ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5004

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.

On Appeal from the U.S. District Court
for the District of Columbia

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN, ELECTRONIC FRONTIER FOUNDATION, ELECTRONIC PRIVACY INFORMATION CENTER, OMB WATCH, OPENTHEGOVERNMENT.ORG, AND PROJECT ON GOVERNMENT OVERSIGHT (POGO) IN SUPPORT OF PLAINTIFF-APPELLANT

Julie A. Murray
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
jmurray@citizen.org

June 18, 2012

Attorneys for *Amici Curiae* Public Citizen, *et al.*

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Parties and *Amici*. All parties appearing before the district court and in this Court are listed in the Brief for Appellant. No amici appeared in the district court. Amici Public Citizen, Electronic Frontier Foundation, Electronic Privacy Information Center, OMB Watch, OpenTheGovernment.org, and the Project on Government Oversight (POGO) appear in this Court as *amici curiae* in support of the Plaintiff-Appellant.

Rulings Under Review. References to the rulings at issue appear in the Brief for Appellant.

Related Cases. This case has not previously come before this Court. Counsel for *amici curiae* are aware of no other related cases pending before this Court or any other court.

/s/ Julie A. Murray
Julie A. Murray

CORPORATE DISCLOSURE STATEMENT

Amici Public Citizen, Electronic Frontier Foundation, Electronic Privacy Information Center, OMB Watch, OpenTheGovernment.org, and the Project on Government Oversight (POGO) are non-profit organizations that have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public. The general purpose of the *amici* organizations is to advocate for the public interest on a range of issues, including openness in government. More detailed information about each organization is set forth in the addendum to the brief.

/s/ Julie A. Murray
Julie A. Murray

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Laws, and Regulations

* Authorities upon which we chiefly rely are marked with asterisks.

Legislative History

GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington
DOJ	Department of Justice
EFOIA	Electronic Freedom of Information Act Amendments of 1996
FEC	Federal Election Commission
FOIA	Freedom of Information Act

STATUTES AND REGULATIONS

The applicable statute, the Freedom of Information Act, 5 U.S.C. § 552, is contained in the Brief for Appellant.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under the Freedom of Information Act (FOIA), an agency must generally determine within twenty working days of receiving a FOIA request whether to comply with the request. It must then immediately notify the requester of that determination, the agency's reasons for the determination, and the requester's right to appeal to the agency an adverse determination. A requester who receives a timely FOIA determination denying a request, in whole or in part, must administratively appeal the decision before filing a FOIA lawsuit. In contrast, a requester who does not receive a timely determination need not pursue an administrative appeal before filing suit. Rather, to ensure an effective means of enforcement through judicial review, FOIA deems such a requester to have constructively exhausted his administrative remedies, thus permitting immediate recourse to the courts to challenge an agency's unlawful delay.

The issue in this case is what constitutes an adequate FOIA "determination" such that a FOIA requester who has not received such a determination from an agency within FOIA's time limits may file suit. In this case, more than twenty working days passed after Citizens for Responsibility and Ethics in Washington (CREW) submitted a FOIA request to the Federal Election Commission (FEC). At the time CREW filed suit, the FEC had not informed CREW whether it would grant or deny the FOIA request in full or in part. It had neither provided a basis for

any denial nor provided CREW with notice of a right to appeal an adverse determination. Nonetheless, the district court held that CREW had not exhausted its administrative remedies before filing suit because the FEC had told CREW (1) that it was processing CREW's FOIA request, and (2) that it would disclose some documents to CREW at an unspecified later date.

Amici submit this brief in support of CREW for two reasons. First, the district court's holding is at odds with the plain text and legislative history of multiple provisions of FOIA. As discussed in more detail below, Congress has repeatedly amended FOIA to combat widespread agency delay and has purposefully established a specific time period to ensure the timely processing of FOIA requests. The rule adopted by the district court upsets this carefully crafted scheme by excusing agencies from providing meaningful responses to FOIA requesters within the statute's time limits.

Second, adoption of the district court's rule would mark a sweeping change in FOIA practice, wreaking havoc in the FOIA requester community and in the courts. The district court's rule makes judicial review unlikely in all but the most egregious cases of agency delay and, as a consequence, opens the door to agency abuse. Moreover, although the district court's rule leaves open the possibility that a requester such as CREW could file suit if an agency does not produce records

"promptly," litigation over this undeveloped standard will burden the courts and further delay the FOIA process.

FOIA—as Congress intended—provides a bright line rule for meaningful determinations on FOIA requests. The district court's decision misconstrues this bright line rule. It also closes the courthouse doors to countless FOIA requesters, diminishing government transparency and agency accountability. The district court's decision should be reversed.

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are organizations that support government transparency, rely on FOIA to receive records necessary for their work, and have significant expertise in how FOIA works in practice. Some *amici* also routinely litigate FOIA cases on behalf of themselves or other requesters. Collectively, *amici* have broad knowledge about the history and function of FOIA.

Amici are particularly well qualified to assist the Court in understanding FOIA's exhaustion and other provisions, its legislative history, and the practical impact that the rule adopted by the district court would have on FOIA requesters

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

and the courts. More detailed information about each organization is set forth in the addendum. All parties have consented to the filing of this brief.

BACKGROUND

Under FOIA, an agency that receives 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.

5 U.S.C. § 552(a)(6)(A)(i) (hereinafter, the "determination provision"). A requester who receives an adverse determination from an agency within twenty days after submitting his request must file an administrative appeal of that decision before he can file suit in federal district court to challenge it. *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61-62 (D.C. Cir. 1990). However, a requester is "deemed to have exhausted his administrative remedies . . . if the agency fails to comply with [FOIA's twenty-day] applicable time limit provisions." 5 U.S.C. § 552(a)(6)(C)(i). Specifically, if an agency has not made a determination after FOIA's time limits expire, "any available administrative appeal—i.e., actual exhaustion—becomes permissive . . . ; the requester may pursue it, but his failure to do so does not bar a lawsuit." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987).

At the time that CREW filed this FOIA lawsuit against the FEC, FOIA's time limits had expired. *See* Joint Appendix (JA) 58-59. The FEC had not granted or denied CREW's request and had not provided CREW with notice of a right to an administrative appeal. All that the FEC had done was indicate that it was processing CREW's FOIA request and state that it would make rolling document disclosures at a later date. *Id*. at 58-59, 67. Only after CREW filed suit did the FEC provide CREW with a letter that denied CREW's FOIA request in part, explained the agency's decision to redact and withhold certain records under FOIA's substantive exemptions, and notified CREW of a right to administrative appeal. *Id.* at 59.

Nonetheless, the district court concluded that the FEC's communications with CREW before the lawsuit provided CREW with a satisfactory FOIA "determination" such that CREW could not file suit. It reasoned that "[i]n the event [an] agency intends to produce documents in response to [a] request, the agency need only (1) notify the requesting party within twenty days that the agency intends to comply; and (2) produce the documents 'promptly.'" *Id.* at 67 (referring to 5 U.S.C. §552(a)(6)(C)(i)). It determined that the FEC did so in this case, *id.*, even though the FEC had not determined whether to grant or deny CREW's request in full or in part, given reasons for its compliance or non-compliance, or provided notice of a right to appeal administratively an adverse determination.

The district court stated that its holding would not foreclose all judicial review of agency delay: Requesters will "still have immediate access to the courts in the event that the agency fails to (1) respond at all; or (2) merely indicates it is 'processing' [a] request, but does not indicate whether the agency will comply." *Id.* at 71. And it concluded that "adherence to . . . [5 U.S.C.] § 552(a)(6)(C)(i), which requires 'prompt' production of responsive documents if an agency intends to comply with [a] request, will guard against any abuse by responding agencies." *Id.*

The district court thus held that CREW had not exhausted its administrative remedies, granted summary judgment to the FEC, and dismissed the case. *Id.* at 73.

ARGUMENT

FOIA's text, legislative history, and structure all indicate that the FEC's response to CREW that it was processing CREW's FOIA request and would provide future rolling disclosures was not a "determination" that required an administrative appeal before CREW filed suit. For FOIA exhaustion purposes, an agency determination must (1) grant or deny a FOIA request in full or in part; (2) provide reasons for any denial, including reference to substantive FOIA exemptions that apply; and (3) provide notice of a right to appeal administratively an adverse determination.

I. The District Court's Decision Conflicts with the Plain Language of FOIA's Determination Provision.

The FEC's statements to CREW before CREW filed suit satisfy none of the three elements of FOIA's determination provision, 5 U.S.C. § 552(a)(6)(A)(i).

A. The FEC did not determine whether to comply with CREW's request before the lawsuit.

The FEC did not determine whether "to comply with [CREW's] request" before CREW filed suit, as required by § 552(a)(6)(A)(i). The FEC stated that it was "processing" CREW's request and would release documents on a rolling basis, JA 58-59, 67, a response that indicates that the agency intended to comply with its statutory obligations under FOIA to process requests and release non-exempt, responsive documents. But FOIA's requirement that an agency inform a requester whether it intends to comply with the request cannot mean simply that the agency tells the requester that it intends generally to follow the law. Rather, § 552(a)(6)(A)(i) requires the agency to inform the requester whether it will comply with *the request itself*—in other words, grant or deny the request, in whole or in part.

The FEC did not indicate before CREW filed suit whether it would comply with *the request itself*—that is, whether it would grant the request in full and release all records responsive to the request. And, in fact, after CREW filed suit, the FEC did not grant CREW's request in full; rather, it determined not to comply

with the request in part by redacting or withholding responsive documents under FOIA's substantive exemptions.

Agency regulations confirm that the decision of whether to comply with a request is a decision to grant or deny it, in whole or in part. Although the FEC's FOIA regulations do not define "determination," *see* 11 C.F.R. §§ 4.1-4.9, they suggest that a determination is a decision to grant or deny the request, not a decision merely to comply with FOIA. Specifically, the regulations provide that "[a]ny person *denied access* to records by the [FEC] shall be notified immediately giving reasons therefore, and notified of the right . . . to appeal such adverse determination . . . ." *Id.* § 4.7(h) (emphasis added). Similarly, some other agencies' regulations recognize that the FOIA "determination" required within FOIA's time limit is a determination to grant or deny a request in full or in part, and that an adverse determination must indicate the exemptions on which the agency relies to redact or withhold records. *See, e.g.*, 28 C.F.R. § 16.6 (Department of Justice); 31 C.F.R. § 1.5(h) (Department of Treasury); 12 C.F.R. §§ 1070.16(c), 1070.18(b) (Consumer Financial Protection Bureau).

B. The FEC did not give CREW "reasons" for a determination.

Since the FEC did not advise CREW whether it would grant or deny the request before CREW filed suit, it certainly did not explain to CREW the "reasons" for its determination, as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). Only *after* CREW filed suit did the FEC supply CREW with "a letter outlining redactions and documents withheld under various FOIA exemptions." JA 59. The district court identified no portion of the FEC's pre-lawsuit statements that explained the reasons for the agency's purported "determination"—nor could it, because the agency had not, in fact, made a determination on CREW's request.

C. The FEC did not advise CREW of a right to administrative appeal.

Before CREW filed suit, the FEC did not advise CREW of its "right . . . to appeal to the head of the agency any adverse determination." 5 U.S.C. § 552(a)(6)(A)(i). The district court excused this failure, stating that FOIA's determination provision only requires this information "*if* the determination [is] adverse." JA 66. But as noted above, after this suit was filed, the FEC denied CREW's request in part. In other words, once the FEC made a determination on CREW's FOIA request, that determination was, in part, adverse. The reason that the FEC had not made an adverse determination requiring notice of a right to

administrative appeal before CREW's lawsuit was not because the agency had made a positive determination, but because it had made no determination at all.

The FEC neither granted or denied CREW's request, nor provided CREW with "reasons" for a determination or notice of a right to appeal, before CREW filed suit. Thus, under the plain language of FOIA's determination provision, the FEC did not provide a "determination" that required CREW to exhaust its administrative remedies.

II. FOIA's Structure and Legislative History Make Clear That a "Determination" Includes a Decision To Grant or Deny a Request and Occurs After All Processing Is Complete.

The determination provision at issue in this case dates to 1974, when Congress substantially amended FOIA. *See* Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (hereinafter, the 1974 Amendments). The legislative history of the 1974 Amendments makes clear that Congress specifically contemplated that an agency would *complete* all FOIA processing, save perhaps the actual production of documents but including all search and review activities and the decision whether to grant or deny a request, within the time provided by the determination provision. More recent amendments to FOIA confirm that Congress intended for agencies to complete processing a FOIA request before making a "determination" on a request. The district court's

decision that the FEC provided an adequate response to CREW before CREW filed suit is at odds with this legislative history and FOIA's structure.

A. At its inception, FOIA failed to ensure timely disclosure of information to the public.

Congress enacted FOIA in 1966 to amend the public disclosure section of the Administrative Procedure Act, which was "generally recognized as falling far short of its disclosure goals." *EPA v. Mink*, 410 U.S. 73, 79 (1973). FOIA created a strong presumption in favor of public disclosure, designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks omitted).

Unlike the Administrative Procedure Act, FOIA created "a judicially enforceable public right to secure . . . information from possibly unwilling official hands." *Mink*, 410 U.S. at 80. FOIA thus provided at its inception, as it does today in substantially similar language, that "[u]pon complaint," a federal district court would "have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant." FOIA, Pub. L. No. 89-487, 80 Stat. 250, 251 (1966); *see also* 5 U.S.C. § 552(a)(4)(B) (current provision).

The original FOIA law left many questions about the FOIA process unanswered. It directed agencies, in accordance with procedural rules that they were to adopt, to respond to "request[s] for identifiable records" by "mak[ing] such records promptly available." FOIA, 80 Stat. at 251; *see also* 5 U.S.C. § 552(a)(3)(A) (current provision using similar language). It did not provide, however, a concrete time limit within which an agency must respond to a FOIA request. It did not indicate whether or when an individual whose request had never been answered could file suit to challenge unreasonable agency delay. And it did not address whether or how a FOIA requester could make an administrative appeal.

In the years leading to the 1974 Amendments, requesters experienced significant delays in the processing of requests. A 1972 report by the House Committee on Government Operations, based on numerous public hearings, chronicled problems in FOIA's administration. *See* H. Rep. No. 92-1419 (1972). It identified "bureaucratic delay in responding to an individual's request for information" as one of FOIA's "major problem areas," and noted that a response from major federal agencies took thirty-three days on average. *Id.* at 8. The same report noted that the news media, which had strongly supported FOIA's passage, used the statute infrequently because it had a "more urgent need for information . . . to meet news deadlines." *Id.* In short, the report concluded, the delays

"frequently ha[d] negated the basic purpose" of FOIA. *Id.* at 10; *see also id.* at 38-40 (citing witnesses who supported adding time limits to FOIA).

The 1972 House report also highlighted findings that some agencies had not "informed an individual of the precise exemption under [FOIA] being exercised to deny a requested record" or "advised individuals of the administrative right to appeal the denial." *Id.* at 10; *see also id.* at 22 (discussing administrative appeal right). It cited an American Bar Association statement urging agencies to adopt regulations that "establish specific time limitations for responding to requests" and "require that denials be supported with specific references to exemptions." *Id.* at 41-42; *see also id.* at 55 (relying on similar recommendations from the Administrative Conference of the United States).

In light of the shortcomings identified, the House Committee responsible for the comprehensive report urged numerous changes to FOIA. It concluded in part that Congress should add a new subsection "to provide that an agency shall grant or deny access to information within 10 working days of receipt of the request" and that "[t]his subsection . . . should provide that the failure of the agency to meet the 10-[day] . . . time limit shall constitute exhaustion of administrative remedies for purposes of litigation." *Id.* at 83. It also urged that agencies administratively "require that letters refusing access to public records notify the requestor of the

right to administrative appeal where it exists and cite the specific subsections of [FOIA] which are the basis for the initial refusal." *Id.* at 82.

B. FOIA's 1974 Amendments added the determination provision and others to ensure prompt disclosure and judicial review.

The problems identified by the 1972 House report, and again in hearings in 1973, played a prominent role in spurring congressional amendment proposals. *See, e.g.*, H. Rep. No. 93-876, at 4-5 (1974) (discussing 1972 report and underlying hearings); S. Rep. No. 93-854, at 3-4, 23 (1974) (discussing 1972 report and 1973 hearings). These congressional efforts culminated in the 1974 Amendments, which were adopted after conference and passed over the veto of President Ford.

The 1974 Amendments added a new subsection that included three key characteristics of today's FOIA process: (1) the requirement for a determination on a FOIA request within a set period of time, i.e., the determination provision, including notice of an agency's reasoning and, if adverse, notice of a right to appeal (subsection 552(a)(6)(A)); (2) a safety valve for agencies that, despite their best efforts, could not comply with FOIA's time limits due to unusual circumstances (subsection 552(a)(6)(B)); and (3) a provision for a requester's constructive exhaustion of administrative remedies to ensure rapid access to judicial review if the agency failed to comply with the time limits, with the possibility of a court-ordered stay in litigation for exceptional circumstances

(subsection 552(a)(6)(C)). The legislative history indicates that Congress intended for these provisions to work in tandem to ensure timely disclosure of information and prompt access to judicial review.

1. The determination provision, § 552(a)(6)(A)(i), was added to require an agency to grant or deny a request and to provide reasons for a denial, including the agency's reliance on any FOIA exemptions.

Congress responded most clearly to the issue of delay by adding the determination provision, which included a time limit within which an agency had to issue a determination. *See* 1974 Amendments, 88 Stat. at 1562. Unlike the then-existing, vague requirement that an agency had to disclose responsive records "promptly," now codified as amended at 5 U.S.C. § 552(a)(3)(A), the determination provision provided ten days for an agency to respond to a request. That time limit has since been extended to twenty days but, in all other respects, the determination provision added by the 1974 Amendments is identical to the current provision, codified at 5 U.S.C. § 552(a)(6)(A)(i).

As the Senate report makes clear, some agencies objected to the determination provision's ten-day limit as an "unworkable" deadline. *See* S. Rep. No. 93-854, at 26. President Ford did as well, citing the "simply unrealistic" time limit for "an agency to determine whether to furnish a requested document" as one of three reasons for his veto—eventually overcome by Congress—of the 1974 Amendments. *See* Veto Message from the President of the United States, Freedom

of Information Act (Nov. 18, 1974), *reprinted at* 120 Cong. Rec. 36,243, 36,243-44 (1974).

It is thus clear from the legislative history that the determination provision and its time limit were intended to and perceived to be meaningful, requiring more than just a *pro forma* statement saying, for example, that the agency intended to comply with the law and process the request. Rather, as the 1972 House report leading to the 1974 Amendments suggests, the determination provision was intended to require an agency to grant or deny a FOIA request within the time limits prescribed by Congress and to provide "reasons" for any denial, such as references to substantive exemptions on which an agency relies.

In this case, the FEC did not grant or deny CREW's request or provide any reasons for its eventual partial denial until after CREW filed suit. The district court's decision that the FEC nevertheless provided an adequate determination is thus at odds with Congress's purpose in enacting the determination provision.

2. The amendment adding an "unusual circumstances" extension to processing time further shows that processing must occur within FOIA's time limit.

In a subsection that immediately followed the determination provision, Congress added a "safety valve" for agencies that could not comply with FOIA's new time limits due to "unusual circumstances." 1974 Amendments, 88 Stat. at 1563. This addition permits a ten-day extension of the time limits for "unusual

circumstances." *See* H. Rep. No. 93-1380, at 11 (1974) (Conf. Rep.) (describing adoption of this provision).

> FOIA confines invocation of this provision to three limited situations:
>
> (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.

1974 Amendments, 88 Stat. at 1563 (emphasis added), *codified at* 5 U.S.C. § 552(a)(6)(B)(iii). In other words, the extension applies when certain activities—including the search for, collection of, and examination of records and consultation with other agencies or components—will take an unusually long time due to the nature of the request. The 1974 Amendments thus make clear that the time limit is inclusive of all of these activities; only when these activities are unusually difficult due to the nature of a request is a ten-day extension permitted. *See* S. Rep. No. 93-854, at 27 (describing role of similar "unusual circumstances" provision in Senate bill and noting that "routine intra-agency consultation . . . should occur within the basic time limits").

Under the district court's interpretation of the determination provision, however, an agency need only begin processing a FOIA request within the time limits (and intend to release some documents later); it need not complete that process. This interpretation conflicts with the language of the "unusual circumstances" provision and the legislative history surrounding it, which indicate that FOIA's time limits cover all search, collection, review, and consultation activities. Were the district court correct, there would have been no need for the "unusual circumstances" extension.

3. Amendments to FOIA's judicial review scheme were intended to provide rapid access to the courts and limit unauthorized extensions.

Congress also used the 1974 Amendments to clarify FOIA's judicial enforcement scheme in three important ways. First, Congress enacted parameters for an administrative appeal process, requiring that an agency notify requesters of their right to appeal administratively adverse determinations and make a determination on an administrative appeal within twenty working days after receipt. 1974 Amendments, 88 Stat. at 1562, *codified at* 5 U.S.C. § 552(a)(6)(A)(ii).

Second, Congress added the "constructive exhaustion" provision so that a requester who did not receive a timely determination on his initial request or on his administrative appeal could file suit in federal court. The Senate report explained

that this provision, which permits a lawsuit "even if the agency has not yet reached a determination whether to release the information requested," was needed because "an agency with records in hand should not be able to use interminable delays to avoid embarrassment, to delay the impact of disclosure, or to wear down and discourage the requester." S. Rep. No. 93-854, at 26.

Third, the 1974 Amendments provided that a court could stay proceedings in a FOIA lawsuit in "exceptional circumstances" to "allow [an] agency additional time to *complete its review of . . . records*," in the event that the agency failed to meet FOIA's time limits before the requester filed suit. 1974 Amendments, 88 Stat. at 1563 (emphasis added), *codified as amended at* 5 U.S.C. § 552(a)(6)(C)(i).[2] This provision authorizing an "exceptional circumstances" stay, today known as an *Open America* stay, applies when "the agency is clearly making a diligent, good-faith effort to complete its review of requested records but could not practically meet the time deadlines." S. Rep. No. 93-854, at 26; *see also Open Am. v.*

[2] The 1974 Amendments also added a sentence immediately following the exceptional circumstances provision stating that "[u]pon 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." 1974 Amendments, 88 Stat. at 1563, *codified at* 5 U.S.C. § 552(a)(6)(C)(i). The district court relied on this language as a safeguard against agency abuse, reasoning that under the obligation set forth in § 552(a)(6)(C)(i), requesters may still seek judicial review in cases of delay by asserting that an agency failed to produce records promptly. JA 71.

Watergate Special Prosecution Force, 547 F.2d 605, 610 n.11 (D.C. Cir. 1976) (discussing the legislative history of this provision).[3]

These clarifications to the judicial enforcement scheme demonstrate that FOIA was intended to provide a rapid route to judicial review, even in cases where requests cover voluminous records. They also demonstrate that Congress had a specific solution in mind—an "exceptional circumstances" stay in litigation—when an agency, despite diligent efforts, cannot complete its review of records within the statute's time limits. In contrast, the district court's decision stymies access to judicial review and robs the "exceptional circumstances" stay provision of much of its utility.

C. Subsequent FOIA amendments make plain that an agency must fully process a request to make an adequate FOIA "determination."

The 1974 Amendments, as described above, establish the key elements of FOIA's administrative and judicial review scheme. Subsequent amendments also make clear that agencies must do more within FOIA's statutory time limit than

[3] As discussed in the Brief of Appellant (p. 31), Congress amended this provision in 1996 to make clear, among other things, that exceptional circumstances do "not include a delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." *See* Electronic Freedom of Information Act Amendments of 1996 (EFOIA), Pub. L. No. 104-231, § 7(c), 110 Stat. 3048, 3051, *codified at* 5 U.S.C. § 552(a)(6)(C)(ii).

simply state that they are processing a request and intend to comply with the law by releasing some responsive documents in the future.

1. EFOIA's amendments indicate that the determination provision requires agencies to fully process requests within FOIA's time limit.

In 1996, Congress passed the Electronic Freedom of Information Act Amendments of 1996 (EFOIA) to address widespread agency non-compliance with the determination provision's time limit. *See* EFOIA, Pub. L. No. 104-231, § 2(b)(3), 110 Stat. 3048, 3048 (1996) (stating purpose of "ensur[ing] agency compliance with statutory time limits"); *see also* H. Rep. No. 104-795, at 23 (1996). Congress recognized, however, that agency delay was due, at least in part, to scarce agency resources. *See* H. Rep. No. 104-795, at 13; S. Rep. No. 104-272, at 15-16 (1996). In particular, both the House and Senate reports addressing EFOIA took note of a memorandum from then-Attorney General Janet Reno to federal agencies acknowledging large FOIA backlogs and stating that agencies frequently could not comply with the "ten-day time limit for processing requests." H. Rep. No. 104-795, at 13; S. Rep. No. 104-272, at 16. Attorney General Reno placed the blame for delay "principally" on "limited resources for the heavy [FOIA] workload." H. Rep. No. 104-795, at 13; *see also* S. Rep. No. 104-272, at 16.

Congress responded to these concerns over delay and limited agency resources by extending the base period of time within which agencies must respond to FOIA requests from ten days to twenty. *See* EFOIA § 8(b), *codified at* 5 U.S.C. § 552(a)(6)(A)(i). It also amended FOIA to encourage collaboration between agencies and FOIA requesters to facilitate processing. Under EFOIA, if an agency takes an "unusual circumstances" extension of ten days, it must notify the requester if the "request cannot *be processed* within th[at] time limit." EFOIA, § 7(b) (emphasis added), *codified at* 5 U.S.C. § 552(a)(6)(B)(ii). The agency then must give the requester "an opportunity to limit the scope of [a] request so that it may *be processed* within [FOIA's] time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request." *Id.* (emphasis added).

The district court's decision is at odds with these EFOIA provisions. As an initial matter, the provision extending the initial time limit for a determination from ten days to twenty makes no sense if FOIA's deadline merely requires agencies to begin processing requests and to express an intent to disclose some records in the future. As the memorandum from Attorney General Reno acknowledges, the ten-day time limit posed a problem for agencies because it provided a period for "processing requests," *see* H. Rep. No. 104-795, at 13; S. Rep. No. 104-272, at 16, not simply beginning to process requests.

Moreover, the language of 5 U.S.C. § 552(a)(6)(B)(ii), which requires agencies to provide requesters with an opportunity to narrow the scope of their request, makes clear that Congress expected in 1996, as it had in 1974, that an agency would complete all processing activities within the time period allotted for a determination. *See* H. Rep. No. 104-795 at 24 (stating that the "provision does not relieve an agency of the responsibility of making a diligent, good-faith effort to *complete its review of an initial request* within the statutory time frame" (emphasis added)); *see also id.* (stating that the provision could "alleviate some of the agency's burden in responding to a request that could not otherwise be processed within the statutory time limits"). Otherwise, it would make no sense to provide a requester with an opportunity to "limit the scope" of his request so that it could "be processed" within the time limit. 5 U.S.C. § 552(a)(6)(B)(ii).

2. The OPEN Government Act confirms that FOIA's determination provision encompasses the complete processing of a request.

In 2007, Congress again amended FOIA by passing the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. The legislation was triggered in large part by "lax FOIA enforcement," including "major delays encountered by FOIA requestors." S. Rep. No. 110-59, at 2 (2007) (accompanying an earlier version of the bill in the 110th Congress); *accord Bensman v. Nat'l Park Serv.*, 806 F. Supp. 2d 31, 37-38 (D.D.C. 2011).

This time around, instead of easing the determination deadline for agencies, as Congress had done in EFOIA, Congress sought to create a penalty for agencies that failed to comply with FOIA's time limits. As amended by the OPEN Government Act of 2007, FOIA now prohibits an agency from assessing search fees, and in some cases duplication fees, if the agency fails to make a determination on a FOIA request within the time limit, unless unusual or exceptional circumstances exist. *See* OPEN Government Act, § 6(b)(1)(A), *codified at* 5 U.S.C. § 552(a)(4)(A)(viii).

Since 2007, FOIA also limits the circumstances in which an agency can "toll" the statutory clock of twenty working days to respond to a FOIA request—a routine agency practice before 2007 that circumvented FOIA's time limits and contributed to requester delay. Under an early Senate draft of the 2007 legislation, agencies would have been precluded from "tolling" the statutory clock under any circumstances without the consent of the requester. The Department of Justice (DOJ) strongly opposed that proposal, citing "numerous occasions when an agency must stop its processing in order to get information from the requester." S. Rep. No. 110-59, at 18 (additional views of Sen. Kyl). It noted, for example, that "after a request is first received by an agency[,] the personnel responsible for processing it might determine that the request fails to reasonably describe the records that are being sought," and thus request clarification while tolling the time period. *Id.* at

19. Likewise, DOJ argued that "during the course of processing a request, [an] agency [might] determine that the search for responsive records w[ould] take longer than anticipated and so w[ould] cost more than the requester ha[d] agreed to pay." *Id.* DOJ indicated that, in this circumstance, "the agency routinely [went] back to the requester to see if the requester would like to narrow its request to reduce the fees owed, or to see if the requester w[ould] agree to pay the fees that [we]re anticipated." *Id.*

The final version of the OPEN Government Act recognized, as DOJ had argued, that tolling is appropriate in some circumstances, but it created statutory parameters for tolling. FOIA now provides that an agency can (1) "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," and (2) toll the statutory clock "if necessary to clarify with the requester issues regarding fee assessment." OPEN Government Act, § 6(a)(1), *codified at* 5 U.S.C. § 552(a)(6)(A). But "[i]n either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period." *Id.*

The district court's decision is at odds with both the fee-related penalty and tolling provisions of the OPEN Government Act. First, Congress enacted the financial penalty to deal with agencies' failure to comply with FOIA's time limits

by creating a strong disincentive for delay. By concluding that agencies need do very little within the time limits, the district court's decision substantially diminishes the effectiveness of the financial penalty that Congress intended as a tool to hasten processing.

Likewise, the tolling provision makes little sense under the district court's ruling. As DOJ recognized when Congress crafted the OPEN Government Act, grounds for tolling frequently arise only *after* an agency begins processing a request and often in conjunction with a statement by the agency that it will release documents. For example, an agency typically seeks more information about a request only once it starts processing the request, at which time elements of the request that are unclear become apparent. Similarly, an agency typically clarifies fee assessment issues after determining either that a requester does not qualify for a fee waiver or that the fees associated with a request are sufficiently high—because of search, review, or duplication costs—that the agency will require the requester to pay them upfront. In either case, the agency must have started processing the request, and it very likely will tell a requester that it intends to release some records, for a fee. Under the district court's decision, however, by the time an agency invokes one of the two grounds for tolling, it has very likely already made a "determination" on the FOIA request, rendering the tolling provision gratuitous.

In sum, the OPEN Government Act of 2007 confirms that FOIA requires agencies to complete processing a FOIA request before making a "determination" on a request. Accordingly, the FEC's response to CREW—that it was processing the request (but had not concluded) and that it would release some documents in the future—was not a determination. Because at that point CREW had not received an appealable determination, there were no administrative remedies to exhaust.

III. The District Court's Decision Would Work a Sweeping Change in FOIA Practice.

In addition to being at odds with FOIA's plain language and structure, the district court's rule, if adopted by this Court, would have a detrimental effect on FOIA requesters, the courts, and, ultimately, on the government transparency that FOIA seeks to promote.

First, the district court's rule—in practical terms—releases agencies from the requirement to provide a meaningful response to FOIA requesters within a set amount of time and will result in longer delays for requesters. Agencies now routinely, although not uniformly, acknowledge receipt of a FOIA request by providing a tracking number, *see* 5 U.S.C. § 552(a)(7)(A), and in requesters' experience, agencies often indicate at that time, without further elaboration, that they are "processing" the request. Agencies are also required to provide requesters

whose requests have been pending for more than ten days with "an estimated date on which the agency will complete action on the request." *Id.* § 552(a)(7)(B)(ii).

If an agency is complying with the law, it will generally satisfy the conditions of the district court's rule without providing useful information to requesters. The district court's rule thus enables agencies to do an end-run around FOIA's administrative time limits by providing, as a matter of course, a letter that says the agency is "processing" the request and some indication to a requester that the agency will release some responsive documents at a future time. An agency may then, long after FOIA's time limits expire, withhold or redact responsive documents, knowing that there is no possibility of judicial review in the interim unless the agency is deemed not to have provided responsive records "promptly." *Id.* § 552(a)(6)(C)(i); *see also* JA 71 (district court decision relying on this subsection to "guard against any abuse by responding agencies").

Second, the district court's rule creates a period of legal limbo for requesters, as evidenced by this very case. The district court concluded that the FEC provided an adequate "determination" to CREW before it filed suit, but at that time, the determination was not adverse. Under the FEC's own regulations, CREW had no recourse to administrative appeal at that point. *See* 11 C.F.R. § 4.8(a) (authorizing administrative appeal by any person whose request "has been denied, or who has received no response"). And even after CREW filed suit, the

FEC provided CREW with two letters accompanying document disclosures that purported "not [to] constitute a final agency decision" and that were thus "not subject to appeal." JA 59. At the same time, the district court held that CREW could not maintain its lawsuit without first exhausting its administrative remedies. Thus, under the district court's rule, requesters will simply have to wait until some indeterminate point when an agency fails to provide responsive documents "promptly," at which time they can file suit. *See id.* at 71.

Third, the district court's rule has sown confusion among the requester community, and if adopted by this Court, it will burden courts with litigation over exhaustion issues. *Amici* who litigate FOIA cases or advise requesters on FOIA-related issues are already struggling to determine whether requesters have constructively exhausted their remedies to file suit in the U.S. District Court for the District of Columbia. For example, *amici* do not know, and the district court's decision does not indicate, whether the rule adopted by the district court requires any particular extent of "processing," or whether minimal effort, such as an agency's assignment of a tracking number to a request, is sufficient, when coupled with an intent to disclose some documents in the future, to constitute a determination. Moreover, *amici* anticipate that the district court's rule will lead to extensive litigation over whether an agency has failed to make records "promptly available," 5 U.S.C. § 552(a)(6)(C)(i)—a standard that is not well developed in the

case law but on which the district court relied as a safeguard to ensure judicial review.

In these ways, the district court's rule upsets settled understandings of FOIA's constructive exhaustion requirement. Its adoption by this Court would create incentives for agencies to delay responding to requesters because requesters could not typically seek judicial review. Moreover, the rule would create confusion among requesters, who in turn will need to clarify the outer limits of the rule through litigation that will unnecessarily burden the courts.

CONCLUSION

The district court's decision granting summary judgment to the FEC on the ground that CREW failed to exhaust administrative remedies should be reversed.

June 18, 2012

Respectfully submitted,

/s/ Julie A. Murray

Julie A. Murray
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
jmurray@citizen.org

Attorneys for *Amici Curiae* Public Citizen, *et al.*

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 6,880.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on June 18, 2012, I caused the foregoing to be filed through the Court's ECF system, which will serve notice of the filing on the following registered counsel for the parties:

Anne L. Weismann
Citizens for Responsibility and Ethics in Washington
aweismann@citizensforethics.org

David Kolker
Federal Election Commission
dkolker@fec.gov

Anthony Herman
Federal Election Commission
aherman@fec.gov

/s/ Julie A. Murray
Julie A. Murray

ADDENDUM

The foregoing brief is submitted on behalf of the following organizations:

Public Citizen is a nonprofit advocacy organization founded in 1971, with approximately 250,000 members and supporters nationwide. Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues involving openness and integrity in government, the protection of consumers and workers, and public health and safety. Public Citizen promotes accountability in government by requesting public records and using them to provide the public with information about the activities and operations of the government. Through its Freedom of Information Clearinghouse, Public Citizen also provides technical and legal assistance to individuals, public interest groups, and media representatives who seek access to information held by government agencies.

The **Electronic Frontier Foundation** (EFF) is a not-for-profit membership organization with offices in San Francisco, California, and Washington, DC. EFF works to inform policymakers and the general public about civil liberties and privacy issues related to technology, and to act as a defender of those rights and liberties. In support of its mission, EFF frequently submits Freedom of Information Act (FOIA) requests to access and make publicly available government documents that reflect on, or relate to, governmental policies involving technology.

The **Electronic Privacy Information Center** (EPIC) is a public interest research organization, established in 1994, to focus public attention on emerging privacy and civil liberties issues. EPIC pursues an extensive FOIA docket across the federal government, makes agency records obtained widely available to the public over the Internet, and routinely litigates FOIA cases in federal district and appellate courts. EPIC Executive Director Marc Rotenberg and EPIC Open Government Project Director Ginger McCall are co-editors of "Litigation Under the Federal Open Government Laws," a 700-page guide to FOIA litigation, and teach a course on Open Government Law at Georgetown University Law Center.

OMB Watch is a nonprofit research and advocacy organization, dedicated to providing citizens and activists with the information, tools, and opportunities they need to participate in the policymaking that directly affects their lives and communities. The organization was formed in 1983 to lift the veil of secrecy shrouding the White House Office of Management and Budget (OMB), which was largely behind the scenes despite its enormous impact on agency operations. The organization's portfolio has expanded to address federal budget, taxation, and government performance; information and access; and regulatory policy. OMB Watch has often used FOIA to obtain data from federal agencies and has long advocated for policy changes to improve agency implementation of the law.

OpenTheGovernment.org is a coalition of consumer, good government and limited-government groups, environmentalists, journalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust through government accountability, and support our democratic principles. A key focus of the coalition is protecting and strengthening the Freedom of Information Act.

The **Project On Government Oversight (POGO)**, founded in 1981, is a nonpartisan, independent watchdog that champions good government reforms. POGO investigates corruption, misconduct, and conflicts of interest in the federal government, and in doing so it relies on the Freedom of Information Act. POGO has found that in many cases, the nondisclosure of government records has to do with hiding corruption, intentional wrongdoing, or gross mismanagement by the government or its contractors. POGO strongly believes that sunshine is the best disinfectant and that we must empower citizens with information and tools to hold their government accountable. In POGO's experience there are many problems with the FOIA process, including an overly inconsistent interpretation of the law and lengthy delays that result when agencies sluggishly process a FOIA request.