



## Litigation Considerations

The President and Attorney General have issued memoranda to all agencies emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure."<sup>1</sup> (For a discussion of these memoranda, see President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, above.) In accordance with the Attorney General's FOIA Memorandum, it is the Department of Justice's policy to defend an agency's decision made under the FOIA "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."<sup>2</sup> The President's and Attorney General's memoranda do not create any new rights or benefits for FOIA litigants.<sup>3</sup>

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<sup>1</sup> [Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum]; accord [Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 49892 (Sep. 29, 2009) [hereinafter Attorney General Holder's FOIA Guidelines]; see *FOIA Post*, "[OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government](#)" (posted 4/17/09).

<sup>2</sup> [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. 49892 (Sep. 29, 2009).

<sup>3</sup> See [President Obama's FOIA Memorandum](#), 74 Fed. Reg. at 4683 ("This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."); [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. 49892 (Sep. 29, 2009) (same); see also [Menifee v. U.S. Dept. of Interior](#), No. 12-252, 2013 WL 1150519, at \*11 (D.D.C. Mar. 21, 2013) (holding that President's memorandum "merely established policy [and] did not, and could not, change the legal requirements of FOIA as adopted by Congress"); [Amsinger v. IRS](#), No. 08-1085, 2009 WL 911831, at \*3 (E.D. Mo. Apr. 1, 2009) (noting that President's memorandum had no impact on case because it "clearly states that it 'does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States'").

The courts of appeals do not have uniform legal standards governing the scope of appellate review of FOIA decisions. Generally, the Courts of Appeals for the District of Columbia,<sup>371</sup> First,<sup>372</sup> Second,<sup>373</sup> Fifth,<sup>374</sup> Sixth,<sup>375</sup> and Eighth Circuits<sup>376</sup> have applied a

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stay for three days to allow Supreme Court to consider a stay); ACLU v. DOD, 357 F. Supp. 2d 708, 709 (S.D.N.Y. 2005) (denying motion to stay an order requiring agency to search and review its operational files because court's order was procedural in nature, agency did not demonstrate likelihood of success, or show that public interest would be served by immediate appeal, or that it would suffer irreparable harm).

<sup>371</sup> See Elec. Priv. Info. Ctr. v. NSA, 678 F.3d 926, 930 (D.C. Cir. 2012) (reviewing de novo district court's grant of summary judgment); ACLU v. DOJ, 655 F.3d 1, 5 (D.C. Cir. 2011) (same); Consumers' Checkbook v. HHS, 554 F.3d 1046, 1049-50 (D.C. Cir. 2009) (same); Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 57 (D.C. Cir. 2003) (same).

<sup>372</sup> See Carpenter v. DOJ, 470 F.3d 434, 437 (1st Cir. 2006) ("Our review of the district court's determination that the materials are exempt from disclosure is de novo."); Sephton v. FBI, 442 F.3d 27, 29 (1st Cir. 2006) (reviewing de novo district court's grant of summary judgment); Church of Scientology Int'l v. DOJ, 30 F.3d 224, 228 (1st Cir. 1994) ("Our review of the district court's determination that the government was entitled to summary judgment based on its index and affidavits is de novo.").

<sup>373</sup> See Assoc. Press v. DOD, 554 F.3d 274, 283 (2d Cir. 2009) ("We review de novo the district court's grant of summary judgment in a FOIA case"); Nat'l Council of La Raza v. DOJ, 411 F.3d 350, 355 (2d Cir. 2005) (reviewing "de novo a district court's grant of summary judgment in a FOIA case"); Tigue v. DOJ, 312 F.3d 70, 75 (2d Cir. 2002) (same); Perlman v. DOJ, 312 F.3d 100, 104 (2d Cir. 2002) ("We review an agency's decision to withhold records under FOIA de novo").

<sup>374</sup> See Abrams v. Dep't of Treasury, 243 F. App'x 4, 5 (5th Cir. 2007) (reviewing district court's grant of summary judgment de novo). But cf. FlightSafety Servs. Corp. v. Dep't of Labor, 326 F.3d 607, 610-11 & n.2 (5th Cir. 2003) (per curiam) (applying de novo standard of review to district court's legal conclusions while recognizing potential applicability of different standard for factual determinations).

<sup>375</sup> See CareToLive v. FDA, 631 F.3d 336, 340 (6th Cir. 2011) (reviewing de novo district court's grant of summary judgment in FOIA proceeding); Joseph W. Diemert, Jr. & Assoc. Co. v. FAA, 218 F. App'x 479, 481 (6th Cir. 2007) ("The review of the district court's application of law to the facts is de novo."); Rugiero v. DOJ, 257 F.3d 534, 543 (6th Cir. 2001) ("[T]his court reviews the propriety of a district court's grant of summary judgment in a FOIA proceeding de novo."); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at \*1 (6th Cir. Feb. 6, 1998) (deciding appeal "[u]pon de novo review"). But see Vonderheide v. IRS, No. 98-4277, 1999 WL 1000875, at \*1 (6th Cir. Oct. 28, 1999) ("Where an appeal concerns a factual attack on subject matter jurisdiction, this court reviews the factual findings of the district court for clear error and the legal conclusions de novo.").

<sup>376</sup> See Hulstein v. DEA, 671 F.3d 690, 694 (8th Cir. 2012) (reviewing "applicability of FOIA exemptions de novo"); Cent. Platte Nat. Res. Dist. v. USDA, 643 F.3d 1142, 1146 (8th Cir. 2011) (reviewing de novo district court's grant of summary judgment, "viewing all facts and

de novo standard of review. By contrast, the Courts of Appeals for the Third<sup>377</sup> and Seventh Circuits<sup>378</sup> apply a two-tiered analysis, whereby they review whether the district court had an adequate factual basis for its decision and, if so, whether that decision is clearly erroneous. Similarly, the Fourth,<sup>379</sup> Ninth,<sup>380</sup> Tenth,<sup>381</sup> and Eleventh Circuits<sup>382</sup>

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making all reasonable inferences in the light most favorable to the nonmoving party"); Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, 542 F.3d 1204, 1209 (8th Cir. 2008) (reviewing district court's decision to grant summary judgment de novo); Missouri v. Dep't of the Interior, 297 F.3d 745, 749 n.2 (8th Cir. 2002) (aligning with Sixth, Tenth, and D.C. Circuits in "establish[ing] the de novo standard of review generally applicable in summary judgment cases"). But see Johnston v. DOJ, No. 97-2173, 1998 WL 518529, at \*1 (8th Cir. Aug. 10, 1998) ("We review the district court's factual findings for clear error and its legal conclusions de novo.").

<sup>377</sup> See, e.g., Abdelfattah v. DHS, 488 F.3d 178, 182 (3d Cir. 2007) (detailing two-tiered standard of review applied in FOIA cases); Sheet Metal Workers Int'l Ass'n v. VA, 135 F.3d 891, 896 & n.3 (3d Cir. 1998) (describing "two-tiered test" while recognizing that review standard is not uniform among circuits); McDonnell v. United States, 4 F.3d 1227, 1241-42 (3d Cir. 1993) (pointing to "unique configuration" of summary judgment in FOIA cases as basis for rejecting "familiar standard of appellate review" for summary judgment cases).

<sup>378</sup> See Enviro Tech Int'l, Inc. v. EPA, 371 F.3d 370, 373-74 (7th Cir. 2004) (recognizing inconsistent application of standards of review among Circuits and within Seventh Circuit's own FOIA case law and reaffirming its use of two-tiered analysis); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1038 (7th Cir. 1998) ("[W]e continue to believe that the clearly erroneous standard remains appropriate in light of the unique circumstances presented by FOIA exemption cases."); Becker v. IRS, 34 F.3d 398, 402 (7th Cir. 1994) (explaining that whether withheld material fits within established standards of exemption reviewed is under two-pronged, deferential test).

<sup>379</sup> See Rein v. U.S. Patent & Trademark Off., 553 F.3d 353, 358 (4th Cir. 2009) ("The standard of review in FOIA cases is limited to determining 'whether (1) the district court had an adequate factual basis for the decision rendered and (2) whether upon this basis the decision reached is clearly erroneous,'" and "[l]egal errors are reviewed de novo") (citations omitted); United States v. Mitchell, No. 03-6938, 2002 WL 22999456, at \*1 (4th Cir. Dec. 23, 2004) (articulating standard of review in this case as "limited to determining whether the district court had an adequate factual basis for its decision and whether upon this basis the decision was clearly erroneous"). But see Hanson v. Agency for Int'l Dev., 372 F.3d 286, 290 (4th Cir. 2004) (stating that grant of summary judgment in FOIA action is issue of law, which is reviewed de novo); Heily v. Dep't of Commerce, 69 F. App'x 171, 173 (4th Cir. July 3, 2003) (per curiam) (same).

<sup>380</sup> See Shannahan v. IRS, 672 F.3d 1142, 1148 (9th Cir. 2012) (reviewing "'conclusions of fact . . . for clear error, while legal rulings, including [the district court's] decision that a particular exemption applies [and the adequacy of agency's Vaughn index], are reviewed de novo'" (quoting Lane v. Dep't of Interior, 523 F.3d 1128, 1135 (9th Cir. 2008))); Pickard v. DOJ, 653 F.3d 782, 785 (9th Cir. 2011); (stating that "[w]here the parties do not dispute the district court had an adequate factual basis for its decision and the decision turns on the district court's interpretation of the law, we review the district court's decision de novo");

generally distinguish between the district court's factual basis for its decision, which is reviewed under a clearly erroneous standard, and the district court's application of FOIA exemptions to approve withholding of documents, which is most often reviewed de novo. The end result has "caused some confusion" in the standard for appellate review for FOIA cases in these circuits,<sup>383</sup> because it is difficult to distinguish between the "clearly erroneous" review standard which applies to the "factual conclusions that place

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Yonemoto v. VA, 686 F.3d 681, 688 (9th Cir. 2012) (noting that it reviews de novo "whether adequate factual basis exists to support district court's decisions" and, if not, "remand[ing] for further development of the record," but if such basis does exist, reviewing district court's conclusions of fact for clear error and its legal rulings regarding applicability of exemptions de novo) (citations omitted); Ctr. for Biological Diversity v. Off. of the U.S. Trade Rep., 450 Fed App'x 605, 907 (9th Cir. 2011) (same); Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1149 (9th Cir. 2008) (same).

<sup>381</sup> See World Publ'g Co., 672 F.3d at 826 (reviewing "de novo district court's legal conclusion that requested records are exempt from disclosure under the FOIA," after noting that it can do so, "given undisputed facts"); Jordan v. DOJ, 668 F.3d 1188, 1192 (10th Cir. 2011) (stating that "the standard of review of a grant of summary judgment is de novo, if the district court's decision had an adequate factual basis" (quoting Audubon Soc'y v. U.S. Forest Serv., 104 F.3d 1201, 1203 (10th Cir. 1997))); Prison Legal News v. EOUSA, 628 F.3d 1243, 1247 (10th Cir. 2011) (same); Stewart v. Dep't of Interior, 554 F.3d 1236, 1241 (10th Cir. 2009) (reviewing de novo agency's decision to withhold records under the FOIA, noting that review was limited to the record before the agency); Casad v. HHS, 301 F.3d 1247, 1251 (10th Cir. 2002) (explaining that review is first "whether the district court had an adequate factual basis" for its decision, and then "de novo [of] the district court's legal conclusions that the requested materials are covered by the relevant FOIA exemptions"). But see Forest Guardians v. Dep't of Interior, 416 F.3d 1173, 1177 (10th Cir. 2005) (reviewing de novo district court's decision to grant summary judgment).

<sup>382</sup> See Miccosukee Tribe, 516 F.3d at 1243-44 (reviewing de novo district court's grant of summary judgment and, with regard to proper application of Exemption 5, determining whether district court had adequate factual basis and whether decision reached was clearly erroneous); News-Press v. DHS, 489 F.3d 1173, 1187-89 (11th Cir. 2007) (concluding that de novo standard of review applies where the facts are not in dispute and the only issue on appeal is whether agency properly applied Exemption 6); Office of the Capital Collateral Counsel v. DOJ, 331 F.3d 799, 802 (11th Cir. 2003) (applying the de novo standard of review because "issues in this appeal are limited to the legal application of [a] FOIA exemption"); cf. Sharkey v. FDA, 250 F. App'x 284, 287 (11th Cir. 2007) (declining to decide what standard of review applies where parties dispute the applicable standard and district court's opinion should be affirmed under either). But see Brown v. DOJ, 169 F. App'x 537, 539 (11th Cir. 2006) (stating that a "district court's determinations under the FOIA are reviewed for clear error").

<sup>383</sup> Schiffer v. FBI, 78 F.3d 1405, 1408 (9th Cir. 1996) ("Determining the appropriate standard of review to apply to summary judgment in FOIA cases . . . has caused some confusion because of the peculiar circumstances presented by such cases.").

a document within a stated exemption of FOIA"<sup>384</sup> and the de novo review standard that is used to determine "whether a document fits within one of FOIA's prescribed exemptions."<sup>385</sup> In sum, the case law on this point is not consistent among the various circuits, and conflicting decisions are not uncommon even within the same circuit.<sup>386</sup>

On another issue involving appeal considerations, the D.C. Circuit, in a case of first impression, ruled that the standard of review of a district court decision on that portion of the FOIA's expedited access provision, which authorizes expedited access "in cases in which the person requesting the records demonstrates a compelling need,"<sup>387</sup> is de novo.<sup>388</sup> The D.C. Circuit held that "[p]recisely because FOIA's terms apply nationwide," it would not accord deference to any particular agency's interpretation of this provision of the FOIA.<sup>389</sup> At the same time, however, the D.C. Circuit held that if an agency were to issue a rule consistent with the FOIA's statutory language that permits expedition "in other cases determined by the agency,"<sup>390</sup> that rule would be entitled to judicial deference.<sup>391</sup> In any event, once an agency has acted upon the underlying

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<sup>384</sup> Id. at 1409 (quoting Ethyl Corp., 25 F.3d at 1246).

<sup>385</sup> Id.

<sup>386</sup> See Enviro Tech Int'l, Inc., 371 F.3d at 374 (recognizing split amongst circuits as to appropriate standard of review in FOIA cases, and further noting inconsistencies within Seventh Circuit).

<sup>387</sup> [5 U.S.C. § 552\(a\)\(6\)\(E\)\(i\) \(2006 & Supp. IV 2010\)](#).

<sup>388</sup> Al-Fayed v. CIA, 254 F.3d 300, 305 (D.C. Cir. 2001) (deciding that "the logical conclusion is that de novo review is the proper standard for a district court to apply to a denial of expedition"); see Tripp v. DOD, 193 F. Supp. 2d 229, 241 (D.D.C. 2002) (same) (citing Al-Fayed).

<sup>389</sup> Al-Fayed, 254 F.3d at 307.

<sup>390</sup> Id. at 307 n.7 (citing to portion of subsection [5 U.S.C. § 552\(a\)\(6\)\(E\)\(i\)](#) that allows for expedition "in other cases determined by the agency").

<sup>391</sup> See id. at 307 n.7 ("A regulation promulgated in response to such an express delegation of authority to an individual agency is entitled to judicial deference . . . as is each agency's reasonable interpretation of its own regulations."). Contra ACLU of N. Cal. v. DOJ, No. 04-4447, 2005 U.S. Dist. LEXIS 3763, at\*22 (N.D. Cal. Mar. 11, 2005) (concluding that "in the absence of any controlling Ninth Circuit authority to the contrary, . . . judicial review of any denial of a request for expedited processing – whether the request is made pursuant to the 'compelling need provision' of subparagraph (E)(i)(I), or is made pursuant to 'other cases determined by the agency provision' of subparagraph (E)(i)(II) – must be conducted de novo").