RECORD NO. 12-5004

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff – Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant – Appellee,

PUBLIC CITIZEN,

Amicus Curiae for Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici. Plaintiff in the district court and appellant in this appeal is Citizens for Responsibility and Ethics in Washington, a non-profit corporation. Defendant in the district court and appellee in this appeal is the Federal Election Commission.

There were no *amici curiae* in district court. Public Citizen Litigation Group has filed notice of its intent to participate as an *amicus curiae* in this appeal.

B. Rulings Under Review. The rulings under review are the order and memorandum opinion of the district court issued on December 30, 2011. *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, No. 1:11-cv-00951-CKK (D.D.C.) (Judge Colleen Kollar-Kotelly). The district court's opinion is available at 2011 U.S. Dist. LEXIS 14967, and page 57 of the Joint Appendix.

C. Related Cases. This case has not previously come before this Court. Counsel is aware of no other related cases pending before this Court or any other court within the meaning of D.C. Circuit Rule 28(a)(1)(c).

APPELLANT'S RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 26.1, plaintiff-appellant Citizens for Responsibility and Ethics in Washington ("CREW") submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a 10% or greater ownership interest in CREW.

(b) CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensuring the integrity of those officials. Among its principle activities, CREW routinely requests information from government agencies under the Freedom of Information Act ("FOIA") and pursues its rights to information under the FOIA through litigation. CREW then disseminates, through its website and other media, both documents it receives in response to its FOIA requests and written reports based in part on those documents and information obtained through other administrative processes.

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GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington
EFOIA	Electronic Freedom of Information Act Amendments
FEC	Federal Election Commission
FOIA	Freedom of Information Act
JA	Joint Appendix

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over this timely appeal filed on January 29, 2012, from a final judgment of the United States District Court for the District of Columbia that was entered on December 30, 2011. The district court's jurisdiction was based upon 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

STATEMENT OF THE ISSUE

Whether the Federal Election Commission ("FEC") made a determination within the meaning of the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A)(i) ("FOIA"), that required Citizens for Responsibility and Ethics in Washington ("CREW") to exhaust administrative remedies before filing suit in the district court.

STATUTES AND REGULATIONS

This litigation involves the application of the FOIA, 5 U.S.C. § 552, which has been reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

This appeal arises from a FOIA request CREW filed with the FEC seeking three categories of records: (1) "all correspondence related to any and all FEC business between Commissioners Matthew S. Peterson, Caroline C. Hunter, or Donald F. McGahn II and any individual or entity outside of the FEC from the date each commissioner took office to the present"; (2) "all calendars, agendas, or other recordations of the schedules" of the three identified commissioners; and (3) "all written *ex parte* communications delivered to an FEC ethics officer or Designated Agency Ethics Official" by the three named commissioners "or by someone acting on their behalf pursuant to 11 C.F.R. §§ 7.15(c), 201.3(c), 201.4(a)," as well as "all statements setting forth the substance and circumstances of any oral *ex parte* communication prepared by any of these commissioners or by someone acting on their behalf." JA49.

The FEC acknowledged receipt of this request one day after its submission, JA8, ¶ 17, and the FEC and CREW had a series of communications via email and telephone over the next several months. JA43-46, ¶¶ 3-12. As a result of those conversations, CREW agreed to narrow the scope of its request for purposes of an initial search by the agency, and excluded some items from its request altogether. JA14-15, ¶¶ 5, 8; JA44, ¶ 5. CREW also pressed the FEC to produce responsive documents on a rolling basis. JA43-44, ¶¶ 3, 5, 6. The FEC agreed to this request

in principle, but failed to provide CREW at any point with a date certain by which it would begin or complete production of responsive records. JA43-46, ¶¶ 3, 11-13.

Nearly two months after CREW submitted its request, the FEC for the first time advised CREW it had culled an initial batch of responsive documents and promised production within two weeks and a timetable for full disclosures within the week. JA45, ¶ 10. When neither was forthcoming, CREW filed suit nearly three weeks later. JA4, 46, ¶ 13. At that point, CREW had not received any responsive records or any timetable for production. JA46, ¶ 13. At no time prior to CREW filing suit did the FEC afford CREW a right to file an administrative appeal.

The FEC moved to dismiss the complaint or, alternatively, for summary judgment, based on its seriatim production of 835 pages of documents over the course of the month after suit was filed, with a purportedly final production just hours before the FEC filed its motion. The FEC argued as a result of this production CREW's claim was moot, and further that CREW had failed to exhaust its administrative remedies. In opposing this motion, CREW submitted a declaration from the CREW representative who had communicated with the FEC in the months preceding CREW's lawsuit. JA43-47. This declaration together with the FEC's declarations submitted in support of its motion to dismiss or,

alternatively, for summary judgment confirm that CREW never received a single document or a timetable for production of documents before filing suit.

Nevertheless, the district court held CREW had failed to exhaust administrative remedies and granted summary judgment for the FEC. JA74. The court found the FEC had made a determination within the meaning of 5 U.S.C. § 552(a)(6)(A)(i) based on the FEC's "response prior to May 23, 2011," the date suit was filed. JA73. The court identified this determination as consisting of an initial conversation between the parties just two days after CREW submitted its request, in which the FEC sought clarification from CREW on the scope of its request, and the FEC's subsequent "work[] . . . with CREW to clarify and narrow the scope of the requests, then to perform searches, to review, and ultimately to produce responsive documents." *Id.* As described by the district court, the FEC made this "determination" over a several month period and communicated this "determination" in a variety of ways. In none of those communications, however, did the FEC commit to provide CREW specific documents by a date certain or advise CREW of its right to file an administrative appeal.

STATEMENT OF THE FACTS

On March 7, 2011, CREW sent by facsimile a FOIA request to the FEC seeking: (1) all correspondence related to any and all FEC business between Commissioners Matthew S. Peterson, Caroline C. Hunter, or Donald F. McGahn II

and any individual or entity outside of the FEC from the date each commissioner took office to the present; (2) all calendars, agendas, or other recordations of the schedules of these three FEC commissioners; (3) all written *ex parte* communications delivered to an FEC ethics officer or Designated Agency Ethics Official (collectively "ethics official") by Commissioners Peterson, Hunter, and McGahn or by someone acting on their behalf pursuant to 11 C.F.R. §§ 7.15(c), 201.3(c), 201.4(a); and (4) all statements setting forth the substance and circumstances of any oral *ex parte* communication prepared by any of these commissioners or someone acting on their behalf and delivered to an ethics official pursuant to 11 C.F.R. §§ 7.15(d), 201.3(c), 201.4(a). JA49. CREW requested any attachments to these records, and further requested that for any email, the FEC produce "metadata and/or headers" showing the email address of the sender and any recipient, the names and email addresses of any "bcc:" recipients, and any data regarding the time and date the email was sent, received, or opened. JA50. CREW noted it welcomed the opportunity to discuss with the FEC whether and to what extent the request could be narrowed or modified to better enable the FEC to process it within the FOIA's deadlines. *Id.*

The following day, CREW received an email from the FEC acknowledging receipt of CREW's request and advising the FEC had granted CREW's request for a fee waiver. JA14, ¶ 4.

Thereafter followed a four-week period of discussions between the parties concerning the scope of CREW's request, a predicate to any search the agency was to conduct. On March 9, 2011, FEC Assistant General Counsel Nicole St. Louis Matthis contacted CREW Senior Counsel Adam Rappaport "to clarify what materials CREW was requesting," and to seek a narrowing of the scope of CREW's request. JA17-18, ¶ 2. The parties agreed the FEC would conduct "an initial document review" that was more limited than the larger review CREW's request on its face would have required, *id.*, but did not at that time determine the scope of the initial review. Mr. Rappaport requested that the FEC produce documents on a rolling basis, to which Ms. St. Louis Matthis agreed. JA43-44, ¶ 3.

Ms. St. Louis Matthis and Mr. Rappaport spoke again on two separate occasions during the following week to determine the specific scope of the documents the FEC would review in its initial search for responsive records. JA18, ¶ 3; JA44, ¶¶ 4-5. In one conversation on March 18, Mr. Rappaport agreed CREW would narrow parts of the request and limit the FEC's initial search to certain documents, after which – based on CREW's review of what the FEC produced – CREW would decide whether to request additional documents. JA44, ¶ 5. In at least one of these conversations, Mr. Rappaport confirmed with Ms. St. Louis Matthis the FEC's willingness to produce documents on a rolling basis.

JA18, ¶ 3; JA44, ¶ 4. While these communications concerning the scope of CREW's request were occurring, Mr. Rappaport understood the FEC had not started its search for responsive documents, and would not be producing any documents soon. JA44, ¶ 6.

In late March, Mr. Rappaport and Ms. St. Louis Matthis exchanged further emails and phone calls over a ten-day period regarding the clarification and initial narrowing of CREW's request. JA18, ¶¶ 4-5; JA44-45, ¶¶ 5, 7. They reached an agreement that Mr. Rappaport memorialized in a March 29 letter to Ms. St. Louis Matthis. JA25-26. Under that agreement, CREW excluded certain files from the FEC's *initial* search, but explained that by agreeing to this procedure CREW was not narrowing the scope of its request. JA25. CREW also explained that after it reviewed any records the FEC produced as part of the initial search, CREW would clarify further whether additional searches were needed to fulfill the request, *id.*, and agreed to exclude entirely several categories of documents from its request. JA25-26. In a follow-up discussion on April 1, CREW further clarified the scope of the FEC's initial search, which it memorialized in an April 4 email. JA18-19 ¶ 6; JA21; JA45, ¶ 8. At no point during any of these communications did Ms. St. Louis Matthis suggest any records would be forthcoming immediately. JA44-45, ¶¶ 6-9.

By April 29, having heard nothing further from the FEC, CREW's counsel contacted Ms. St. Louis Matthis for an update. JA45, ¶ 9. While Ms. St. Louis Matthis and Mr. Rappaport again discussed the FEC producing documents on a rolling basis, the FEC did not identify dates by which it would begin and complete any production. *Id.* Ms. St. Louis Matthis withheld from Mr. Rappaport the fact that she was about to leave the FEC. *Id.*

On May 4, Katie A. Higginbothom, an attorney in the FEC's Office of General Counsel, telephoned Mr. Rappaport and advised him she was taking over CREW's FOIA request. JA45, ¶ 10. Ms. Higginbothom informed Mr. Rappaport the FEC was still in the process of searching for documents responsive to CREW's request. JA27-28, ¶ 3. Ms. Higginbothom also said she had just received access to a first set of responsive material consisting of 200 documents, and was waiting to receive more documents from the commissioners. JA45, ¶ 10. Ms. Higginbothom suggested she might be able to provide an initial response within two weeks, and stated she anticipated having a timetable for full disclosure by the end of that week (*i.e.*, by May 6, 2011). *Id.*; JA27-28, ¶ 3.

By May 9 of the following week, when the FEC had neither contacted CREW with a promised timetable nor produced any documents, Mr. Rappaport sought an update from Ms. Higginbothom. JA45-46, ¶ 11; JA28, ¶ 4. Ms. Higginbothom claimed the FEC was in receipt of thousands of documents for

which it was in the process of conducting an initial agency review, and was still unable to commit to a date by which it would begin production to CREW. JA45-46, ¶ 11. When Mr. Rappaport again contacted Ms. Higginbothom on May 13 (Friday of that week), Ms. Higginbothom said CREW's request was "where it was before," and added she was still waiting to receive more documents. JA46, ¶ 12. As for the first set of documents, Ms. Higginbothom said they were in "first level review," after which they would go through a second level of review, to be followed by a further review by the commissioners. *Id.* Ms. Higginbothom again could not provide a date when the FEC would begin production of these or any other documents. JA28, ¶ 5.

CREW waited another ten days. Having heard nothing further from the FEC and not having received any documents responsive to its request, CREW filed its complaint in this matter on May 23, 2011, more than two and one-half months after submitting its FOIA request to the FEC. JA4-10. Three weeks later, on June 15, the FEC made a first production of documents to CREW. JA28, ¶ 6. The accompanying letter stated:

> The FEC is continuing to process your request and has produced with this letter an initial round of responsive records. You will continue to receive additional responsive records on a rolling basis. Upon the agency's final production of records, you will receive a decision letter that will include information regarding your appeal rights. *Today's*

> *letter does not constitute a final agency decision, and thus is not subject to appeal.*

JA38 (emphasis added). CREW received a similar letter dated June 21, 2011, with a second production of responsive records. JA28, ¶ 7; JA40-42. Once again the FEC asserted the letter "does not constitute a final agency decision," and characterized its production as "not subject to appeal." JA41. CREW received the FEC's third and purportedly final production on June 23, a month after CREW had sued the agency and just hours before the FEC filed its motion to dismiss or, alternatively, for summary judgment. JA28-29, ¶ 8; JA31-33. For the first time, this letter advised CREW of its right to file an administrative appeal. JA33.

In all, the FEC produced 835 pages of documents. JA46, ¶ 14. For each of the productions, the FEC withheld records or portions of records pursuant to various FOIA exemptions, and withheld other portions of records as "non-responsive." JA46, ¶¶ 14-15. The FEC withheld an unknown number of records in their entirety pursuant to Exemption 6. JA31-33. The FEC further withheld portions of 219 pages of records pursuant to Exemptions 2, 4, 6, and 7(C), and portions of 25 pages of records deemed "non-responsive." JA46, ¶¶ 14-15.

In addition, the FEC did not respond to all categories of requested records and failed to produce or otherwise account for a number of requested records. Despite CREW's specific request for parts of metadata and headers, including

metadata showing which commissioner received a particular email, the FEC failed to produce any such information and failed to provide any explanation for this withholding. JA46-47, ¶ 16. The FEC also failed to produce all attachments to the records, which CREW specifically had requested. *Id.* In addition, even though many of the emails provided by the FEC indicate they were replied to, the FEC did not produce all the replies. *Id.* Also missing from the production are certain categories of records CREW requested, including calendars and agendas of two of the three named FEC commissioners. JA47, ¶ 17.

The FEC's purportedly final decision and production also violated its explicit agreement with CREW on the procedure for complying with the request. Under that agreement, the FEC was to provide CREW an opportunity to review the records following the FEC's initial search, after which CREW would clarify whether additional searches were needed to fulfill the request. JA25-26. In violation of this agreement, the FEC instead provided only what it had located as a result of its initial search, which the FEC characterized as a final response. JA28-29, ¶ 8. The FEC also denied CREW any practical opportunity to review the initial production and clarify whether additional searches were needed. Just four hours after the FEC sent CREW its purportedly final production, the FEC filed a motion to dismiss CREW's lawsuit or, in the alternative, for summary judgment. JA2, Docket Entry 4.

SUMMARY OF ARGUMENT

The district court below adopted a radical interpretation of the Freedom of Information Act that, if upheld, will undermine the statutory scheme and bring mass confusion to the FOIA process for both requesters and responding agencies. Specifically, the court ruled the FEC's initial inquiry to CREW about the scope of its FOIA request coupled with the agency's course of conduct over the next several months, which included unfulfilled promises and a refusal to identify what the agency would be releasing and when, constituted a determination within the meaning of 5 U.S.C. § 552(a)(6)(A)(i). This determination, the court concluded, triggered a requirement that CREW exhaust administrative remedies before filing suit.

Neither the language of the FOIA nor its structure supports this outcome, especially considering the congressional intent behind the FOIA's constructive exhaustion provision and the safety valves the FOIA provides agencies that can not meet its rigid time-frame for processing requests. First, in concluding the FEC had made a determination that required CREW to exhaust administrative remedies, the district court plucked a phrase of the FOIA out of context – that dictating that the agency "determine within 20 days . . . whether to comply with such request" – and ignored the entire statutory provision of which it was a part, thereby robbing the isolated phrase of its intended meaning. Congress dictated that within 20

working days of receiving a FOIA request responding agencies not only determine whether to comply with the request, but also notify the requester of that determination, the reasons for the determination, and the requester's right to appeal an adverse determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

Imposing a requirement that the agency provide the requester the reasons for the agency determination makes clear Congress intended the determination to flow from the actual processing of a request, be substantive in nature, and therefore susceptible to administrative review if adverse. Yet the events that form the determination the court found here do not include a substantive determination on the merits of CREW's request based on the FEC's actual processing of that request. Moreover, at no time in the "determination" process identified by the district court did the FEC provide CREW an opportunity to pursue an administrative appeal.

Second, the district court's interpretation of what constitutes a determination that triggers the requirement to exhaust administrative remedies conflicts with, and makes a nullity of, other key provisions of the FOIA. When Congress extended from ten to twenty working days the time in which responding agencies must make a determination on a FOIA request, it also afforded those agencies facing certain "unusual circumstances," defined specifically by the statutory amendment, an extension of up to ten additional working days in which

to provide their determinations. 5 U.S.C. § 552(a)(6)(B)(i). If the district court's decision stands, however, this provision would be rendered completely unnecessary as an agency could obtain an extension of an indeterminate number of days simply by advising the requester the agency was working on, or planned to work on, the request, without committing to produce any specific documents by any specific date.

Similarly, Congress afforded courts the ability to grant an extension of an agency's time to respond to a FOIA request beyond what the FOIA mandates upon a showing from the agency of "exceptional circumstances," as defined by the statute, "and that the agency is exercising due diligence in responding to the request. . ." 5 U.S.C. § 552(a)(6)(C)(i). Known as an *Open America* stay, this safety valve permits a court "to retain jurisdiction and allow the agency additional time to complete its review of the records." *Id.* Again, however, the district court's approach would render this provision a nullity, as agencies could obtain as much time as they desired, and divest courts of jurisdiction, simply by making a so-called "determination" of their intent to comply with their obligations under the FOIA without satisfying the statute's *Open America* requirements.

Third, the district court's decision creates enormous uncertainty in the FOIA process, as it leaves agencies and requesters with no clear sense of what constitutes a "determination" sufficient to trigger a requester's obligation to

exhaust administrative remedies. Here, the district court failed to identify a date specific on which the FEC had made such a determination, referring instead to a period of time during which the agency negotiated with CREW over the scope of the request and the initial search the agency was to conduct. The imprecision in the court's ruling makes it impossible to extract a usable measure of the precise point in time at which an agency makes a determination. Unless overturned, this decision will defeat Congress' intent to bring speed and certainty to the FOIA process by imposing specific, narrow deadlines within which agencies must act, and providing for constructive exhaustion after the passage of a specified period of time.

STANDARD OF REVIEW

This Court reviews district court grants of summary judgment *de novo*. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008).

ARGUMENT

I. THE FEC FAILED TO MAKE A DETERMINATION ON CREW'S FOIA REQUEST WITHIN THE PLAIN MEANING OF 5 U.S.C. § 552(a)(6)(A)(i) BEFORE CREW FILED SUIT.

This dispute centers on the nature of the determination the FEC was required to make under section 552(a)(6)(A)(i) of the FOIA in order to trigger the statutory requirement that CREW exhaust administrative remedies before filing

suit, 5 U.S.C. § 552(a)(6)(C)(i). Under section 552(a)(6)(A)(i), each agency receiving a FOIA request must:

> 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 . . .

On its face, this provision imposes three specific requirements that must be met within twenty days: (1) the agency must determine whether to comply with the request; (2) the agency must provide the requester the reasons for the agency determination; and (3) the agency must advise the requester of its right to an administrative appeal from an adverse determination. The language and structure of this provision inform the nature of the determination the agency must make within the specified time, *i.e.*, "whether to comply with [the] request." The determination must be substantive in nature based on the outcome of the agency's actual processing of the request, as only such a determination would yield "reasons" susceptible to administrative review.[1]

[1] The range of substantive decisions susceptible to administrative review includes threshold issues such as entitlement to a fee waiver and expedition, in addition to decisions to withhold specified material under claims of exemption. No such threshold issues are at play here. By contrast, a decision merely to process a request is not susceptible to administrative review, as there is nothing for the reviewing body to consider and decide.

Here, the district court declined to accord § 552(a)(6)(A)(i) its plain meaning, instead assigning it a meaning derived from a phrase of this provision coupled with a portion of the constructive exhaustion provision, 5 U.S.C. § 552(a)(6)(C)(i), which states:

> 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.

From this the district court reasoned an agency need only notify a requester within twenty days "that the agency intends to comply" and thereafter "produce the documents 'promptly.'" JA67. The court found this later condition satisfied even though the FEC took several months to provide CREW with requested documents. *Id.*

The plain language of § 552(a)(6)(A)(i) clearly requires more, notably processing of the request at issue followed by notification of the reasons for the agency's determination of what it will and will not release, as well as notification of the requester's right to file an administrative appeal from any adverse decision. The district court's interpretation essentially reads these requirements out of the statute, and instead imposes on an agency only the burden to advise the requester it "intends to comply." And even as to that duty, it is not at all clear whether the district court was referring to an intent to comply with the request or, more broadly, a generalized intent to comply with the FOIA. Under the express

language of the statute, however, neither standing alone constitutes a determination that triggers the exhaustion requirements.[2]

Precedent in this Circuit reinforces this interpretation. In *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52 (D.C. Cir. 1987), the court confronted the issue of whether the statute of limitations barred a FOIA plaintiff's lawsuit, filed more than seven years after he submitted his FOIA requests to the agency. To resolve this question, the court had to ascertain when the plaintiff's cause of action first accrued, which in turn depended on whether and when the plaintiff had constructively exhausted his administrative remedies. *Id.* at 59.

As the *Spannaus* court noted, the FOIA contains two "'time limit provisions' that trigger constructive exhaustion" – (1) the specified time for making a determination, 5 U.S.C. § 552(a)(6)(A)(i); and (2) the specified time for deciding an administrative appeal, 5 U.S.C. § 552(a)(6)(A)(ii). 825 F.2d at 58. In the case before it, the court found the agency had failed to make the initial determination required by § 552(a)(6)(A)(i). *Id*. at 59. Of particular relevance here, the court reached this conclusion after factoring in the agency's initial

[2] The district court also maintained that *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57 (D.C. Cir. 1990), confirms its interpretation of what constitutes a determination. In support of this proposition the court cited a passage of the *Oglesby* opinion that merely echoes the language of the FOIA, including the requirement that the responding agency provide "the reasons for its decision" and notice of appeal rights. JA67 (citing *Oglesby*, 920 F.2d at 65).

response, made within the then-applicable ten-day statutory period, which "merely acknowledged the request and informed appellant that the request would be forwarded to FBI Headquarters, as well." *Id.* at 59 n.9. This initial acknowledgment coupled with the agency directing the request to the proper agency component for processing did not alter the court's conclusion that the agency had not made a determination within the meaning of § 552(a)(6)(A)(i) sufficient to trigger the administrative exhaustion requirements. *Id.*[3]

This Circuit's subsequent decision in *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57 (D.C. Cir. 1990), further supports the conclusion that § 552(a)(6)(A)(i) requires an agency to do more than merely acknowledge a request and provide a vague commitment to process the request, as the FEC did here. The issue before the *Oglesby* court was whether the FOIA still requires actual exhaustion of administrative remedies when an agency responds outside of the required time period, but before a requester has filed suit. The court first examined its *Spannaus* decision, which it characterized as involving a failure by the agency in question "to make a determination" within the then-statutorily required period of ten days. 920 F.2d at 63. Thus, *Oglesby* accepted the notion

[3] *See also Taylor v. Appleton*, 30 F.3d 1365, 1368, 1369 (11th Cir. 1994) (agency acknowledgment of receiving FOIA request and advising request had been forwarded to the appropriate IRS office did not constitute a determination that triggered FOIA's administrative exhaustion requirement).

that merely acknowledging a request and sending it on for processing does not constitute a "determination" within the meaning of the FOIA.

This was made all the more clear by the *Oglesby* court's evaluation of the response from the State Department, one of the six agencies in question. The court evaluated two letters the State Department had sent the requester: a first letter agreeing to process the request, and a subsequent letter informing the requester the agency had found no records responsive to his request. 920 F.2d at 67. The court characterized only the second letter as "an 'adverse determination' under 5 U.S.C. § 552(a)(6)(A)(i), because appellant did not receive the documents he requested." *Id.* Notwithstanding this substantive response, the *Oglesby* court held this letter still did not trigger the exhaustion requirement because it failed to advise the requester of "his right to appeal the negative reference to this inquiry." *Id.*

As to the FBI, the court noted its initial response "merely informed appellant that the FBI was processing the request," but declined to opine on whether this constituted a "determination" under the FOIA because the FBI had sent additional letters before the requester filed suit, including a letter denominated by the FBI as a "'final' determination" that included notice of the

requester's right to file an administrative appeal. *Id.* at 69.[4] Thus, while *Oglesby* may appear to leave open the question of whether an agency's promise to process a request triggers the exhaustion requirement, the court's treatment of the responses by the State Department and its acceptance of the ruling in *Spannaus* suggest strongly the answer is no.

Here, to support its truncated interpretation of what constitutes a determination under the FOIA, the district court cited to several district court cases finding that requesters had failed to exhaust administrative remedies. None of these cases provides persuasive authority to depart from this Circuit's approach in *Spannaus*. For example, while the district court here found "persuasive" the reasoning in *Love v. FBI*, 660 F. Supp. 2d 56 (D.D.C. 2009), JA63, that reasoning suffers from the same flaw as that of the district court, namely it construes § 552(a)(6)(A)(i) as requiring only that an agency determine whether it will comply with a request, and ignores the requirements that the agency provide reasons and a right to an administrative appeal. Moreover, at least one agency at issue in *Love* – the FBI – completed its search for responsive documents, notified the requester it had found none, and advised the requester of its administrative

[4] Similarly, the court refrained from deciding whether an initial letter from the CIA indicating the agency would go forward with a search was an adequate response to trigger the FOIA's administrative exhaustion requirements because the CIA made a final determination on the merits of the request before the requester filed suit. 920 F.2d at 69.

appeal rights, all actions that go well beyond mere notification. 660 F. Supp. 2d at 57.[5]

In another case on which the court below relied, *Cabreja v. U.S. Citizenship & Immigration Servs.*, 2008 U.S. Dist. LEXIS 94262 (D.D.C. Oct. 30, 2008), the court dismissed a lawsuit brought by a requester who had failed to exhaust administrative remedies after the agency in question sent a letter acknowledging receipt of the request, informing the requester the request was in the "complex" track, and advising that unless the requester submitted within 30 days "a specific certification and his father's signature . . . the request would be administratively closed." 2008 U.S. Dist. LEXIS 94262, *1. Dismissal clearly was appropriate for the entirely separate reason that having failed to provide the requested certification, the requester did not perfect its request.[6]

[5] Another responding agency, the Executive Office of United States Attorneys, merely indicated it would comply with the request, while a third advised the request would be handled "as expeditiously as possible." 660 F. Supp. 2d at 58. The court in *Love* erroneously treated these responses as determinations under the FOIA, relying on its assessment that only a "'reply from the agency indicating that it is responding to [the] request'" is required. 660 F. Supp. 2d at 59 (quoting *Oglesby*, 920 F.2d at 61).

[6] *See*, *e.g.*, *Borden v. FBI*, 1994 U.S. App. LEXIS 16157, *1 (1st Cir. June 28, 1994).

At bottom neither these cases nor the others cited by the district court[7] offer a sound basis to read out of the FOIA the requirement that an agency make a determination, based on actual processing of the requested records, that includes the basis for the determination and provide appeal rights. Indeed, District Court Judge Kollar-Kotelly's opinion in *Defense of Animals v. NIH*, 543 F. Supp. 2d 83 (D.D.C. 2008), which she cited below, actually undermines her interpretation here. In that case, she found the two defendant agencies' responses did *not* trigger the FOIA's exhaustion requirement because they failed to advise the requester of its right to pursue an administrative appeal until after suit was filed. *Id.* at 97. Moreover, even though the agencies had responded in part on the merits with a promise to continue processing the remainder of the responsive documents, Judge

[7] They include *Percy Squire Co., LLC v. FCC*, 2009 U.S. Dist. LEXIS 70555 (S.D. Ohio Aug. 7, 2009), and *Bonner v. Soc. Sec. Admin.*, 574 F. Supp. 2d 136 (D.D.C. 2008). The court expressly refrained from relying on the key case relied on below by the FEC, *Petit-Frere v. U.S. Attorney's Office for the S.D. of Fla.*, 664 F. Supp. 2d 69 (D.D.C. 2009), after finding the FEC had provided a response deemed sufficient by the *Oglesby* court. JA65. The most notable feature of *Petit-Frere* is not its initial holding that the agency's acknowledgment of the request and assertion processing the request could take nine months constituted a "determination," but the court's subsequent decision to reopen the matter after the defendant agency notified the court the factual basis for the dismissal was inaccurate. The agency conceded its acknowledgment letter was not a final agency response subject to administrative appeal, a concession that led the court to note its "subsequent additional review of the relevant documents and the case law demonstrates that the dismissal was erroneous." *Petit-Frere*, No. 09-1732 (RWR), Order Reopening Case at 1 (D.D.C. Dec. 4, 2009). Curiously the district court here ignored the subsequent history in *Petit-Frere*, even though it was brought to the court's attention. *See* JA54-56.

Kollar-Kotelly deemed those responses insufficient to constitute a determination because "[d]efendants did not indicate their decision to comply or not comply with Plaintiff's entire request until after Plaintiff filed suit . . ." *Id.*

Here, as in *Defense of Animals*, the FEC neither indicated a decision to comply with the entirety of CREW's request – something that still has not been forthcoming – nor provided CREW any right to administratively appeal before CREW filed suit. Instead, after initially acknowledging receipt of CREW's request, the FEC engaged in a series of communications during which CREW discussed narrowing its request for purposes of an initial search only, and CREW agreed to exclude specified categories of documents from its request altogether. The FEC awaited the outcome of those discussions before actually beginning to process CREW's request.[8] Moreover, while the FEC agreed to produce responsive documents on a rolling basis, it never did so before CREW filed suit. At no time did the FEC commit to provide CREW with any specific document by any specific date, and at no time did the FEC provide CREW with a date by which the agency would complete processing CREW's request. Indeed, the FEC failed to meet the few suggested target dates it provided for processing some aspects of CREW's

[8] The district court made a point of differentiating the FEC's response here – an indication it would comply – from a response indicating a request is being processed. JA71, n.3.

request, JA3-4, ¶¶ 10-13, leaving CREW with no confidence any final response would be forthcoming in the near future.

Thus, by the time CREW filed suit it had obtained from the FEC only a commitment to process some aspects of CREW's request by some unspecified date, with a further search dependent on the fruits of the FEC's initial search. To date, the FEC has yet to comply with the entirety of CREW's request. The FEC has not produced or otherwise accounted for whole categories of records CREW requested and the agency's motion to dismiss or, alternatively, for summary judgment was based on the results of the preliminary search it conducted, without providing CREW an opportunity to request further documents under the parties' agreed-upon process. *See* JA25-26.

Further, at no time prior to CREW filing suit did the FEC provide CREW with any administrative appeal rights. Even after CREW sued and the agency began the process of producing responsive documents, the FEC made clear CREW did not yet have any administrative appeal rights to pursue. The two letters accompanying the FEC's interim production of documents on June 15 and June 21, 2011, stated expressly: "Today's letter does not constitute a final agency

decision, and thus is not subject to appeal." JA38, 41.[9] Accordingly, with no actual "determination" on the merits of its request, CREW properly invoked the district court's jurisdiction based on its constructive exhaustion of administrative remedies.

II. THE DISTRICT COURT'S INTERPRETATION OF WHAT CONSTITUTES A DETERMINATION SUFFICIENT TO TRIGGER THE EXHAUSTION REQUIREMENT NULLIFIES OTHER KEY PROVISIONS OF THE FOIA AND CONFLICTS WITH THE FOIA'S PURPOSE.

Under cardinal rules of statutory construction, a statute must be read as a whole and its parts interpreted consistent with the broader statutory context and purpose. As Justice Scalia has explained,

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (citations omitted). Under this principle, the meaning of a statutory phrase is

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[9] Not until June 23, 2011, when the FEC produced what it characterized as "the remaining agency records we retrieved that are responsive to your request," did the FEC advise CREW of its right to appeal any adverse FOIA determination. JA32. Notably, this letter was sent hours before the FEC filed its motion to dismiss or, alternatively, for summary judgment.

derived from the overall structure and purpose of the statute at issue. *See*, *e.g.*, *Bhd. of Locomotive Eng'rs v. Atchison, T. & S.F.R.R.*, 516 U.S. 152, 157-58 (1996) (statutory provision at issue "must be understood in accord with [the statute's] objective" and examining the statutory scheme).

The district court's interpretation of what constitutes a "determination" sufficient to trigger the FOIA's administrative exhaustion requirement violates this principle, as it nullifies other key provisions of the FOIA and sanctions delay in situations where Congress intended to afford requesters direct access to the district courts. In two key amendments to the FOIA, Congress provided a safety valve for agencies facing circumstances in which, even with due diligence, they cannot complete processing a request within the statutory time frame. Under the district court's interpretation of what constitutes a determination, however, neither provision would retain any utility.

In 1996, as part of the Electronic Freedom of Information Act Amendments, Pub. L. No. 104-231, 110 Stat. 3048 ("EFOIA"), Congress extended from ten to twenty the number of working days in which agencies must make the determination prescribed by § 552(a)(6)(A)(i). At the same time, Congress retained and expanded upon the portion of this subsection that affords agencies facing "unusual circumstances" an opportunity to extend this period by up to an

additional ten days, provided the agencies meet certain conditions. 5 U.S.C. § 552(a)(6)(B)(i). The amendments define "unusual circumstances" to include:

> (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.

Id., § 552(a)(6)(B)(iii)(I)-(III). In addition, agencies seeking to invoke the "unusual circumstances" provision must provide the requester written notice "setting forth the unusual circumstances . . . and the date on which a determination is expected to be dispatched." *Id.*, § 552(a)(6)(B)(i). As amended, this written notice cannot extend the response time by more than ten additional days unless agencies afford requesters "an opportunity to limit the scope of the request . . . or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request." *Id.* and § 552(a)(6)(B)(i)-(ii).

The legislative history of this provision confirms Congress' understanding it was extending by ten days the time in which agencies must complete their *processing* of FOIA requests. Hearings in the years leading up to the passage of the amendments revealed agencies had largely failed to produce records within the ten-day time limit. *See*, *e.g.*, Hearing on S. 1940 before the Subcomm. on Tech. & the Law of the S. Comm. on the Judiciary, 102d Cong. 4 (1992) (statement of Sen. Patrick Leahy) ("The FOIA's statutory time limit for agencies to respond is ten days. But requesters wait weeks, months and years for information from the government.").

After the EFOIA amendments were introduced, Senator Leahy, sponsor of the bill in the Senate, explained that the legislation "contains provisions intended to help agencies comply with statutory limits by doubling the time allowed for a determination on requests for records . . . [m]any Federal departments and agencies [were] often unable to meet *the Act's ten-day time limit for processing FOIA requests* . . ." S. Rep. No. 104-272, at 16 (1996) (emphasis added). Similarly, Rep. Randy Tate, sponsor of the EFOIA in the House of Representatives, explained the ten-day extension to make a determination was addressing the situation where "many agencies[] failed to *process* FOIA requests within the deadlines required by law." H.R. Rep. No. 104-795, at 13 (1996) (emphasis added). Congress also took note of then-Attorney General Janet Reno's

acknowledgment that many departments and agencies were "often unable to meet *the Act's ten-day time limit for processing FOIA requests*, and some agencies . . . maintain large FOIA backlogs greatly exceeding the mandated time period." Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies, regarding the Freedom of Information Act (Oct. 4, 1993) (quoted in S. Rep. No. 104-272. at 16; H.R. Rep. No. 104-795, at 13) (emphasis added).[10]

Through this provision Congress established a detailed scheme by which agencies can obtain additional time to process requests, but only if they meet specified conditions and only for specified additional periods of time. Under the district court's approach here, however, agencies need never invoke the "unusual circumstances" provision of the FOIA, as they could unilaterally grant themselves an indefinite extension simply by indicating a willingness to comply in some fashion with the FOIA, the so-called "determination" recognized below. An agency could ignore with impunity the requirement to satisfy any of the three enumerated circumstances that qualify as "unusual" and grant itself an extension for no particular reason at all. Further, agencies would have no obligation to

[10] This remains the interpretation of the Department of Justice; its most recent guide to the FOIA provides, "[a]n agency's response that merely acknowledges receipt of a request does not constitute a 'determination' under the FOIA in that it neither denies records nor grants the right to appeal the agency's determination." U.S. Dep't of Justice, Guide to the Freedom of Information Act, 743 (2009) (citations omitted).

provide requesters a specified date by which their requests will be satisfied and instead, as happened here, could simply make vague promises to produce some subset of documents at some point in the future.

With the 1996 amendments, Congress added another safety valve that clarified the authority of a district court to grant agencies additional time to complete their review of records. In a FOIA lawsuit brought by a requester that has constructively exhausted its administrative remedies, 5 U.S.C. § 552(a)(6)(C)(i) authorizes the district court to "retain jurisdiction and allow the agency additional time to complete its review of the records." The court may do so, however, only when the agency is facing "exceptional circumstances," defined as excluding "a delay that results from a predictable agency workload . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." *Id.* at § 552(a)(6)(C)(ii). Known as *Open America* stays,[11] these safety valves are available only to agencies that meet specified conditions. Moreover, they do not deprive a court of jurisdiction obtained through a requester's constructive exhaustion, but permit a court to retain jurisdiction while the agency completes processing the records responsive to the request. *Id.*

[11] Their name is derived from *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 615-16 (D.C. Cir. 1976), which construed the reference in the FOIA to "exceptional circumstances" as including where agencies are facing large backlogs even with the exercise of "due diligence."

Again, Congress intended these changes to address the problem of delayed disclosure of requested information. Both the House and Senate reports explain the legislation as a response to delays in processing requests and producing records within the statutory time limit. The House Committee on Government Reform and Oversight identified agency failure "to *process* FOIA requests within the deadlines required by law" as one of the most significant problems with the FOIA. H.R. Rep. No. 104-795, at 13 (emphasis added). The Senate Committee on the Judiciary explained, "[t]he purposes of the bill are to ensure and improve public access to agency records and information . . ." *Id.* at 9. These statements confirm that through the 1996 amendments to the FOIA, Congress intended to address delays in producing requested information and documents beyond the ten days the FOIA afforded agencies to process requests.

The interpretation of "determination" advanced by the FEC and accepted by the district court below, which requires a requester to refrain from filing suit and instead pursue administrative remedies whenever they are finally made available, contravenes congressional intent and robs the congressionally created *Open America* stay of any utility. Agencies would be relieved of the obligation to demonstrate any "exceptional circumstances," and could grant themselves unilateral stays even when not facing scarce resources and unexpected snags.

Beyond these specific provisions, the evolution of the FOIA and the provision at issue here underscore Congress' intent that agencies produce records on a specific, certain, and firm timetable, with an immediate judicial remedy when they fail to meet the processing deadline. As originally enacted in 1966, the FOIA had no clear schedule for producing requested records. Pub. L. No. 90-23, 80 Stat. 383 (1966). Instead, the statute required only that agencies facing requests for records "make the records promptly available," while providing requesters access to federal courts to enjoin improper withholdings. *Id.* at § (a)(3).

Hearings five years after the FOIA's passage confirmed the absence of any time limits for the production of records had resulted in extensive "'foot-dragging' delays" by agencies in producing requested information. H.R. Rep. No. 92-1419, at 16-17 (1972). "Nearly all agencies" were moving so slowly in responding to requests "that the long delay often [became] tantamount to denial." *Id.* at 20. The House Committee on Government Operations identified "bureaucratic delay in responding to an individual's request for information" as the first major problem area with the statute, with "delaying tactics of the Federal bureaucracies" acting as "a major deterrent to more widespread use of the act." *Id.* at 8. More hearings over the next two years confirmed a problem of delays in agency responses of "epidemic proportion." S. Rep. No. 93-854, at 175 (1974).

The statutory provisions at issue in this litigation were born out of this widespread problem. In 1974, Congress amended the FOIA to add the predecessors to the provisions at issue here: the "determination" provision, Pub. L. No. 93-502, 88 Stat. 1561, 1562-63 (1974), and the constructive exhaustion provision, *id.* at 1563. Congress intended these amendments to address agency failure to provide requested records in a timely manner. The legislative reports focused on the problems caused by delayed production of documents and information, especially for "someone attempting to meet a deadline on any research project or news story where the requested information is needed on a timely basis." H.R. Rep. No. 92-1419, at 16. Congress recognized that for a reporter, delay in those circumstances "can often moot the story being investigated and will ultimately blunt the reporter's desire to utilize the provisions of the Act." S. Rep. No. 93-854, at 175.

Each of the provisions at issue is part of a carefully crafted statutory scheme that imposes on agencies an obligation to process FOIA requests within very rigid time limits in recognition of the principle that delay in access "can mean no access at all." S. Rep. No. 104-272, at 32. At the same time, Congress recognized these time limits may not always be realistic, and wove into the FOIA certain escape hatches available only for agencies meeting specified conditions. Correspondingly, for requesters facing unexcused delays or inaction Congress

provided a safety valve through the FOIA's constructive exhaustion provision. Construing the "determination" requirement of § 552(a)(6)(A)(i) as requiring a responding agency only to advise the requester the agency intends in some unidentified way to comply with at least some part of the request and requiring the requester in these circumstances to forego a lawsuit until the agency finally completes processing the request seriously disturb this scheme and the congressional intent behind it. Accordingly, the district court's interpretation violates the cannon of statutory construction that statutory provisions are to be construed consistent with their broader statutory context and purpose.

III. READING OUT OF 5 U.S.C. § 552(a)(6)(A) THE REQUIREMENT THAT AGENCIES PROCESS FOIA REQUESTS WITHIN 20 WORKING DAYS WILL CREATE ENORMOUS UNCERTAINTY FOR AGENCIES AND REQUESTERS.

Left undisturbed, the district court's decision here will create enormous uncertainty in the FOIA process, as it leaves agencies and requesters with no clear sense of what constitutes a "determination" sufficient to trigger a requester's obligation to exhaust administrative remedies. Rather than pick a date specific on which the FEC made a determination, the district court referred to a period of time "prior to May 23, 2011" – the date on which CREW filed suit – during which the following occurred:

> The FEC provided notice within two days that it intended to comply with CREW's request, and worked diligently with CREW to clarify and narrow the scope of the requests, then to perform searches, to review, and ultimately to produce responsive records.

JA73.[12] All this, the court held, "was a sufficient response as required by the FOIA." *Id.*

The imprecision in the court's ruling makes it impossible to extract a usable measure of the precise point in time at which an agency makes the determination required by § 552(a)(6)(A)(i). By identifying a continuum of conduct – none of which included processing CREW's request and producing or otherwise identifying specific responsive documents – the district court's opinion leaves requesters and agencies alike guessing as to what specifically constitutes a determination and when it is made.

[12] The district court's reference to the FEC "work[ing] diligently with CREW to clarify and narrow the scope of the requests, then to perform searches, to review, and ultimately to produce responsive records," JA73, is misleading to the extent it suggests the FEC actually performed searches, reviewed documents, and made decisions to produce specific documents prior to CREW filing suit. As even the district court conceded, the FEC's responses "indicated it would comply with the request, not that the request was merely being 'processed.'" JA71, n.3. Thus, the district court must have been referring to the FEC's intent to perform searches, review documents, and make decisions to produce specific documents, most of which was not memorialized and did not occur prior to CREW filing suit. And, in fact, to date the FEC still has not searched for or produced all records responsive to CREW's request. *See infra* at 10.

Not only is the district court's approach unworkable, but it relies on facts that, on their face, fall far short of an agency determination. Much of the conduct the court identified as comprising the "determination" involved communications between CREW and the FEC regarding the scope of the initial search the agency would conduct. As the FEC's own declarations submitted in support of its motion to dismiss or for summary judgment confirm, CREW did not provide a final clarification of the scope of the FEC's initial search until April 4, 2011. *See* JA18-19, ¶ 6. By May 4, 2011, the FEC still was in the process of searching for responsive records, a status that continued after CREW filed suit. JA27-28, ¶¶ 3, 5. During this "determination" period the FEC was unable (or unwilling) to provide a timetable for producing documents, *id.*, or identify what, if any, specific documents it would produce, and in the end its productions appear to have been manipulated so as to coincide with its legal obligation to respond to the complaint.

As these facts make clear, during the time leading up to this lawsuit the FEC was not making a specific determination on how it was responding to CREW's FOIA request that it communicated to CREW (together with the reasons for the determination and notice of administrative appeal rights) on a specific date. Instead, CREW was communicating to the agency CREW's willingness to narrow the scope of its request and the initial search the agency was to conduct, and pressing the FEC to produce documents on a rolling basis. Under no reasonable

interpretation of the FOIA do CREW's actions and the agency's inactions constitute a "determination" that triggered CREW's obligation to exhaust administrative remedies.

The intent of the FOIA's constructive exhaustion provision reinforces this conclusion. Congress added that provision to bring certainty and speed to the process. As the Senate Report on the bill explains,

> an agency with records in hand should not be able to use indeterminable delays to avoid embarrassment, to delay the impact of disclosure, or to wear down and discourage the requester. Therefore, the time limits set in section 1(c) of S. 24543 will mark the exhaustion of administrative remedies, allowing the filing of lawsuits after a specified period of time, even if the agency has not yet reached a determination whether to release the information requested.

S. Rep. No. 93-854, at 178. The district court's approach here undermines this intent, as it removes both certainty and speed. Agencies could delay production for months or even years with nothing more than a promise to comply.

Particularly in cases like this one, where the requested documents were expected to reveal a cozy relationship between outside parties having business before the FEC and the three Republican FEC commissioners, agencies have an incentive to delay production "to avoid embarrassment [or] to delay the impact of disclosure." *Id.* The FOIA's constructive exhaustion provision prevents such delay and ensures requesters will get the speedy access to documents Congress

intended. As Senator Kennedy explained describing the intent of the 1974 amendments to the FOIA:

> By setting administrative deadlines, prescribing certain information to be contained in responses, and generally giving the FOIA teeth, the amendments were intended to assist the public in its efforts to disgorge information . . .

121 Cong. Rec. S22729 (daily ed. Dec. 18, 1975). Only by reversing the judgment of the district court can this Court give full effect to this intent.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand this case for consideration of the merits of CREW's claims.

Respectfully submitted,

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Dated: June 11, 2012

/s/ Anne L. Weismann
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 11th day of June, 2012, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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ADDENDUM

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5 U.S.C. § 552: Freedom of Information Act

(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.