwise general rule that agencies must disclose all requested information. 5 U.S.C. § 552(b). It made those exemptions

exclusive. § 552(d); *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011). Waiver would act as an impermissible tenth exemption because it would provide the Government with a means to avoid disclosure of requested information. And FOIA's legislative and amendment history only clarifies what the statutory text already states: that the enumerated statutory exemptions are the only means by which an agency can withhold information about its practices. *See* §§ 552(b), (d).

The presumption of waivability is also overcome because FOIA waivers would vitiate important public policy interests that FOIA safeguards. Those public policy interests here include that FOIA: (1) opens agency action to the light of public scrutiny, subject to exclusive exceptions set by Congress; (2) preserves public confidence in the criminal justice system and the integrity of the plea-bargaining process; and (3) prevents the Government from circumventing the limitations on other appeal and collateral attack waivers.

Because FOIA rights are not waivable, the court below erred when it enforced Price's guilty plea waiver of his right under FOIA to seek information about government practices. The case should be remanded for further proceedings.

A. Congress Has Affirmatively Prohibited Contractual FOIA Waivers

FOIA requires executive agencies to disclose documents requested by any member of the public unless the requested documents fall within one of nine exemptions. 5 U.S.C. §§ 552(a)(3)(A) (requiring disclosure to "any person"), (b) (listing nine exemptions). The statute makes clear that § 552(b) enumerates the *only* exceptions to its otherwise robust disclosure regime: the Act "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." § 552(d). By specifically enumerating nine categories under which the Government may refuse disclosure, Congress prohibited the Government from denying FOIA requests on any other ground, including waiver. Put differently, the nine categories in § 552(b) are "explicitly made exclusive" by § 552(d). *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011); *Rose*, 425 U.S. at 361. Waiver would operate as an impermissible tenth exemption.

The Supreme Court found that a similar statutory limitation precluded waiver of Federal Rule of Criminal Procedure 43's requirement that defendants be present at criminal proceedings. *Crosby*, 506 U.S. at 258–59. Rule 43 required the defendant's presence "at the arraignment,

at the time of the plea, at every stage of the trial . . . *except as otherwise provided by this rule*." *Id.* at 258 (emphasis added). The Court held that this "express use of a limiting phrase" rendered exclusive the situations in which a defendant's absence was permissible, and that any purported waiver beyond those situations was invalid. *Id.* at 258–59. FOIA similarly renders exclusive its enumerated exemptions. §§ 552(b), (d).

The explicit limitations contained in FOIA and Rule 43 stand in contrast to cases where the Court found no affirmative congressional limitation on waiver. *See Mezzanatto*, 513 U.S. at 203–04 (Congress was silent and the Federal Rules suggested waiver was permissible); *New York v. Hill*, 528 U.S. 110, 116 (2000) (an intent to proscribe waiver could only be inferred by negative implication).[3]

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[3] In *Mezzanatto*, the Court held that nothing in the structure or history of Federal Rule of Evidence 410 suggested that the evidentiary privilege at issue could not be waived, 513 U.S. at 206 n.4; to the contrary, the evidence permitted by the Rule is fully consistent with waiver. *Id.* at 205–206. And in *Hill*, the Court refused to infer a bar on retrospective waiver of rights under the Interstate Agreement on Detainers Act from the negative implication of a good-cause continuances provision. *Hill*, 528 U.S. at 116. Neither case is analogous to a waiver of FOIA rights because Congress has made express its intent to bar novel, unenumerated grounds for withholding. *See* § 552(d).

Legislative history further supports that FOIA's detailed exemptions are the exclusive mechanisms by which the Government can escape FOIA's disclosure requirement. *See Zedner*, 547 U.S. at 501–02 (considering legislative history in the waivability analysis). That history reflects congressional intent to preclude the Executive from denying a FOIA request on any basis not enumerated in § 552(b). The House Committee Report explains that § 552(d)'s purpose "is to make clear beyond doubt that all the materials of Government are to be available to the public unless specifically exempt from disclosure by the [statutory] provisions." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966); *see also id*. at 1 (FOIA requires "the availability, to any member of the public, [] all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions"). The Senate Committee Report echoes that sentiment. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) ("FOIA establish[es] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.").

Congress's repudiation of the "properly and directly concerned" test also demonstrates its affirmative intention to foreclose limitations on

those people who are qualified to seek information from the government. Congress had previously limited access to agency records to only those persons "properly and directly concerned" with the information, *see U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 754 n.3 (1989) (hereinafter *Reporters Comm.*), a limitation the Executive repeatedly invoked to withhold information. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1, 2, 6, 9, 11 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). Congress responded by eliminating the test altogether, instead requiring that records be disclosed to "any person" who requests them. § 552(a)(3). In so doing, Congress affirmatively codified the "fundamental [ ] principle that the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Roth*, 642 F.3d at 1183; *see also Favish*, 541 U.S. at 172 ("[D]isclosure does not depend on the identity of the requester . . . . [I]f the information is subject to disclosure, it belongs to all."). Congress also sought to ensure that a requester's right to access FOIA records is neither enhanced nor diminished based upon the requester's identity. *Sears, Roebuck & Co.*, 421 U.S. at 143 n.10.

Guilty plea waivers, in contrast, render the requester's identity of paramount importance and diminish the requester's access to

information vis-à-vis the general public. Under the Government's view of FOIA, any other citizen could access the very same information Price requested, thus reviving requester based distinctions that Congress explicitly eliminated. It also invites costly litigation because it purports to bar requests made by Price's "representatives." JA61. To enforce this term, a court would need to inquire into the identity and intent of a requestor allegedly acting as a waivor's agent. But FOIA makes clear that the statutory beneficiary is the *public*—and that the requester's identity, interest, and intended use are irrelevant. *See Reporters Comm.*, 489 U.S. at 771.

FOIA's amendment history is another indication that Congress did not intended for the Executive to refuse disclosure by expanding the limitations contained in the statute. In the years following FOIA's enactment, agencies stretched these exemptions to disclosure. *See* H.R. Rep. No. 795, 104th Cong. 2d Sess. 8 (1996) ("The widespread reluctance of the bureaucracy to honor the public's legal right to know has been obvious in parts of two [presidential] administrations."). The Executive, for example, wholly refused to produce records containing both exempted and non-exempted material. It also aggressively used § 552(b)(7) to

foreclose public access to any law enforcement records. *See, e.g.*, *Weisberg v. U.S. Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973).

But in 1974, Congress overrode the President's veto and amended FOIA to address both issues. *See* 10 Weekly Comp. Pres. Docs. 1318 (1974) (president's veto message). First, it required agencies to redact exempt portions rather than withhold entire documents. § 552(b). Second, it amended § 552(b)(7) to "clarify Congressional intent disapproving [the expansion] of agency authority to withhold certain investigatory files compiled for law enforcement purposes." S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 11 (1974) (internal quotation marks omitted).

As technology reshaped the nature of Government records, the Executive began denying requests because disclosure of electronic records in paper form would amount to the creation of records. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980) ("The Act does not obligate agencies to create" records). Yet again Congress rebuffed this newfound exception by amending FOIA to ensure that "review of computerized records would not amount to the creation of records." H.R. Rep. No. 795, 104th Cong., 2d Sess. 22 (1996).

This history teaches an unmistakable lesson: congressional intent to narrowly define the nine exclusive exemptions is inconsistent with the Executive's attempts at supplementing or augmenting them. And by using its enormous power in the criminal context to extract FOIA waivers, the Executive has effectively amended Congress's exclusive FOIA exemptions. *See Milner*, 562 U.S. at 565 ("These exemptions . . . must be narrowly construed.") (internal quotations and citations omitted). Because Congress has never provided for FOIA waivers in the Act's exclusive exemptions, waivers in plea agreements are unenforceable.

B. Public Policy Concerns Overcome the Presumption of Waivability

Even if Congress did not expressly preclude waiver of FOIA rights, public policy nonetheless prohibits FOIA waivers in plea agreements. The Supreme Court has held that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Sav. Bank*, 324 U.S. at 704; *see also Barrentine*, 450 U.S. at 740. In weighing whether to override the presumption of waivability, courts should consider any other public policy considerations "which counsel in favor of departing from that norm." *Burch*, 156 F.3d at 1321 (citing

Mezzanatto, 513 U.S. at 204–10). These considerations foreclose waiver here either because of general contract principles that agreements against public policy are void, *see Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), or because policy interests served by the statute "may permit the inference that Congress intended to override the presumption of waivability." *Mezzanatto*, 513 U.S. at 207.

1. FOIA Waivers Contravene FOIA's Central Statutory Policy of Opening Government Action to Public Scrutiny

FOIA and its history of amendments reflect Congress's resolve to foster open government in the face of a persistently resistant Executive. FOIA waivers in plea agreements are but a manifestation of that resistance, and they accordingly contravene the central statutory policy of "broad disclosure" to the public. *See Milner*, 562 U.S. at 571. Congress carefully balanced the public's interest in disclosure with the Government's interest in secrecy when it produced the nine § 552(b) exemptions, which is why Congress has consistently rejected other bases for nondisclosure. *See Rose*, 425 U.S. at 361–62 ("It was not an easy task to balance the opposing interests, but it is not an impossible one either.") (internal quotations omitted).

Waiver never made it into the statute—and for good reason. FOIA is

designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 361. For that reason, it does not condition disclosure on the requester's identity. *See Favish*, 541 U.S. at 172. As a primary tool for exposing Government misconduct, it also provides public benefit independently of any benefit to the specific requester.

FOIA waivers in plea agreements directly threaten this central statutory policy since, with rare exceptions, only the waivor has the requisite knowledge and interest to lodge a FOIA request in the first place. *Cf. Zedner*, 547 U.S. at 502–03 ("[The Speedy Trial Act] assigns the role of spotting violations of the Act to defendants—for the obvious reason that they have the greatest incentive to perform this task."). By cutting off a waivor's access, the Government all but ensures the public will not see these countless records and, for all practical purposes, any potential misconduct will forever be hidden in secret government files.

Although not a FOIA case, *Zedner* illustrates how guilty plea waivers undermine the central policies that drive FOIA. There, the Court unanimously held that the purposes of the Speedy Trial Act precluded its waiver by the defendant. *Id.* at 500. The Court reasoned that "[i]f the Act

were designed solely to protect a defendant's right . . . it would make sense to allow a defendant to waive [its] application . . . . But the Act was designed with the public interest firmly in mind. That public interest cannot be served . . . if defendants may opt out of the Act entirely." *Id.* at 500–01 (internal citations omitted).

So too with FOIA waivers. The public has an acute interest in ensuring people like Price can obtain information about their criminal case—for if Price does not, it is unlikely that anybody will, and the records will likely never come to light. When defendants waive FOIA rights as a condition of guilty pleas, they essentially opt out of the Act entirely, thereby frustrating FOIA's central policy of transparency. *See Brooklyn Sav. Bank*, 324 U.S. at 704.

As conditions of guilty pleas, FOIA waivers allow the Government to keep information about plea agreements hidden from sight. *See Washington Post v. Robinson*, 935 F.2d 282, 287–88 (D.C. Cir. 1991) (scrutinizing plea agreements that seal criminal proceedings). Placing FOIA rights on the trading block thus allows prosecutors to exert "the coercive power of criminal process" in bargaining away the public's right to know, to the detriment of both the defendant and the public. *Rumery*,

480 U.S. at 400 (O'Connor, J., concurring) (describing the effect of § 1983 waivers in release-dismissal agreements).

FOIA plays a significant role in discovering *Brady* material and evidence of ineffective assistance of counsel. *See, e.g.*, *Hare*, 688 F.3d at 880 (records relevant to ineffective assistance of counsel discovered via FOIA); *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1100 (9th Cir. 2005) (same); *Monroe*, 323 F.3d at 294 (*Brady* violation uncovered via FOIA); *Bagley v. Lumpkin*, 798 F.2d 1297, 1299 (9th Cir. 1986) (same). But if FOIA rights can be waived via guilty plea, this evidence is unlikely to be discovered. That is true even though the important public interest in discovering claims of misconduct or defense counsel incompetence exists wholly apart from the defendant's parochial interest in vindicating his rights. *See Strickland v. Washington*, 466 U.S. 668, 684–86 (1984) (effective assistance is central to fair proceedings); *Roth*, 642 F.3d at 1176 (acknowledging the public's interest in discovering *Brady* material). Even in cases where defendants fail to discover evidence of misconduct or incompetence, knowing that nothing is amiss serves the public interest by informing the citizenry. *Reporters Comm.*, 489 U.S. at 773.

Mezzanatto's endorsement of a waiver providing more information to

the jury is instructive here. The Court there held that a defendant can waive Federal Rule of Evidence 410(a)(4)'s prohibition against admitting statements made during plea discussions. *Mezzanatto*, 513 U.S. 196. The Court noted that the inadmissibility waiver did not undermine the public interest in part because stripping away limitations on admissible statements "*enhances* the truth-seeking function of trials" by providing the jury with more information. *Id*. at 204 (emphasis in original).

In contrast to the information-enhancing function of inadmissibility waivers, FOIA waivers limit available information and sometimes "suppress[ ] complaints against official abuse." *Rumery*, 480 U.S. at 400 (O'Connor, J., concurring) (addressing § 1983 waivers in release-dismissal agreements). The search for truth is relevant to a fair plea bargain as it is to a fair trial. *See Santobello v. New York,* 404 U.S. 257, 260–61 (1971) ("[T]he sentencing judge must develop, on the record, the factual basis for the plea[.]"). Yet FOIA waivers neither enhance any truth-seeking function nor promise greater accuracy. Instead, they artificially reduce the sum of information available to litigants, courts, and the public alike.

2. FOIA Waivers Introduce Perverse Incentives into the Modern Plea-Bargaining Process

When prosecutors are tempted to bargain with non-criminal justice considerations in mind, the integrity of plea-bargaining is endangered. *See Rumery*, 480 U.S. at 400–01 (O'Connor, J., concurring) ("The legitimacy of plea bargaining depends in large measure upon eliminating extraneous considerations from the process.") (citations omitted).

FOIA waivers may tempt prosecutors and other government officials to insulate convictions from attack generally and by concealing violations of the accused's fundamental rights. This incentive exists whether the violation results from intentional misconduct or inadvertence, and even if the prosecutor is unaware of the violation because it is known only to other components of the Government. *See Kyles v. Whitley*, 514 U.S. 419, 437–438 (1995). *Brady* itself compounds this moral hazard because it requires disclosure of only exculpatory evidence that is *material* (*i.e.*, evidence that might have affected the verdict). *See Bagley*, 473 U.S. at 674–75. With prosecutors in the unenviable position of making fine-grain determinations about the hypothetical usefulness of evidence, there is a powerful temptation to put a lid on FOIA requests so those decisions will never come to light.

Even aside from the temptation to insulate convictions from legal challenge, FOIA waivers could also provide a shield to individual prosecutors and law enforcement agents from the professional consequences that accompany revelations of misconduct. *Cf. Imbler v. Pachtman,* 424 U.S. 409, 429 (1976) ("[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."). But professional fallout may just be the beginning. Bad faith *Brady* violations are now felonies in some states, *see, e.g.*, Cal. Penal Code § 141(c), compounding the urge prosecutors might feel to insulate themselves from liability. The desire to suppress *Brady* material would be emboldened if FOIA can be neutralized in a plea agreement.

3. FOIA Waivers Undermine the Limitations Courts Have Placed on Other Waivers That Have Become Standard Components of Federal Guilty Pleas

FOIA waivers, as routine conditions of federal guilty pleas, should not be viewed in isolation because they are part of a broader scheme to limit further review of Government action once the plea is entered. Courts have upheld other such waivers, including of appeal and collateral attack rights. Both waivers are very common; a recent survey found that 67.5%

of federal pleas in a large, representative sample contained the latter. Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 87 (2015). The U.S. Attorney's Office in the District of Columbia recently began including those waivers in plea agreements. *Id.* at 122 n.5.

Appeal and collateral attack waivers, however, are not absolute; they are unenforceable insofar as the defendant colorably alleges he received ineffective assistance of counsel or where enforcement would lead to a miscarriage of justice. *See Guillen*, 561 F.3d at 530–31. But *Guillen* would mean very little, practically, if there are no means of establishing ineffective assistance or a miscarriage of justice. FOIA waivers essentially undercut a waivor's ability to procure evidence used to invalidate appeal and collateral attack waivers and, in many instances, FOIA is the only means of obtaining the information needed to proceed.

Similarly, FOIA waivers undermine judicial scrutiny of ineffective assistance of counsel and *Brady* waivers. *See McCann v. Mangialardi*, 337 F.3d 782, 787–88 (7th Cir. 2003) (doubting that the right to *Brady* material can be entirely waived); DAVID LEONARD, THE NEW WIGMORE: SELECTED RULES OF LIMITED ADMISSIBILITY § 5.11 at n.34 (Rev. Ed. 2017)

(same); *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002) (articulating limits on waiving ineffective assistance claims). By extracting FOIA waivers, the Government does indirectly through FOIA waivers what it cannot do directly through *Brady* and ineffective assistance waivers; it avoids subjecting these waivers to the judicial and executive scrutiny they would face were they expressly included in a plea deal. *See* Memorandum from James M. Cole, Deputy Attorney General, to All Federal Prosecutors (Oct. 14, 2014), *available at* https://www.justice.gov/file/70111/download (instructing federal prosecutors to stop extracting ineffective assistance of counsel waivers in the interest of fairness). The public interest militates against permitting this circumvention.

4. The Policy Reasons Supporting FOIA Waivers Are Insubstantial

FOIA rights, if waivable, may be traded to the prosecution for something of interest to the defendant. That is the standard contract formulation of waiver: defendants may capture more utility if their rights are alienable, because the government may offer more in return than the rights are worth to the defendant. *See Guillen*, 561 F.3d at 530. Of course, the bargaining chip model of waiver is not dispositive—it applies in

theory to any right whose waiver conceivably has value, and yet not all rights are waivable. *See, supra*, at 16–17 (citing statutory provisions that are not waivable). Nor does the bargaining chip model answer the public policy concerns outlined above.

The Government's interest in preserving resources expended through processing requests also does not justify FOIA waivers. The Government already has a robust system in place that exists solely to adjudicate and litigate these requests. Its costs in processing FOIA requests arising from criminal cases are but a small fraction of the total FOIA requests that are processed, and those costs are covered in part by fees charged to the requester. *See* 5 U.S.C. § 552(a)(4)(A)(i) (specifying fee structure).[4] At any rate, the financial toll of processing and potentially litigating such requests were among the interests Congress balanced in passing the FOIA. *See* § 552(a)(4)(B); *Rose*, 425 U.S. at 361–62.

Any other interests the Government may have in enforcing FOIA

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[4] The Government's costs are not the sole criterion for weighing the interests at play in FOIA waivers; judicial economy is also relevant. The judicial inquiry raised by FOIA waiver like Price's into whether a requestor is acting as the waivor's representative should also be factored into any cost-benefit analysis. *See Ebling v. U.S. Dep't of Justice*, 796 F. Supp. 2d 52, 63–64 (D.D.C. 2011).

waivers are undercut by the availability of the nine FOIA exemptions. Concerns for victim privacy and the protection of legitimate law enforcement practices, for example, are addressed by Exemptions 6 and 7(C). *See* §§ 552(b)(6–7). To whatever extent that FOIA waivers may serve the public interest, they are insubstantial when weighed against the significant risks they pose to the proper functioning of FOIA and the criminal justice system.

II. THE DISTRICT COURT ERRED IN FINDING THAT ALL RECORDS RELATED TO TAMI LYNN PRICE ARE COVERED BY MR. PRICE'S FOIA WAIVER WITHOUT INSPECTING THE WITHHELD RECORDS *IN CAMERA* OR REQUIRING THE GOVERNMENT TO DESCRIBE THEM IN DETAIL

Even if Mr. Price's FOIA waiver is valid, it covers only those records "pertaining to the investigation or prosecution of [his criminal] case." JA138. Some of the documents sought in Price's FOIA requests—such as those properly in his criminal case file—admittedly fall within the scope of the waiver. But some requests for records regarding Tami Lynn Price have not been linked to his criminal case and should not have been dismissed. JA81, 143.

A. Hardy's Conclusory Affidavit Does Not Suffice to Support the Blanket Rejection of Price's FOIA Requests

Hardy (the Government's declarant) claimed in the lower court that all responsive records involved Price's criminal case, so Price's FOIA requests were completely subject to the FOIA waiver in his guilty plea. JA178–79 (claiming that the FBI did not possess files or documents relating to Price's FOIA requests "but for the documents located in [his] investigative file," and that the only records contained in the investigative file were those involving "the investigative file" on Mr. Price's criminal case). The district court accepted this assertion without discussion, JA228, notwithstanding Price's request that the court

examine the documents *in camera* or require the Government to more specifically describe the documents to verify that they indeed pertain to the investigation into Price. JA187, 209.

Not only are conclusory assertions insufficient to warrant summary judgment, *see Quinon v. F.B.I.*, 86 F.3d 1222, 1227 (D.C. Cir. 1996), there is also evidence to suggest that Hardy's assertion was misleading or false. Mr. Price's crimes were discovered no earlier than June 9, 2006,[5] when a computer technician alerted local police to the contents of his computer hard drive. J.A.123–24. Yet a criminal investigation into Ms. Price for assaulting a process server[6] is dated June 1, 2006, no fewer than eight days before Mr. Price's crimes were reported to law enforcement. JA41. It is unclear how an investigation into Ms. Price for assaulting a process server relates to an investigation into Mr. Price for sex crimes, especially when Ms. Price was being investigated before police knew of Mr. Price's transgressions. Still, the Government cannot simply place documents from Ms. Price's investigative file into Mr. Price's and call them "related."

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[5] The actual discovery date may have been June 12, 2006. *See United States v. Price*, 326 F. App'x 985, 986 (8th Cir. 2009).

[6] The handwritten complaint form naming Ms. Price as a defendant indicates that she was alleged to have violated 18 U.S.C. § 1501. JA41.

But even if they are somehow related, and even if Hardy is technically correct that the FBI does not possess additional files, JA178, he did not account for responsive records from the *EOUSA* (such as the investigative file on Ms. Price) that are obviously not in Mr. Price's file. Price brought this discrepancy to the district court's attention, JA186, 209, but the court failed to consider it.

In reviewing *de novo* the denial of a FOIA request, § 552(a)(4)(B), district courts must consider whether "the documents are *clearly* exempt from disclosure." *Quinon*, 86 F.3d at 1227 (quotation omitted and emphasis added). Although affidavits may "provide a sufficient basis for granting summary judgment in favor of the Government without an *in camera* review of the withheld documents," for an affidavit to be sufficient it "must show, with reasonable specificity, why the documents fall within the exception." *Id*. Regarding the level of specificity required, this Court noted that:

> The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping. If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents.

Id. (quotations omitted).

Hardy's affidavit here was plainly inadequate under this standard. First, he purported to speak for only the FBI, not the EOUSA. JA175. Insofar as EOUSA records are concerned, the Government offered *no* declaratory support in the lower court for its position that responsive records fall within the scope of Price's waiver. Second, in a couple sweeping sentences, Hardy averred that *every* available record on Ms. Price "involve[s] the investigative file on [Mr. Price.]" JA179. But he failed to describe in any detail the types of documents in the Government's possession, and he disregarded contradictory evidence that an investigation into Tami Price for an entirely different crime predated that into Mr. Price by at least eight days. Consequently, the district court could not have known from this record whether all withheld documents were covered by the FOIA waiver. *See Quinon*, 86 F.3d at 1229 (finding inadequate the Government's conclusory assertion that the documents are exempt from disclosure and ordering the district court to review the documents *in camera* on remand); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) (ordering the Government to set forth more than simply its opinion that the records are not subject to disclosure).

Given the inadequacy of Hardy's declaration, the district court should have either ordered supplemental affidavits, *see King v. U.S. Dep't of Justice*, 830 F.2d 210, 225 (D.C. Cir. 1987), or reviewed the records *in camera*, *see* § 552(a)(4)(B); S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 9 (1974) ("[I]n many situations [*in camera* review] will plainly be necessary and appropriate."). *In camera* review is warranted where, as here, the Government's declaration was conclusory, contradicted by the record, or if there was evidence of bad faith. *Carter*, 830 F.2d at 392. It was also particularly appropriate when, like here, "the dispute turns on the contents of the withheld documents." *Quinon*, 86 F.3d at 1228.

The court below thus erred when it refused to examine the records *in camera* or, alternatively, order the Government to describe the documents with specificity sufficient to establish that they were in fact covered by Price's waiver.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that the order granting summary judgment be reversed.

Dated: January 4, 2017 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,928 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook, Size 14 in Microsoft Word (2013).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 4, 2017, I electronically filed the Opening Brief of Appointed Amicus Curiae in Support of the Appellant William S. Price and Joint Appendix with the Clerk of the Court. I certify that the following attorneys are registered CM/ECF participants for whom service will be accomplished electronically by the CM/ECF system and with hard copies provided by a courier: R. Craig Lawrence and Peter C. Pfaffenroth. I also certify that on this day I sent, by Federal Express, paper copies of the foregoing Opening Brief to William S. Price, appellant, at the following address:

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STATUTORY ADDENDUM

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5 U.S.C. § 552 provides:

(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 in an electronic format--

(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--

(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

(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 in an electronic format 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.

(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).

(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 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;
(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.

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