Standard of Review in FOIA Appeals and the Misuse of Summary Judgment

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INTRODUCTION

Imagine a reporter writing an exposé on the meat industry. He knows that the Food and Drug Administration (FDA) conducted an investigation of the city's biggest meat plant and wants to get his hands on the FDA's reports. Under the Freedom of Information Act[1] (FOIA) the public can access government records like FDA reports. Congress enacted FOIA to promote disclosure, but recognized that disclosure must be limited when it conflicts with interests such as national security, fair competition, or privacy. Congress gave agencies the right to withhold documents if they fall into any of FOIA's nine exemptions.[2] The FDA reports, for instance, might include information about how the meat plant runs its business. Disclosing these documents could lead to substantial competitive injury to the plant, and so FOIA's exemption four gives the FDA the right to withhold these documents.[3] The reporter could appeal this decision to the agency, and if that were unsuccessful, then to federal district court. The district court would review the agency's decision de novo. The district court would likely decide the case on summary judgment, as almost all FOIA cases are decided.[4]

Litigants in many FOIA cases do not dispute any facts, but rather question the legal interpretation of an exemption an agency seeks to use. Litigants in other FOIA cases, however, do have factual disputes, and district courts hastily decide these cases on summary judgment. This problem of district courts misusing summary judgment in FOIA cases impacts circuit courts' review of those cases on appeal.

The circuits are split over the appropriate standard of appellate review where a district court has decided a FOIA case on a motion for summary judgment. Several circuits maintain that the proper standard of review is de novo, which is typically used for reviewing summary

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1 5 USC § 552 (2000).

2 See 5 USC § 552(b)(1)–(9).

3 See 5 USC § 552(b)(4).

4 See *Flightsafety Services Corp v Department of Labor*, 326 F3d 607, 610 (5th Cir 2003).

judgment decisions. Other circuits use a two-tiered standard of review that first asks whether the district court made adequate factual findings and then reviews those factual findings for clear error.

The courts that use the two-tiered standard of review recognize that district courts often make factual findings at the summary judgment stage and treat FOIA summary judgment more like a minitrial than a time to determine whether there are genuine issues of material fact present. When material facts are in dispute, district courts deprive FOIA plaintiffs of their right to a trial when they make factual determinations at the summary judgment stage.[5] Rather than straying from the generally applicable standard, district courts should take note of the two-tiered standard of review that many circuits adopt and reexamine what has become their default practice of deciding FOIA cases at the summary judgment stage. Meanwhile, the de novo standard is the appropriate standard of review in any summary judgment decision,[6] and remains so in FOIA cases.

This Comment's objectives are twofold: to illustrate and analyze a circuit split that results from a misuse of summary judgment when there are issues of material fact present in FOIA cases, and to explore district courts' misuse of summary judgment. The Comment offers a similarly twofold solution to these problems. District court judges should not reflexively resolve FOIA cases at the summary judgment stage; instead they should look more carefully to see whether the case includes material issues of fact and conduct trials when such factual disputes exist. Once district courts consistently do this, it will become obvious that circuit courts should adopt the de novo standard of review for FOIA summary judgment cases.

Part I of this Comment explains the historical and practical dimensions of FOIA. Part II describes the circuit split over the appellate standard of review and analyzes the different rationales given for each standard. Part III describes the misuse of summary judgment in FOIA cases and examines why this is especially problematic in the FOIA context. Part IV clarifies the undercurrents of the split and offers tools for handling factual disputes at the district court level.

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5 See *Greenberg v FDA*, 803 F2d 1213, 1216 (DC Cir 1986) ("[B]ecause summary judgment is a drastic remedy, courts should grant it with caution so that no person will be deprived of his or her day in court to prove a disputed material factual issue.").

6 The de novo standard of review is proper when reviewing summary judgment decisions because a grant of a motion for summary judgment implies that no genuine issues of material fact exist. See, for example, *Eastman Kodak Co v Image Technical Services, Inc*, 504 US 451, 465 n 10 (1992) (noting that on summary judgment the court can examine the record de novo); *Pierce v Underwood*, 487 US 552, 558 (1988) (noting that questions of law are traditionally reviewed de novo). Appellate courts use de novo review for issues of law for a variety of practical reasons that are discussed in Part II.A.

I. HOW FOIA WORKS

Congress sought to promote disclosure when it enacted FOIA, but it realized that disclosure must have limits. These limits include several exemptions under which agencies can withhold documents. This Part discusses the background objective of disclosure and then provides a step-by-step guide to how FOIA works at different stages of a request.

A. FOIA's Goal of Disclosure

The Supreme Court first explicitly recognized the public's right to receive information in 1943 with *Martin v City of Struthers*,[7] in which the Court explained that the First Amendment's "freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it."[8] Prior to the enactment of FOIA, there was no comprehensive legislation designed to protect people's right to receive information. Under § 3 of the Administrative Procedure Act,[9] which governed the sharing of government information before FOIA, an agency could withhold information if secrecy was "in the public interest"[10] or for "good cause."[11] Government agencies often used § 3's loose wording to justify concealing information that would show agency misconduct.[12] As a result, in 1966 Congress passed the Freedom of Information Act[13] to ensure fuller access to government information.[14]

The main purpose of FOIA is to promote disclosure of government documents.[15] The Supreme Court has stated that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption

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7 319 US 141 (1943).

8 Id at 143, citing *Lovell v City of Griffin*, 303 US 444, 452 (1938). See also Herbert N. Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act* 12 (Greenwood 1999).

9 5 USC § 1002 (1946).

10 Id § 1002(1).

11 Id § 1002(2)(c).

12 See Foerstel, *Freedom of Information and the Right to Know* at 36 (cited in note 8).

13 Pub L No 89-487, 80 Stat 250 (1966), codified at 5 USC § 552 (2000).

14 See Clarifying and Protecting the Right of the Public to Information, HR Rep No 89-1497, 89th Cong, 2d Sess 1 (1966), reprinted in 1966 USCCAN 2418, 2418.

15 The Senate Report accompanying FOIA describes the purpose of the bill by quoting President James Madison: "Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives." Clarifying and Protecting the Right of the Public to Information, S Rep No 89-813, 89th Cong, 1st Sess 2–3 (1966). The House strived to create a "workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." HR Rep No 89-1497 at 2423 (cited in note 14).

and to hold the governors accountable to the governed."[16] In light of this purpose, the Court recognizes a presumption in favor of disclosure with the burden on the agency to justify nondisclosure.[17] Furthermore, the government must supply documents that fall under FOIA regardless of an applicant's ability to show need for the information because "need or interest is irrelevant" under the statute.[18]

The 1966 FOIA statute contained a variety of loopholes that allowed government agencies to avoid disclosure of many documents.[19] In 1974, Congress closed those loopholes and reasserted the primary goal of disclosure.[20] These amendments and those after 1974 reflect a strong congressional preference for openness, and a recognition that blind deference to government decisions to withhold information thwarts that openness.[21]

B. Step-by-Step in FOIA Litigation

Congress designed FOIA to ensure an open government and to counteract political and financial corruption.[22] Unfortunately, individuals can use disclosed information in order to gain commercial advantages over business rivals or the government, to avoid government regulations, or to attain advance warning of government plans. To prevent this abuse, Congress created nine exemptions that allow a federal agency to withhold particular documents in the face of FOIA requests,[23]

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16 *NLRB v Robbins Tire & Rubber Co*, 437 US 214, 242 (1978).

17 See *United States Department of Justice v Reporters Committee for Freedom of the Press*, 489 US 749, 755 (1989).

18 *Forsham v Califano*, 587 F2d 1128, 1134 (DC Cir 1978). See also *Robles v EPA*, 484 F2d 843, 847 (4th Cir 1973).

19 See Administration of the Freedom of Information Act, HR Rep No 92-1419, 92d Cong, 2d Sess 8 (1972) ("The efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy.").

20 See An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act, Pub L No 93-502, 88 Stat 1561–64 (1974), codified at 5 USC § 552 (2000).

21 In 1986, FOIA was again amended—this time to expand the protection for law enforcement information and create a new fee and fee waiver structure. In 1996, FOIA was amended once more, under the Electronic Freedom of Information Act Amendments.

22 See Richard J. Pierce, Jr., Sidney A. Shapiro, and Paul R. Verkuil, *Administrative Law and Process* 432 (Foundation 4th ed 2004).

23 See 5 USC § 552(b). Exemption one protects national defense and foreign policy secrets; exemption two protects records solely related to internal personnel rules; exemption three protects records that are otherwise exempt under statute; exemption four protects trade secrets, commercial information, and financial information; exemption five protects intra- and inter-agency memoranda; exemption six protects personnel and medical files when disclosure would constitute an invasion of privacy; exemption seven protects records compiled for law enforcement purposes; exemption eight protects records related to regulation or supervision of financial institutions; and, exemption nine protects geological data concerning wells. See id § 552(b)(1)–

even though FOIA strongly favors disclosure. Congress also recognized that certain records must be kept confidential to ensure the proper functioning of government and to protect individuals' personal privacy rights.[24] For example, the government needs to keep certain documents pertaining to military defense private for the better functioning of the armed forces. Similarly, an individual's right to privacy mandates protection of one's medical records from the public eye.[25]

Ultimately, it is the courts' duty to balance the need for public access to government information with these national interests and personal interests in privacy.[26] If an agency denies an individual's FOIA request and that request is again denied upon agency appeal, the requestor can take the matter to a federal district court to obtain the withheld records.[27] FOIA explicitly instructs the district court to review the agency's decision de novo when determining whether to grant the requestor access to the records.[28] The district court may choose to examine the agency records in camera.[29] Alternatively, the district court may demand from the government agency a *Vaughn* index, which explains in detail the reasons the agency withheld the documents at issue.[30] After a district court makes its final decision, the losing party may appeal that decision in a federal appellate court.

II. THE CIRCUIT SPLIT

The vast majority of FOIA cases that reach district courts are decided on a motion for summary judgment.[31] At the district court level,

(9). These exemptions are not mandatory, so if a document falls under one of these exemptions the agency may still choose to disclose it. See *Chrysler Corp v Brown*, 441 US 281, 293 (1979).

24 See *CIA v Sims*, 471 US 159, 166–67 (1985). This can be a difficult balance to maintain—in recognition of this fact, Congress suggested that "[s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S Rep No 89-813 at 3 (cited in note 15).

25 See 5 USC § 552(b)(6).

26 See *EPA v Mink*, 410 US 73, 79 (1973) ("Aggrieved citizens are given a speedy remedy in district court."). See also *Sims*, 471 US at 189 n 5 (Marshall concurring) (finding that congressional amendment of the statute after *Mink* had merely given courts more authority to engage in de novo balancing). Although courts ultimately decide these cases, the extent to which the executive branch has favored disclosure can affect how broadly or narrowly the courts read these exemptions.

27 See 5 USC § 552(a)(4)(B).

28 See id. There is an argument that this language refers to both appellate and district courts, which will be discussed later.

29 See 5 USC § 552(a)(4)(B).

30 A *Vaughn* index correlates each document an agency withholds with a FOIA exemption and the agency's justification for not disclosing the document. See *Vaughn v Rosen*, 484 F2d 820, 827–28 (DC Cir 1973).

31 See, for example, *Miscavige v IRS*, 2 F3d 366, 369 (11th Cir 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified.").

FOIA is clear that "the court shall review the matter de novo."[32] At the appellate court level, the circuits are split over what standard of review is appropriate in FOIA cases.

The appellate standard of review is important to the outcome of a case.[33] This Part explores the different standards of review the circuits use when evaluating district court summary judgment decisions in FOIA cases. It first discusses the circuits that review the matter de novo. Then it examines the circuits that use a two-tiered approach—which first looks at whether the district court made adequate factual findings, and then reviews those findings for clear error.

A. De Novo Review

De novo review is the strictest standard of review, in which the appellate court determines an issue "anew; afresh; a second time."[34] In other words, the appellate court reviews the matter fully and independently.[35] The Supreme Court has identified two purposes of de novo review: doctrinal coherence and economy of judicial administration.[36] De novo review helps achieve these goals because of the distinctions in the job descriptions of district and appellate court judges. District judges preside over fast-paced trials, where there are constant issues of fact and law that arise and logistical burdens that limit counsel's ability to provide the judge with supplemental legal research.[37] Appellate judges, on the other hand, are able to devote their time to legal issues, and parties can focus on the most pressing legal issues that are the subject of appeal.[38] Furthermore, appellate courts have multijudge panels that promote "reflective dialogue and collective judgment."[39]

The District of Columbia, Second, Sixth, Eighth, and Tenth circuits[40] all apply a de novo standard of review when evaluating FOIA

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32 5 USC § 552(a)(4)(B).

33 See, for example, *In re McLinn*, 739 F2d 1395, 1397 (9th Cir 1984) ("[I]f the question of law were reviewed under the deferential standard . . . which permits reversal only for clear error, then [we] would affirm; but, if [we] were to review the determination under an independent de novo standard, [we] would reverse."). See also Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Seattle U L Rev 11, 12 (1995) ("Other courts use standard of review to create an illusion of harmony between the appropriate result and the applicable law.").

34 *Black's Law Dictionary* 435 (West 6th ed 1990).

35 See *In re Asahi/America, Inc*, 68 F3d 442, 444 (Fed Cir 1995) ("[Q]uestions of law are subject to full and independent review (sometimes referred to as '*de novo*' or 'plenary' review).").

36 See *Salve Regina College v Russell*, 499 US 225, 231 (1991).

37 See id.

38 See id at 232.

39 Id.

40 See, for example, *Assassination Archives and Research Center v CIA*, 334 F3d 55, 57 (DC Cir 2003) ("We review the district court's grant of summary judgment *de novo*."); *Perlman v*

summary judgment decisions by the district courts.[41] Although most of these appellate courts do not explain their rationale for using plenary review, the following are some reasons that the courts have given. The most powerful explanation is that courts must review all types of summary judgment decisions de novo. There is also a statutory language justification, and legislative intent provides an additional rationale.

1. De novo review is proper for summary judgment.

Typically, when an appellate court reviews a summary judgment decision, the court uses the de novo standard because summary judgment, by its nature, implies there are no issues of fact in dispute—therefore only questions of law are decided on summary judgment. Under the Federal Rules of Civil Procedure, summary judgment is only granted when, viewing the record in the light most favorable to the nonmoving party, the court finds that there remains no "genuine issue as to any material fact."[42] Many courts using the de novo standard simply point to the fact that this standard is always the appropriate one for reviewing summary judgment decisions to explain why they do not defer to the district court.[43]

United States Department of Justice, 312 F3d 100, 104 (2d Cir 2002) ("We review an agency's decision to withhold records under FOIA *de novo*."); *Garstang v United States Department of Interior*, 297 F3d 745, 749 (8th Cir 2002) ("This court performs a *de novo* review of the grant of summary judgment in a FOIA case, applying the same standard as the district court."); *Rugiero v United States Department of Justice*, 257 F3d 534, 543 (6th Cir 2001) ("Similarly, this court reviews the propriety of a district court's grant of summary judgment in a FOIA proceeding de novo.").

The Tenth Circuit's standard of review first appears to be a construction of the two-tiered standard discussed below, but it is not. First, the appeals court looks at whether the district court had an adequate factual basis to make its decision, and once this is established, it reviews the district court's legal conclusions de novo rather than for clear error. See *Utah v United States Department of Interior*, 256 F3d 967, 969 (10th Cir 2001), quoting *Anderson v Department of Health and Human Services*, 907 F2d 936, 942 (10th Cir 1990) ("We 'review de novo the district court's legal conclusions that the requested materials are covered by the relevant FOIA exemptions' in cases where, as here, 'the district court has granted summary judgment in favor of the government.'").

41 When an appellate court reviews a FOIA case de novo, the court can review the same materials that the district court reviewed in coming to its decision. See, for example, *Perlman*, 312 F3d at 104 ("The district court reviewed the [report of investigation] *in camera*, and we have done so on appeal.").

42 FRCP 56(c).

43 See, for example, *Rugiero*, 257 F3d at 543 (explaining that, for summary judgment to be appropriate, there can be no issues of material fact); *Garstang*, 297 F3d at 749 n 2 ("Although the Service urged us in this appeal to establish a separate standard of review for FOIA cases, . . . [we have] established the *de novo* standard of review generally applicable in summary judgment cases."); *Miller v USDA*, 13 F3d 260, 262 (8th Cir 1993); *Petroleum Information Corp v United States Department of the Interior*, 976 F2d 1429, 1433 (DC Cir 1992) ("This circuit applies in FOIA cases the same standard of appellate review applicable generally to summary judgments.").

De novo review is appropriate for reviewing summary judgment decisions not only because of the Federal Rules of Civil Procedure, but also because of the underlying logic of de novo review. De novo review promotes doctrinal coherence and economy of judicial administration because appellate courts are designed to conduct deep analysis of legal questions. When district courts decide cases on summary judgment, they should be looking only at legal issues, and appellate courts are well suited to look at those same legal questions anew. In contrast, when district courts decide factual issues at trial, the appellate court is not in a position to judge those same facts for itself because it is more removed from the evidence and has not had the benefit of watching the trial unfold.

Although this reason may appear overly simplistic or self-evident, it is a powerful one that poses these questions to circuits not using the de novo standard: What are the facts in dispute? And, if there are genuine issues of material fact, why did the district court decide this case on summary judgment?[44] If there is a fact that is so in dispute that an appellate court would find that the district court clearly erred, then this is an obvious example of a case that ought to be decided at trial rather than on summary judgment. When an appellate court encounters a case with such genuine issues of material fact, it should remand the case to allow the district court to settle these issues.

2. Statutory language.

One appellate court points to the language of FOIA as the reason why it reviews FOIA cases de novo. The statute requires that "the court shall determine the matter de novo."[45] It may be unclear to which "court" the statute is referring. At least one appellate court discusses this as a reason for the circuits to adopt a de novo standard.[46] Other courts interpret this language as applying exclusively to the district court standard of review.[47]

Although the interpretation that the statutory mandate applies to all levels of the judiciary is plausible, it is unlikely that Congress intended the statute to be read in that way.[48] The preceding sentence in

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44 See, for example, *Miller*, 13 F3d at 264 (finding that a question of fact was presented as to the good faith of the agency and remanding for trial because the district court inappropriately decided the case on summary judgment).

45 5 USC § 552(a)(4)(B).

46 See *Halpern v FBI*, 181 F3d 279, 288 (2d Cir 1999) ("[A] pure *de novo* standard faithfully tracks the language of FOIA, which requires that the court shall determine the matter *de novo*.") (internal quotation marks omitted).

47 See, for example, *Lame v United States Department of Justice*, 767 F2d 66, 69 (3d Cir 1985).

48 The relevant portion of FOIA reads, "On complaint, the *district court* . . . has jurisdiction to enjoin the agency from withholding agency records . . . . In such a case *the court shall deter-*

the statute explicitly refers to the "district court" in discussing jurisdiction to enjoin agencies from withholding their records. Immediately after discussing the district court, the statute reads, "In such a case the court shall determine the matter de novo," linking up the two sentences so that the word "court" should be read to refer back to the district court in the previous sentence. The statutory language argument does not weigh in favor of de novo review, but Congress certainly has not called for a departure from this traditional standard of review for summary judgment decisions.

3. Legislative intent.

The Supreme Court has found that Congress's purpose when enacting FOIA was to promote disclosure.[49] The Second Circuit states that this purpose requires a de novo standard of review:

> In striking a balance between the incompatible notions of disclosure and privacy when it enacted FOIA in 1966, Congress established—in the absence of one of that law's clearly delineated exemptions—a general, firm philosophy of full agency disclosure, and provided de novo review by federal courts so that citizens and the press could obtain agency information wrongfully withheld. De novo review was deemed essential to prevent courts reviewing agency action from issuing a meaningless judicial imprimatur on agency discretion.[50]

De novo review at the district court level is certainly important to serving this legislative intent of promoting disclosure because the district court will only review agency decisions to withhold documents, meaning that deference to agency decisions will always weigh against disclosure. It is unclear, however, what the Second Circuit is referring to when it says that de novo review at the appellate level promotes disclosure. The appellate court would review both decisions holding in favor of disclosure and those allowing agencies to withhold documents.[51] Because the decision of the district court can be either to grant the requestor's summary judgment motion or the agency's summary judgment motion, de novo review on appeal does not make a definitive move towards disclosure. Legislative intent does not sup-

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mine the matter de novo, and may examine the contents of such agency records in camera." 5 USC § 552 (a)(4)(B) (emphasis added).

49 See *Department of the Air Force v Rose*, 425 US 352, 361 (1976) ("[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.").

50 *A. Michael's Piano, Inc v FTC*, 18 F3d 138, 141 (2d Cir 1994) (emphasis omitted).

51 See, for example, *Petroleum Information Corp*, 976 F2d at 1433.

port either de novo review or a two-tiered review because it does not always increase or decrease disclosure.

The Second Circuit might have perceived, accurately, that district courts usually find for the defendant and allow the agency to withhold the documents.[52] Therefore, a de novo standard at the appellate level may indeed provide for more disclosure because the majority of cases appellate courts hear have not granted disclosure. But the Second Circuit does not come close to making this claim, which would essentially condemn district courts for offering more deference than Congress has deemed appropriate. It is somewhere between presumptuous and absurd to think that Congress intended appellate courts to review district court FOIA decisions de novo because Congress suspected that district courts would favor agencies against Congress's wishes. Therefore, it remains unclear why the Second Circuit found the legislative intent to offer a reason supporting de novo review at the appellate level. Nevertheless, the legislative intent certainly does not rule out de novo review at the appellate level—it simply does not address the question. Although the statutory language and legislative intent do not indicate that de novo review is required at the appellate level, they do not indicate that the courts should depart from their norm of analyzing summary judgment decisions de novo. In the absence of some indication from Congress that the appellate courts should depart from their traditional standard of review, the courts should maintain de novo review for summary judgment decisions in FOIA litigation.

B. Two-Tiered Standard of Review

The circuits that adopt a two-tiered standard of review typically look first at the adequacy of factual findings at the district court level and then look at issues of fact for clear error. The first tier involves looking for adequate factual findings made by the district courts. This is a task all circuits complete, regardless of whether they use a strictly de novo standard of review or a two-tiered deferential standard.[53]

The second tier looks at issues of fact for clear error. The definition of "clear error" is, itself, unclear, but the case law yields certain general principles. "The foremost of these principles . . . is that '[a] finding is "clearly erroneous" when although there is evidence to sup-

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52 See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 Wm & Mary L Rev 679, 713 (2002):

> This study revealed that, of the more than 3600 FOIA cases . . . decided in the district courts during the ten year period from 1990 to 1999, just over 10% were reversed. . . . District courts seem to affirm FOIA cases almost instinctively, and by so doing have produced a real world reversal rate that is closer to the hypothesized arbitrary and capricious standard.

53 See, for example, *Halpern*, 181 F3d at 294–95.

port it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"[54]

How would this two-tiered review play out with the reporter and the meat plant? First, the court would evaluate whether the district court made adequate factual findings. If the district court looked at the FDA report in camera or even required a *Vaughn* index of what was in the report, the district court would likely have satisfied this first tier. The appellate court then would review the factual findings for clear error. The appellate court would look at the same documents the district court examined—the report, affidavits, etc.—and determine whether the district court clearly erred in denying disclosure because of the potential for substantial competitive injury to the meat plant. If the court determined there was no clear error, the appellate court would affirm the district court's decision, and the reporter would not be allowed to see the documents.

There are many policy justifications for granting deference to a lower tribunal's decisions on issues of fact, such as finality, reduction of court congestion, maintaining the morale of trial court judges, and maintaining public confidence in their decisions.[55] Furthermore, district courts are in a better position to make findings because they are present throughout a trial and see matters firsthand.[56]

The Third, Fourth, Seventh, and Ninth circuits all have some version of the two-tiered standard of review that recognizes deference to the district court decision.[57] Among the circuits that have adopted a

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54 *Anderson v City of Bessemer City*, 470 US 564, 573 (1985), quoting *United States v United States Gypsum Co*, 333 US 364, 395 (1948). See also *Inwood Laboratories, Inc v Ives Laboratories, Inc*, 456 US 844, 855 (1982) (stating that if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it under the clearly erroneous standard).

55 See Kunsch, 18 Seattle U L Rev at 19–21 (cited in note 33).

56 Id at 20. See also Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 Notre Dame L Rev 645, 651–52 (1988). Cooper summarizes the reasons for a strict standard of review, including: (1) reducing the number of appeals taken, easing appellate burdens, and helping the parties; (2) enhancing the quality of district court findings by increasing trial court prestige and attracting more qualified people to the bench; and (3) forcing parties to focus their cases on the trial court stage because appeal will not present them with a significant chance to win. Id.

57 The Third Circuit has a basic two-tiered construction, first looking for adequacy of factual findings, then reviewing factual findings for clear error, while maintaining plenary review for issues of law. See *Sheet Metal Workers International Association v United States Department of Veterans Affairs*, 135 F3d 891, 896 (3d Cir 1998), citing *McDonnell v United States*, 4 F3d 1227, 1242 (3d Cir 1993). The Third Circuit discusses the determination of whether a document falls into a FOIA exemption as an issue that is typically factual, which differentiates this standard from other circuits that view this decision as a legal determination. Id.

The Fourth Circuit has been somewhat inconsistent in its standard of review. In *United States v Mitchell*, 2003 US App LEXIS 26218 (4th Cir), it used a standard construction of the two-tiered approach, inquiring "whether the district court had an adequate factual basis for its decision and

two-tiered standard of review, there are several different constructions of the standard. A common construction looks first for adequacy of factual findings by the district court, then reviews issues of fact for clear error, while still reviewing issues of law de novo.[58] An alternative involves looking for adequacy of factual findings, then reviewing the entire decision for clear error.[59] Other courts do not note the adequacy of factual findings prong, and merely review issues of fact for clear error and issues of law de novo.[60] The common feature in all of these approaches is some application of the clear error standard of review to issues of fact.[61]

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whether upon this basis the decision was clearly erroneous." Id at *1. In *Heily v United States Department of Commerce*, 69 Fed Appx 171 (4th Cir 2003) (unpublished opinion), though, the Fourth Circuit used a de novo standard of review. Id at 173.

For the Seventh and Ninth circuits' versions of the two-tiered standard of review, see, for example, *Solar Sources, Inc v United States*, 142 F3d 1033, 1038 (7th Cir 1998) ("We review a district court's determination on summary judgment with respect to a FOIA request by determining whether the district court had an adequate factual basis to make its decision and, if so, whether its decision was clearly erroneous."); *Schiffer v FBI*, 78 F3d 1405, 1409 (9th Cir 1996), quoting *Church of Scientology v United States Department of the Army*, 611 F2d 738, 742 (9th Cir 1979) ("[W]e first 'determine whether the district judge had an adequate factual basis for his or her decision.' If so, we will overturn the district court's factual findings underlying its decision only if they are clearly erroneous.").

The First Circuit has been inconsistent in its standard of review for FOIA appeals. Initially the First Circuit used the de novo standard because "[i]n summary judgment there can be no review of factual issues, because Rule 56(c) bars the district court from resolving any disputed factual issues at the summary judgment stage." *New England Apple Council v Donovan*, 725 F2d 139, 141 n 2 (1st Cir 1984). The First Circuit brought this rationale into question in *Irons v FBI*, 811 F2d 681 (1st Cir 1987), when it said, "Where the conclusions of the trial court depend on its election among conflicting facts or its choice of which competing inferences to draw from undisputed basic facts, appellate courts should defer to such fact-intensive findings, absent clear error." Id at 684. But the *Irons* court went on to say that the issues in that case were ones of law, as evidenced by the fact that they were determined on a grant of partial summary judgment. Id. In *Aronson v HUD*, 822 F2d 182 (1st Cir 1987), the court again said that it would "apply the same standard as the district court." Id at 188.

The Fifth Circuit recognized the potential use of a standard other than de novo review in *Avondale Industries, Inc v NLRB*, 90 F3d 955, 958 (5th Cir 1996), quoting *Halloran v Veterans Administration*, 874 F2d 315, 320 (5th Cir 1989) ("In *Halloran* . . . we reviewed *de novo* a grant of summary judgment that was based, 'not upon the unique facts of [the] case, but upon categorical rules regarding what does and does not constitute an invasion of privacy for FOIA purposes.'"). In *Flightsafety Services Corp v Department of Labor*, 326 F3d 607 (5th Cir 2003), the Fifth Circuit recognized the circuit split but chose not to take a firm stand on one side or the other because "[o]ur conclusion here remains the same whether the district court's judgment is reviewed *de novo* or for clear error." Id at 610–11 n 2.

58 See, for example, *Shors v Treasury Inspector General for Tax Administration*, 68 Fed Appx 99, 99–100 (9th Cir 2003).

59 See, for example, *Frazee v United States Forest Service*, 97 F3d 367, 370 (9th Cir 1996); *Becker v IRS*, 34 F3d 398, 402 (7th Cir 1994); *Miscavige, Miscavige v IRS*, 2 F3d 366, 367–68 (11th Cir 1993).

60 See, for example, *Office of the Capital Collateral Counsel v Department of Justice*, 331 F3d 799, 802 (11th Cir 2003).

61 One of the ambiguities of the two-tiered standard of review is in what constitutes a "factual finding" that ought to be reviewed for clear error. Some courts treat the decision that a

Appellate courts offer various rationales for choosing this clear error standard of review, including: (1) the "unique nature" of FOIA cases, in that one side does not have full access to the relevant information and that there are simply very few factual disputes in FOIA cases; (2) the practical constraints of conducting de novo review; and (3) the lack of necessity to do so. And there also may be an alternative reason why courts may adopt this standard that they do not articulate.

1. The "unique nature" of FOIA cases.

a) Plaintiff-requestor's lack of access to documents. FOIA appeals usually involve review of an order that is designated as a grant of summary judgment, but some courts note that "by reason of the 'peculiarity' of the procedures under FOIA, in reality we are dealing with a hybrid summary judgment."[62] Summary judgment in FOIA cases takes on this "unique configuration" because the requesting party often does not have access to the factual information upon which the moving party relies.[63] In a typical case the relevant facts are available to both parties, which allows for a thorough adversarial proceeding.[64] In an attempt to retain some of the benefits of an adversarial proceeding, the district court in a FOIA case can examine the documents in camera.[65] "Such an examination [ ] may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure."[66]

The courts that note this "unique nature" of FOIA litigation make an accurate observation, but fail to link that observation to their decision to use a two-tiered standard of review at the appellate level. There is a step missing between noting that the party that seeks disclosure does not have access to the materials necessary to be a fully capable advocate for his position and concluding that the appellate court should look at the adequacy of the factual findings and review facts for clear error.

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document fits into a particular exemption as a finding that should be reviewed for clear error. See, for example, *O'Kane v United States Customs Service*, 169 F3d 1308, 1309 (11th Cir 1999); *Solar Sources*, 142 F3d at 1039. Other courts look at more particular findings for clear error, like those a district court judge makes upon in camera review. See, for example, *Lame*, 767 F2d at 72. Other courts use the clear error standard to review such decisions as holding that documents were properly redacted. See, for example, *Becker*, 34 F3d at 405.

62 *Lame*, 767 F2d at 70.

63 See id at 69 ("[I]t is 'somewhat ironic that legislation intended to open up the workings of executive agencies incorporates a scheme of judicial review designed to be closed in large part not only to the public but to adverse parties.'"), quoting *Stein v Department of Justice*, 662 F2d 1245, 1252 (7th Cir 1981).

64 See *Lame*, 767 F2d at 70.

65 See id.

66 *Vaughn*, 484 F2d at 825.

One logical link between the plaintiff not seeing the documents and the two-tiered standard of review might lie in the fact that the role of the district court is particularly onerous in this situation. The district court must sometimes examine documents in camera, and appellate courts are not in a position to conduct the same thorough examinations. Appellate courts—this argument would hold—should therefore just review for clear error. The Seventh Circuit offers this as an explanation for why "the real responsibility for appraisal of the issue is with the district court, and review by the appellate court is correspondingly limited."[67] Under a de novo standard, the appellate court must make the same determination as the district court with respect to facts: whether there is a genuine issue of material fact present. Therefore, to save appellate courts the task of reviewing documents in camera with a fresh eye, the two-tiered standard requires only that appellate courts make sure that the district court made adequate factual findings, and then reviews those findings with strong deference to the lower court.[68] Although this system may alleviate some of the burden on the appellate court, it does not correct for the problem that one side does not get to see the documents at issue. Therefore, the unique nature of FOIA is not a sufficient reason to justify the two-tiered standard of review.

b) Undisputed facts. Some courts hold that there is no need to ask whether there is a genuine issue of material fact in FOIA cases, "because the facts are rarely in dispute."[69] Put another way, "[W]e do

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67 *Becker*, 34 F3d at 402 n 11.

68 The question of how much more deferential the two-tiered standard is depends in large part on what the courts view as questions of law versus questions of fact. As noted in Part II.A, the courts that employ de novo review see the determination of whether a document falls under an exemption as a question of law, while some of the two-tiered courts view this as a factual determination to be reviewed for clear error. This characterization makes the two-tiered standard much more deferential in those cases where the exemption is treated as a factual determination. Where the two-tiered courts view the issue as a question of law, however, the two standards of review are not as starkly different as they appear.

69 See *Minier v CIA*, 88 F3d 796, 800 (9th Cir 1996):

> Ordinarily, we review summary judgments *de novo*. In FOIA cases, because of their unique nature, we have adopted a two-step standard of review. Unlike the typical summary judgment analysis, in a FOIA case, we do not ask whether there is a genuine issue of material fact, because the facts are rarely in dispute.

But see *Klamath Water Users Protective Association v United States Department of the Interior*, 189 F3d 1034, 1036 (9th Cir 1999), affd 532 US 1 (2001) (justifying use of the two-step standard with reference to the "unique nature" of FOIA cases, but emphasizing the prevalence of disputes regarding findings of facts):

> Some of our cases have applied the clearly erroneous standard to review of a district court's final determination of whether a particular document is exempt under the FOIA.... [A]pplication of that standard is appropriate in the common FOIA case where the district court's findings of fact effectively determine the legal conclusion.

not ask whether there is a genuine issue of material fact because 'the document says whatever it says.'"[70] Because the facts are so rarely in dispute, it may be a waste of time for the appellate court to go through the process of again determining de novo whether there is a genuine issue of material fact.

There are, however, two problems with this argument. First, the frequency with which the facts are in dispute depends on what the court considers a factual finding. If the document's content is the only matter of fact, then there should indeed be very few factual disputes. However, some of the questions relevant to the determination of whether a document fits into a given FOIA exemption are issues of fact, like the question of whether a document will cause competitive injury.[71] Second, appellate courts always look to see if any genuine issues of material fact exist when deciding cases that district courts have handled on a motion for summary judgment. If the facts really are self-evident it will be easy for appellate courts to make this determination and there will be no reason to apply a two-tiered standard of review.

2. Practical constraints.

The structure of an appellate court may make it more difficult to review documents and *Vaughn* indexes at this level than at the district court level. *Summers v Department of Justice*[72] suggests that although it is onerous for a district court to look at documents in camera and review *Vaughn* indexes to determine whether they fall under a FOIA exemption, that task is "at least triply [onerous] for an appellate court."[73] The *Summers* court explained that although it is difficult for a district court judge to go through all the necessary materials, "for three judges to either simultaneously or seriatim acquire and peruse the same documents and then attempt a collegial decision is still more daunting. . . . '[T]he appellate court is particularly ill-equipped to con-

70 *Schiffer*, 78 F3d at 1409, quoting *Assembly of the State of California v United States Department of Commerce*, 968 F2d 916, 919 (9th Cir 1992).

71 See, for example, *GC Micro Corp v Defense Logistics Agency*, 33 F3d 1109, 1113 (9th Cir 1994) (evaluating whether there would be "substantial competitive injury" to a private business to determine if a document fell under a FOIA exemption).

72 140 F3d 1077 (DC Cir 1998).

73 Id at 1080. The court raised this issue when explaining why district courts must not give "generalized treatment" to an agency's claims regarding a document's exemption from FOIA. Id at 1081. Although the circuits that adopt the two-tiered deferential standard have not explicitly used this rationale, it remains a significant one that another circuit has noted as a counterargument to its de novo review. See *Halpern*, 181 F3d at 288 ("We are not unmindful of the institutional pressures that might make a more deferential standard of review seem appealing.").

duct its own investigation into the propriety of claims for nondisclosure.'"[74]

This rationale differs only slightly from the one discussed previously that emphasizes the "unique configuration" of FOIA cases. While the "unique configuration" argument revolves around how the lack of a full adversarial proceeding makes the role of the courts difficult, the instant rationale focuses on the sheer number of papers to consider. Both of these reasons are valid if the two tiers—examining whether adequate factual finding has been done and determining whether those facts are clearly erroneous—are easier for the appellate courts to complete than is examining whether there is a genuine issue of material fact present. It is unclear, however, whether the two-tier process is actually easier. Courts using both of these standards complete the same tasks of going through the documents in camera and reviewing the *Vaughn* indexes.[75] Some might argue that a court that is just reviewing for adequacy of factual findings and clear error does not have to go through these documents as carefully as a court reviewing de novo. Appellate courts with the de novo standard of review do not review issues of fact de novo, but rather determine whether there is a genuine issue of material fact present, so both standards of review require similar degrees of thoroughness. Therefore, practical necessity does not explain why courts are using the two-tiered review.

3. Lack of necessity.

Courts typically are deferential to agency decisions.[76] When Congress designed FOIA, however, it deliberately gave the district courts de novo review in order to meet the goal of fullest possible disclosure. Courts propose that de novo review by an appellate court may not be necessary to achieve this goal. Before the D.C. Circuit began using de novo review for FOIA appeals, it reviewed facts for clear error under *Mead Data Central, Inc v United States Department of the Air Force*.[77] The *Mead* court stated, "We are not reviewing the agency's decision or even the district court's approval of an agency decision. We are re-

74 *Summers*, 140 F3d at 1080, quoting *Van Bourg, Allen, Weinberg & Roger v NLRB*, 656 F2d 1356, 1358 (9th Cir 1981).

75 See, for example, *Lame*, 767 F2d at 71.

76 See generally *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984). The two-tiered approach imports a standard similar to the deference granted to agencies in *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402 (1971), where a court considers whether an agency's decision was based on a consideration of the relevant factors and whether there was a clear error of judgment. Id at 416. There is no basis for *Overton Park* deference in FOIA cases, where Congress has explicitly told district courts not to defer to agency decisions and has not instructed appellate courts to give any deference to district court decisions.

77 566 F2d 242 (DC Cir 1977).

viewing only the district court's independent and *de novo* decision."[78] The rationale that there is no need for appellate courts to use de novo review for an independent decision of the district court is strong and undoubtedly lies in the background of other cases adopting a clear error standard.

The fact that appellate courts are reviewing an independent de novo decision of the district court may explain why it is not *necessary* for these courts to conduct de novo review themselves to comply with FOIA and its purpose, but it does not explain why they *should not* do so. An added level of de novo review is a problem only if it presents some cost or causes some benefit to be foregone. Therefore, the lack of necessity for de novo review does not provide an adequate reason for departing from the traditional de novo review.

4. Alternative reasons why courts use two-tiered review.

Courts that use the two-tiered standard of review sometimes use the term "clear error" when they are affirming a lower court, but omit it when they reverse what the lower court has determined.[79] This fact illustrates how appellate judges use the clear error standard of review as a tool to deflect responsibility from themselves and place it on the district court for all decisions upon which the two agree. Alternatively, a court may use the clear error standard to "cert-proof" the case and leave little room for the Supreme Court to reverse. There are often tough calls regarding whether something is a finding of fact or a legal holding, so by framing decisions as pertaining to issues of fact that the appellate court merely reviews for clear error, the appellate court is able to take less responsibility in the eyes of everyone, including the Supreme Court.

III. EXPLAINING THE CIRCUIT SPLIT: THE MISUSE OF SUMMARY JUDGMENT IN FOIA CASES

The appellate courts split on the appropriate standard of review in FOIA cases because of an underlying problem at the district court level. Several circuits deviate from the typical de novo review of summary judgment decisions and use a two-tiered approach without offer-

78 Id at 251. The D.C. Circuit has switched from the two-tiered standard of review it used in this case to the de novo standard of review, but the rationale offered in this case remains sound.

79 See, for example, *Solar Sources*, 142 F3d at 1039–40 ("[T]he district court did not clearly err in finding . . . . We also do not believe that the district court erred by . . . ."); *Becker*, 34 F3d at 403, 405 (stating, when affirming the district court, that "[w]e conclude that [the district judge's] finding . . . was not clearly erroneous," but stating that "[w]e conclude that up to this stage the IRS has not met its burden of showing that the material redacted in this document is exempt" when reversing).

ing a sound explanation. The reason may lie in the fact that many district courts have adopted a default practice of deciding FOIA cases on summary judgment. By exploring this district court practice, this Part seeks to explain why circuit courts are split on the appropriate standard of review.

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which states that the "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact."[80] Summary judgment is appropriate when there are no facts "susceptible to divergent inferences bearing upon an issue critical to disposition of the case."[81] FOIA cases are almost always decided at the summary judgment stage of litigation, and this Part analyzes the reasons for, and the ramifications of, this practice.

In *Solar Sources, Inc v United States*,[82] the Seventh Circuit used the two-tiered standard of review after the district court granted the government's motion for summary judgment.[83] This case provides a helpful example of the misuse of summary judgment in FOIA cases and the subsequent irregularities it causes at the circuit court level. The Department of Justice's Antitrust Division was investigating a price fixing conspiracy. Plaintiffs, in a civil suit related to this conspiracy, filed a FOIA request to disclose certain documents related to the government's criminal antitrust investigation. The government withheld certain documents based on exemption seven, claiming disclosure would interfere with an ongoing investigation. The district court awarded summary judgment to the government because it found that "producing the requested documents to plaintiffs in this case reasonably could be expected to interfere with ongoing enforcement proceedings."[84]

The circuit court reviewed this decision to determine whether the district court had an adequate factual basis to make its decision and then whether the decision was clearly erroneous.[85] The plaintiff-appellants argued that disclosure of the withheld documents would not interfere with enforcement proceedings because the government had already obtained convictions and because disclosure would actually assist enforcement.[86] The district court had decided the issues that

80 FRCP 56(c).

81 *Alyeska Pipeline Service Co v EPA*, 856 F2d 309, 314 (DC Cir 1988).

82 142 F3d 1033 (7th Cir 1998).

83 See id at 1038.

84 Id at 1037.

85 See id at 1038.

86 See id at 1040.

involved factual determinations at the summary judgment stage, and the appellate court then reviewed these decisions for clear error, ultimately finding that the district court's determination that the documents fit into the exemption was not clearly erroneous. Along the way, the litigants may have been deprived of a full and fair trial.

This Part fleshes out why the *Solar Sources* problems occurred. Part III.A discusses the use of summary judgment in FOIA cases, Part III.B offers several explanations of courts' misuse of summary judgment in FOIA litigation, and Part III.C explores when issues of fact arise in FOIA cases.

A. Summary Judgment's Use in FOIA Cases

Courts resolve almost all FOIA cases at the summary judgment stage.[87] According to one circuit court, "Summary judgment is available to the defendant in a FOIA case when the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester."[88] A court can grant summary judgment in a FOIA case based solely on agency affidavits.[89] Courts give substantial weight to agency affidavits when they are specific, reasonably detailed, and describe the information at issue in a nonconclusory manner.[90] Furthermore, courts almost never allow discovery in FOIA cases.[91]

In *Greenberg v FDA*,[92] the D.C. Circuit offered commentary on the use of summary judgment in FOIA cases. The majority noted that "because summary judgment is a drastic remedy, courts should grant it with caution so that no person will be deprived of his or her day in court to prove a disputed material factual issue."[93] The dissent, however, quoted the Supreme Court's statement that summary judgment should not be treated as "a disfavored procedural shortcut" because it

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87 See *Wickwire Gavin, PC v United States Postal Service*, 356 F3d 588, 591 (4th Cir 2004) (noting that FOIA cases are generally resolved on summary judgment); *Cooper Cameron Corp v United States Department of Labor*, 280 F3d 539, 543 (5th Cir 2002) ("Summary judgment resolves most FOIA cases."); *Cappabianca v Commissioner, United States Customs Service*, 847 F Supp 1558, 1562 (MD Fla 1994) ("[O]nce documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment.").

88 *Miller v United States Department of State*, 779 F2d 1378, 1382 (8th Cir 1985).

89 See, for example, *Miscavige v IRS*, 2 F3d 366, 368 (11th Cir 1993).

90 See *Piper v United States Department of Justice*, 294 F Supp 2d 16, 20 (D DC 2003).

91 See *Heily v United States Department of Commerce*, 69 Fed Appx 171, 174 (4th Cir 2003) (unpublished opinion) ("It is well-established that discovery may be greatly restricted in FOIA cases."); *Wheeler v CIA*, 271 F Supp 2d 132, 139 (D DC 2003) ("Discovery is generally unavailable in FOIA actions.").

92 803 F2d 1213 (DC Cir 1986).

93 Id at 1216.

can be the principal tool "by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources."[94]

In *Washington Post Co v United States Department of State*,[95] the D.C. Circuit issued another illuminating decision regarding the use of summary judgment in FOIA litigation. The Washington Post had requested information regarding whether a doctor was a United States citizen while living in Iran as a prominent government figure. The Department of State denied the newspaper's request, invoking FOIA exemption six, which authorizes withholding "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[96] The majority held that summary judgment was inappropriate because material issues of fact persisted regarding the degree of danger to the Iranian man.

The court noted that "FOIA cases are not immune to summary-judgment requirements"[97] and continued, "This limitation on the use of summary judgment is not a mere technicality. The integrity of a [district] court's de novo judgment rests upon an adversarial system of testing for truth when critical adjudicative facts are subjects of a contest."[98] The majority held that summary judgment was inappropriate because there were material issues of fact present and the district court was supposed to examine those facts de novo rather than deferring to the agency. The court explained, "In FOIA cases, as in other litigation, discovery is an important tool for truth-testing."[99] The court found, therefore, that the Post and the State Department should be able to cross-examine witnesses, and present expert and nonexpert witnesses with knowledge on the state of affairs in Iran.[100]

The *Washington Post* dissent argued that the "facts" at issue in the case were nothing more than speculation on what might happen to a person "under wholly unknowable circumstances in the future."[101] Many "facts" in FOIA cases are just predictions. The majority decision in the *Washington Post* case is important because it holds that the predictions that are often at issue in FOIA cases are issues of fact that merit discovery and may warrant a trial. The "facts" in dispute in *Solar Sources* were also of this speculative sort, requiring consideration of

94 Id at 1220 (Bork dissenting), quoting *Celotex Corp v Catrett*, 477 US 317, 327 (1986).
95 840 F2d 26 (DC Cir 1988), vacd on other grounds, 898 F2d 793 (1990).
96 Id, quoting 5 USC § 552(b)(6).
97 *Washington Post*, 840 F2d at 29.
98 Id at 30–31.
99 Id at 38.
100 See Id at 39.
101 Id at 40 (Bork dissenting).

whether information could be expected to interfere with law enforcement proceedings. The *Solar Sources* district court may have decided the case on summary judgment because the facts in dispute were speculative.

Courts explain that they usually decide FOIA cases on summary judgment because "in FOIA cases there is rarely any factual dispute . . . only a legal dispute over how the law is to be applied to the documents at issue."[102] As a default practice, many district courts use summary judgment in FOIA litigation. This Comment questions that practice and considers whether this tendency deprives already disadvantaged litigants, who cannot see the documents they are requesting, of a full and fair trial on the merits of their case.

B. Possible Explanations for the Misuse of Summary Judgment

FOIA cases are different from most other litigation because the plaintiff-requestor cannot see the documents at issue. Courts may view this as a reason to decide FOIA cases on summary judgment. To the extent that summary judgment is the gatekeeper to prevent the high costs of litigation, it is appropriate in FOIA cases because this litigation may prove particularly expensive: keeping the crucial piece of evidence a secret from the plaintiffs may prolong the trial and make cross-examinations difficult.

Also, the factual disputes in FOIA cases often revolve around predictions as to whether harms may arise in the future, as opposed to looking backward to assess past harms. Judges may feel capable of making factual predictions without a trial, and some might even agree with the *Washington Post* dissent that factual predictions are not "issues of fact." But, as the majority in that case found, witnesses will often have a great deal to contribute in making factual predictions.

District and appellate courts all accept that FOIA cases generally are decided on summary judgment, which makes the misuse of summary judgment a self-perpetuating problem. District courts use summary judgment more and more as a general matter, so they may not question this status quo for FOIA cases.

Finally, there is a possibility that district courts do not treat FOIA claims as seriously as they should and are not conducting a thorough de novo review, as FOIA requires. FOIA presents an interesting scenario in which the party arguing against disclosure may not be the party who would suffer the harm if the documents were disclosed. For example, the meat plant that would suffer competitive injury would

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[102] *Gray v Southwest Airlines, Inc*, 33 Fed Appx 865, 868–69 n 1 (9th Cir 2002) (unpublished opinion) (Reinhardt dissenting), citing *Schiffer v FBI*, 78 F3d 1405, 1409 (9th Cir 1996).

not be a party to the litigation between the newspaper reporter and the FDA. It is possible that courts do not think FOIA cases warrant a trial because of this once-removed nature of the parties to the dispute.

C. Issues of Fact in FOIA Cases

District courts only misuse summary judgment if they decide disputed issues of fact at this stage. Courts encounter issues of fact in FOIA cases in a variety of contexts. Often, such issues arise when the parties dispute whether disclosure of documents would cause competitive harm or impact a person's privacy. In *Solar Sources*, the factual issue was whether documents would interfere with law enforcement proceedings. The hypothetical scenario of the reporter and the FDA reports on the meat plant offers an example of an issue of fact regarding competitive injury. Similarly, in *GC Micro Corp v Defense Logistics Agency*,[103] the district court granted summary judgment for the defendant agency that withheld documents under exemption four,[104] which allows an agency to withhold documents where disclosure would likely result in substantial competitive injury to private businesses.[105] The issue was whether there was potential for substantial competitive harm, and it involved balancing the public interest in favor of disclosure against the right of private businesses to protect sensitive information. The ultimate decision at to whether the competitive harm constitutes a "substantial competitive harm" is a decision of law, but there are determinations of fact that inevitably lead up to that legal decision. For example, what are the potential injuries? How serious an effect would they have on the business?

In *Sheet Metal Workers v United States Department of Veteran Affairs*,[106] the court had to weigh the privacy interests of employees in the nondisclosure of their names and addresses against the public interest of a union in obtaining this information.[107] The court should have made a factual finding determining the strength of the union's interest in the information. The union might have benefited from a trial in which it could put on witnesses to explore the public interest in obtaining these documents. But district courts usually rule on FOIA cases at the summary judgment stage even when facts are in dispute, which leads to confusion at the circuit court level.

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103 33 F3d 1109 (9th Cir 1994).
104 See id at 1110.
105 5 USC § 552(b)(4).
106 135 F3d 891 (3d Cir 1998).
107 See id at 894–95.

IV. SOLVING THE UNDERLYING PROBLEM OF SUMMARY JUDGMENT

The justifications supplied by those circuits that seek to explain their standards of review for FOIA appeals are weak. However, a review of these different rationales reveals a theme that FOIA litigation is different from most litigation and thus requires special protection from the courts.

There are certainly many FOIA cases that do not involve factual disputes, where the two sides only disagree about whether a certain exemption applies to the requested documents. These cases should be determined at the summary judgment stage in the district courts, and the appellate courts should review these decisions de novo. When there are factual disputes, though, it is important for the district court to make the relevant determinations at trial and for the appellate court to review those factual findings for clear error.

A. Solution: Changing the Default Practice

The current default practice of handling FOIA cases on summary judgment has many things to recommend it: summary judgment is faster for the litigants and the courts, and leaves more time for other cases. Trials impose added costs that may deter litigants from continuing their cases, particularly when the party making the FOIA request is an individual rather than a newspaper. However, due process requires that litigants receive a full and fair evaluation of the merits of their cases, which includes a trial if there are material facts in dispute. It makes sense that district courts are tempted to dispose of FOIA cases on summary judgment for two main reasons: (1) these trials may be more difficult than non-FOIA trials because of the sensitive nature of the materials at issue that the plaintiff cannot see during the trial; and (2) the facts involved are often speculative. Therefore, the district courts should develop a procedure that respects the secretive nature of the documents involved and accounts for this speculation.

The solution requires district courts to stop misusing summary judgment. In *Solar Sources*, the district court encountered predictive facts and chose to just look at the relevant documents in camera instead of holding a trial where the plaintiff requestor could have endeavored to show that the documents would not interfere with law enforcement. The misuse of summary judgment presents an array of problems that are particularly daunting in FOIA cases.

First, due process guarantees a trial to resolve disputed, material issues of fact.[108] In *Goldberg v Kelly*,[109] the Supreme Court noted that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[110] In FOIA cases, litigants may be inexperienced citizens seeking information, where the process of the court system is essential to protect the right to access information that Congress afforded them.

Trials also "give citizen-litigants a sense of investment in their own destiny, not a small consideration in a democratic republic such as ours."[111] In particular, FOIA trials offer citizens a sense of power with respect to an array of government agencies. The legislative goal of promoting a more open government means that courts must not deprive plaintiff litigants in FOIA cases of a fair trial.

Finally, trials balance the scales between plaintiffs and defendants better than summary judgment because summary judgment "typically favors repeat players . . . and more affluent defendants."[112] To the extent that summary judgment favors agency-defendants, this is in direct conflict with the legislative intent of FOIA favoring disclosure.

B. Tools for Adjudicating Factual Disputes in FOIA Cases

Although courts should not deprive FOIA plaintiffs of a full and fair trial, holding a trial in a FOIA case presents problems of its own. A workable solution must include guidance for the district courts in how to handle these trials. District courts may find FOIA trials to be cumbersome because one side cannot see the relevant documents and the facts in dispute are often predictive. If district courts find that the factual disputes cannot be resolved in a standard trial format, there are other tools that may aid courts in adjudicating FOIA cases.

Courts might, for example, consider using special masters in certain FOIA cases.[113] Rule 53(b) of the Federal Rules of Civil Procedure al-

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108 See Mollica, 84 Marq L Rev at 182 (cited in note 87).

109 397 US 254 (1970).

110 Id at 269.

111 Mollica, 84 Marq L Rev at 194 (cited in note 87).

112 Id.

113 Special masters can play a variety of roles in litigation:

> They serve as surrogate judge, facilitator, mediator, monitor, investigator and claims processor. . . . They rule on discovery motions, evaluate the testimony of scientific experts, issue subpoenas, rule on the admissibility of evidence, make recommended findings of fact, and propose remedial orders. . . . [T]hey may also take an activist role and use ad hoc informal procedures, such as information requests, interrogation of the parties, round table meetings, shuttle diplomacy, on-site fact gathering, telephone interviews, meetings with experts, com-

lows a trial court to refer complicated issues to a special master if a case features "exceptional conditions." Special masters might have expert knowledge in a subject area, which could aid courts in handling speculative issues of fact, such as whether there will be a competitive harm to a corporation. Special masters can also have the necessary security clearance to see documents that may be harmful to national security, as was the case in *In re United States Department of Defense*,[114] where a special master was appointed to aid in a FOIA case after a newspaper tried to obtain documents relating to efforts to rescue Iranian hostages.[115]

Critics of the use of special masters claim that using masters "produces inequities among litigants by fostering designer procedures that are tailored to the unique factors of individual cases, rather than the development of formal rules applicable to all disputes" and that it results in "an abdication of judicial responsibilities."[116] In FOIA litigation, special masters could actually help eliminate the inequities that currently exist because one party does not get to view the documents at issue. Tailoring to the factors of an individual case may be necessary when there are particularly sensitive or technical issues at play and the judge does not have the benefit of a full adversarial process. The special masters would also work with the judge so there would not be an abdication of judicial responsibilities.

In *La Buy v Howes Leather Co*,[117] the Supreme Court determined that calendar congestion, complexity of issues, and the possibility of a lengthy trial were not "exceptional conditions" that would warrant appointment of a special master.[118] Citing *La Buy*, the Third Circuit withdrew the appointment in a case of a special master who was to rule on nondispositive discovery motions, hear motions to dismiss and summary judgment motions, and report to the court the relevant facts and conclusions of law.[119]

In FOIA cases, however, the use of special masters should be permissible because the courts would not be using special masters simply to avoid complex issues and alleviate their workload. Rather courts might appoint special masters because the masters have par-

missioning studies—sometimes, engaging in activities one would be surprised to find a judge pursuing.

Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 Wid L Symp J 235, 237–38 (1997).

114 848 F2d 232 (1988).

115 Id at 233.

116 Farrell, 2 Wid L Symp J at 247–48 (cited in note 113).

117 352 US 249 (1957).

118 Id at 259.

119 *Prudential Insurance Co of America v United States Gypsum Co*, 991 F2d 1080, 1086 (3d Cir 1993).

ticular expertise in the relevant field, as well as the security clearance necessary to allay fears about the disclosure of private documents. Courts should consider using special masters to assist in certain FOIA cases when the documents at issue are particularly sensitive or the issues are scientific or require expert interpretation. If the courts handling FOIA cases limit the use of special masters in this way, special masters could be helpful and would be used in accordance with the Court's ruling in *La Buy*.

Courts might also consider a less formal process of hearings that could be scheduled on a case-by-case basis to suit the needs of the particular FOIA request. The discovery process could be tailored to the case at hand with the judge taking into account factors such as the secrecy of the documents and the factual issues in contention. The court then could call in special masters if necessary to aid the court when particularly complicated issues of fact arise.

Regardless of whether courts choose to carry out a full trial or to modify their trial practice to fit the needs of the FOIA litigants, courts should only use summary judgment when there really are no genuine issues of material fact in dispute. District courts should stop reflexively deciding FOIA cases on summary judgment—even though their inclination to use this practice is understandable given the unique nature of FOIA litigation. Of course, the problem of misusing summary judgment may well be pervasive across other areas of litigation. In FOIA cases, however, the summary judgment default practice is particularly dangerous because plaintiff requestors already have the disadvantage of not knowing the content of the documents they seek to access.

Once district courts stop misusing summary judgment in FOIA cases, the irregularities that currently exist at the circuit court level will dissipate. At present, the circuit courts see the district courts resolving issues of fact on summary judgment, and may instinctively think to review those facts for clear error. The circuit courts that adopt the two-tiered standard of review never acknowledge that they are adjusting because district courts are making a mistake in using summary judgment to resolve cases where there are factual disputes. But the reasons the circuit courts offer for adopting the two-tiered standard of review do not provide an explanation for departing from the norm.

Solving the problem of misuse of summary judgment at the district court level will clarify the standard of review question for appellate courts and thereby help resolve the circuit split. When the district court decides a case on summary judgment because there are no factual disputes, the appellate court will review the case de novo because the only questions that remain will be legal ones. When the district

court decides a FOIA case at trial because there are factual disputes, the appellate court will then review any factual matters for clear error.

CONCLUSION

The majority of FOIA cases are decided on summary judgment. Because the district courts designate this as summary judgment, these decisions signal that there are no genuine issues of material fact, and that de novo review is appropriate on appeal. Appellate courts that employ a two-tiered standard of review have astutely noted that the district courts often determine issues of fact when granting motions for summary judgment, as was the case in *Solar Sources*. When the district courts make these factual findings, then clear error may be the appropriate standard of review on appeal, but summary judgment was inappropriate in the first place. When there are genuine issues of material fact, the district court should make factual findings and determine the case after a trial—not on summary judgment.

The emergence of the two-tiered standard highlights a much broader concern: district courts must be wary of instinctively deciding FOIA cases on summary judgment when these cases involve factual disputes. These cases, like that of the reporter and the FDA's meat plant documents, should be determined at a trial. Therefore, although de novo is the proper appellate standard of review for cases decided on summary judgment, many FOIA cases should probably not be decided on summary judgment in the first place.