



Exemption 7(A)

Introduction

The first subpart of Exemption 7 of the Freedom of Information Act, Exemption 7(A), authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."¹ The Freedom of Information Reform Act of 1986, often referred to as the 1986 FOIA amendments, lessened the showing of harm required from a demonstration that release "would interfere with" to "could reasonably be expected to interfere with" enforcement proceedings.² The courts have recognized repeatedly that the change in the language for this exemption effectively broadened its protection.³

¹ 5 U.S.C. § 552(b)(7)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

² Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 10 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

³ See Robinson v. DOJ, No. 00-11182, slip op. at 8 n.5 (11th Cir. Mar. 15, 2001) (noting that 1986 FOIA amendments changed standard from "would" interfere to "could reasonably be expected to" interfere); Manna v. DOJ, 51 F.3d 1158, 1164 n.5 (3d Cir. 1995) (stating that Congress amended statute to "relax significantly the standard for demonstrating interference"); Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 311 n.18 (D.C. Cir. 1988) (treating lower court's reliance on pre-amendment version of Exemption 7(A) as irrelevant as it simply "required EPA to meet a higher standard than FOIA now demands"); Wright v. OSHA, 822 F.2d 642, 647 (7th Cir. 1987) (explaining that amended language creates broad protection); Curran v. DOJ, 813 F.2d 473, 474 n.1 (1st Cir. 1987) ("[T]he drift of the changes is to ease -- rather than to increase -- the government's burden in respect to Exemption 7(A)."); In Def. of Animals v. HHS, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at *9 (D.D.C. Sept. 28, 2001) (reiterating that
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or as preventative.¹³

Although Exemption 7(A) is temporal in nature, it nevertheless remains viable throughout the duration of long-term investigations.¹⁴ For example, in 1993 it was held applicable to the FBI's continuing investigation into the 1975 disappearance of Jimmy Hoffa.¹⁵ And in 2005, the continued use of Exemption 7(A) was held proper in the FBI's long-term investigation of the 1971 airplane hijacking by "D.B. Cooper," who parachuted out of that plane with a satchel of money.¹⁶ Indeed, even when an investigation is dormant, Exemption 7(A) has been held to be applicable because of the possibility that the investigation could lead to

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Ohio Mar. 9, 2007) (finding that "generalized statement that border investigations are 'ongoing,' simply does not satisfy the government's burden to demonstrate that the investigation is 'likely to lead' to an enforcement proceeding").

¹³ See, e.g., Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003) (determining that release of information at issue could allow terrorists to "more easily formulate or revise counter-efforts" and could be of "great use to al Qaeda in plotting future terrorist attacks"); Moorefield v. U.S. Secret Serv., 611 F.2d 1021, 1026 (5th Cir. 1980) (finding that material pertaining to "Secret Service investigations carried out pursuant to the Service's protective function" -- to prevent harm to protectees -- is eligible for Exemption 7(A) protection); cf. Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1322 (D. Utah 2003) (recognizing that use of dam inundation maps "could increase risk of an attack on the dams" by enabling terrorists to assess prospective damage) (Exemption 7(F) case).

¹⁴ See Antonelli v. U.S. Parole Comm'n, No. 93-0109, slip op. at 3-4 (D.D.C. Feb. 23, 1996) (reiterating that courts repeatedly find "lengthy, delayed or even dormant investigations" covered by Exemption 7(A)); Butler v. DOJ, No. 86-2255, 1994 WL 55621, at *24 (D.D.C. Feb. 3, 1994) (stating that agency "leads" were not stale simply because they were several years old given that indictee remained at large), appeal dismissed voluntarily, No. 94-5078 (D.C. Cir. Sept. 8, 1994); Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at *4 (S.D.N.Y. May 26, 1993) (finding that documents that would interfere with lengthy or delayed investigation fall within protective ambit of Exemption 7(A)); see also Davoudlarian v. DOJ, No. 93-1787, 1994 WL 423845, at *2-3 (4th Cir. Aug. 15, 1994) (unpublished table decision) (holding that records of open investigation of decade-old murder remained protectible).

¹⁵ Dickerson, 992 F.2d at 1432 (affirming district court's conclusion that FBI's investigation into 1975 disappearance of Jimmy Hoffa remained ongoing and therefore was still "prospective" law enforcement proceeding). But see Detroit Free Press v. DOJ, 174 F. Supp. 2d 597, 600 (E.D. Mich. 2001) (ordering in camera inspection of FBI's records of Hoffa disappearance investigation in light of "inordinate amount of time that [it] has remained an allegedly pending and active investigation").

¹⁶ Cook v. DOJ, No. 04-2542, 2005 WL 2237615, at *2 (W.D. Wash. Sept. 13, 2005) (stressing that "mere fact that this crime remains unsolved . . . do[es] not establish, or even raise a genuine issue of material fact, regarding the pendency of this investigation").

applicable have been interpreted broadly by the courts; such proceedings have been held to include not only criminal actions,²⁷ including those connected with national security,²⁸ but civil actions²⁹ and regulatory proceedings³⁰ as well. They include "cases in which the agency has the initiative in bringing an enforcement action and those . . . in which it must be prepared to

²⁷ See, e.g., Manna v. DOJ, 51 F.3d 1158, 1165 (3d Cir. 1995) (finding that criminal law enforcement proceedings involving La Cosa Nostra and its "long, sordid and bloody history of racketeer domination and exploitation" meets threshold); Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) (explaining that ongoing criminal investigation of organized crime activities including narcotics, gambling, stolen property, and loan sharking satisfies threshold), summary affirmance granted, No. 95-5388 (D.C. Cir. Jan. 24, 1997).

²⁸ See, e.g., Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 926 (D.C. Cir. 2003) (stating that law enforcement proceeding requirement is met by investigation into "breach of this nation's security"); Edmonds v. FBI, 272 F. Supp. 2d 35, 54-55 (D.D.C. 2003) (concluding that agency justified its withholding of records under Exemption 7(A) in case involving "national security issues").

²⁹ See, e.g., Manna, 51 F.3d at 1165 (stating that disclosure would interfere with contemplated civil proceedings); Judicial Watch v. Rossotti, 285 F. Supp. 2d 17, 29 (D.D.C. 2003) (concluding that "documents in question relate to an ongoing civil investigation by IRS and are exempt under Exemption 7(A)"); Bender v. Inspector Gen. NASA, No. 90-2059, slip op. at 1-2, 8 (N.D. Ohio May 24, 1990) (explaining that information relating to "official reprimand" was reasonably expected to interfere with government's proceeding to recover damages "currently pending" before same court).

³⁰ See, e.g., Env'tl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005) (stating that disclosure of records compiled as part of EPA's investigation into violations of its Toxic Substance Control Act "would prematurely reveal the EPA's case . . . in the administrative proceeding that is currently pending"); Graves v. EEOC, No. CV 02-6842, slip op. at 10 (C.D. Cal. Apr. 4, 2003) (finding employment dispute and pending EEOC charge sufficient to meet law enforcement standard), aff'd, 144 F. App'x 626 (9th Cir. 2005); Johnson v. DEA, No. 97-2231, 1998 U.S. Dist. LEXIS 9802, at *9 (D.D.C. June 25, 1998) (reiterating that "law being enforced may be . . . regulatory"); Rosenglick v. IRS, No. 97-747-18A, 1998 U.S. Dist. LEXIS 3920, at *6 (M.D. Fla. Mar. 10, 1998) (confirming that phrase "law enforcement purposes" includes "civil, criminal, and administrative statutes and regulations such as those promulgated and enforced by the IRS"); Farm Fresh, Inc. v. NLRB, No. 91-603-N, slip op. at 1, 7-9 (E.D. Va. Nov. 15, 1991) (holding that NLRB's unfair labor practice action constitutes law enforcement proceedings); Concrete Constr. Co. v. U.S. Dep't of Labor, No. 2-89-649, slip op. at 2-6 (S.D. Ohio Oct. 26, 1990) (ruling that agency's regulation and inspection of construction sites constitute enforcement proceedings); Fedders Corp. v. FTC, 494 F. Supp. 325, 327-28 (S.D.N.Y.) (concluding that FTC investigation into allegations of unfair advertising and offering of equipment warranties constitutes law enforcement proceedings), aff'd, 646 F.2d 560 (2d Cir. 1980) (unpublished table decision).

however, that both the First and the Fourth Circuits have approved a "miscellaneous" category of "other sundry items of information."⁵¹

Descriptions of Harm

The functional test set forth by the D.C. Circuit does not require a detailed showing that release of the records is likely to interfere with the law enforcement proceedings; it is sufficient for the agency to make a generalized showing that release of these particular kinds of documents would generally interfere with enforcement proceedings.⁵² Indeed, publicly revealing too many details about an ongoing investigation could jeopardize the government's ability to protect such information.⁵³

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nature of document and likely interference); cf. Inst. for Justice & Human Rights v. EOUSA, No. 96-1469, 1998 U.S. Dist. LEXIS 3709, at *14-15 (N.D. Cal. Mar. 18, 1998) (explaining that four categories -- confidential informant, agency reports, co-defendant extradition documents, and attorney work product -- are too general to be functional and ordering government to "recast" categories to show how documents in "new categories would interfere with the pending proceedings"); Putnam v. DOJ, 873 F. Supp. 705, 714 (D.D.C. 1995) (stating that agency "administrative inquiry file" is "patently inadequate" description); SafeCard Servs. v. SEC, No. 84-3073, slip op. at 6 n.3 (D.D.C. May 19, 1988) (holding that agency "file" is not sufficient generic category to justify withholding), aff'd in part, rev'd in part on other grounds & remanded, 926 F.2d 1197 (D.C. Cir. 1991); Pruitt Elec. Co. v. U.S. Dep't of Labor, 587 F. Supp. 893, 895-96 (N.D. Tex. 1984) (explaining that disclosure of reference material consulted by investigator that might aid an unspecified target in unspecified manner found not to cause interference).

⁵¹ Spannaus, 813 F.2d at 1287, 1289; Curran, 813 F.2d at 476 (finding that wide range of records made some degree of generality "understandable -- and probably essential").

⁵² See, e.g., Judicial Watch v. Rossotti, 285 F. Supp. 2d 17, 29-30 (D.D.C. 2003) (approving IRS's use of Exemption 7(A) to withhold names of specific employees because "[c]ollecting taxes is an unpopular job, to put it mildly, and IRS 'lower level' employees are entitled to some identity protection"); Kay, 976 F. Supp. at 39 (stating that agency "need not establish that witness intimidation is certain to occur, only that it is a possibility"); Pully v. IRS, 939 F. Supp. 429, 436 (E.D. Va. 1996) ("All that is required is an objective showing that interference could reasonably occur as the result of the documents' disclosure."); Wichlacz v. U.S. Dep't of Interior, 938 F. Supp. 325, 331 (E.D. Va. 1996) (holding that "particularized showing of interference is not required; rather, the government may justify nondisclosure in a generic fashion"), aff'd, 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision); Gould Inc. v. GSA, 688 F. Supp. 689, 703-04 n.34 (D.D.C. 1988) (describing functional test as steering "middle ground" between detail required by Vaughn Index and blanket withholding); Alyeska Pipeline Serv. v. EPA, No. 86-2176, 1987 WL 17081, at *2-3 (D.D.C. Sept. 9, 1987) (explaining that government need not "show that intimidation will certainly result," but that it must "show that the possibility of witness intimidation exists"), aff'd, 856 F.2d 309 (D.C. Cir. 1988).

⁵³ See Detroit Free Press v. DOJ, 174 F. Supp. 2d 597, 600-01 (E.D. Mich. 2001) (concluding that information published in newspaper -- including quotes from FBI Special Agent-in-Charge

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agency's ability to control or shape investigations,⁶⁰ would enable targets of investigations to elude detection⁶¹ or to suppress or fabricate evidence,⁶² or would prematurely reveal evidence

⁶⁰ See, e.g., Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996) (holding that release "could reveal much about the focus and scope" of investigation); J.P. Stevens & Co. v. Perry, 710 F.2d 136, 143 (4th Cir. 1983) (finding that premature disclosure would "hinder [agency's] ability to shape and control investigations"); EDUCAP, 2009 WL 416428, at *5 (finding that release would reveal scope and direction of investigation); Arizechi v. IRS, No. 06-5292, 2008 U.S. LEXIS 13753, at *15 (D.N.J. Feb. 25, 2008) (concluding that release could reveal "nature, scope, direction and limits" of investigation); Cal-Trim, Inc. v. IRS, No. 05-2408, slip op. at 6-8 (D. Ariz. Feb. 6, 2007) (finding that release of documents would reveal nature, direction, scope, and limits of tax investigation); Watkins Motor Lines, 2006 905518, at *6 (explaining that document release would give insight into progress, scope, and direction of investigation); Judicial Watch, 306 F. Supp. 2d at 75 (finding that release could reveal status of investigation and agency's assessment of evidence (citing Swan, 96 F.3d at 500)); Youngblood v. Comm'r, No. 2:99-cv-9253, 2000 U.S. Dist. LEXIS 5083, at *36 (C.D. Cal. Mar. 6, 2000) (holding that disclosure "could reveal the nature, scope, direction and limits" of investigation); Kay, 976 F. Supp. at 38-39 (discussing how release would reveal scope, direction, and nature of investigation); Concrete Constr. Co. v. U.S. Dep't of Labor, No. 2-89-649, slip op. at 3-4 (S.D. Ohio Oct. 26, 1990) (holding that disclosure of "projections for inspections and areas of concentration" would be detrimental to agency's enforcement objectives by enabling "company to do a cost/benefit analysis" to ascertain costs of noncompliance); Farmworkers Legal Servs. v. U.S. Dep't of Labor, 639 F. Supp. 1368, 1374 (E.D.N.C. 1986) (agreeing the disclosure of agency's "targeting scheme" would reveal agency resources for inspections).

⁶¹ See, e.g., Moorefield v. U.S. Secret Serv., 611 F.2d 1021, 1026 (5th Cir. 1980) (explaining that disclosure of requested information would enable targets "to elude the scrutiny of the [Secret] Service"); Azmy, 562 F. Supp 2d at 605 (stating that disclosure could enable targets to "conceal their activities").

⁶² See, e.g., Juarez v. DOJ, 518 F.3d 54, 58 (D.C. Cir. 2008) (finding that release "would compromise the investigation as it could lead to destruction of evidence"); Solar Sources, 142 F.3d at 1039 (stating that disclosure "could result in destruction of evidence"); EDUCAP, 2009 WL 416428, at *5 (upholding protection for "documents related to an ongoing investigation target because disclosure . . . could allow the target to destroy or alter evidence, fabricate fraudulent alibis, and intimidate witnesses" (quoting North v. Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989))); Mendoza v. DEA, No. 06-0591, 2006 WL 3734365, at *4 (D.D.C. Dec. 20, 2006) (reiterating that disclosure could assist fugitives and other targets to avoid apprehension and to develop false alibis), aff'd, No. 07-5006, 2007 U.S. App. LEXIS 22175, at *2 (D.C. Cir. Sept. 14, 2007); Watkins Motor Lines, 2006 WL 905518, at *8 (finding that "even if the Court disregards the allegation that Plaintiff may falsify or dispose of records, Defendants have made a sufficient showing of harm that could reasonably be expected to result from disclosure"); Lion Raisins, Inc. v. USDA, No. 05-0062, 2005 WL 2704879, at *7-8 (E.D. Cal. 2005) (agreeing that it is "unlikely that Lion will now try to extricate itself from these accusations of fraudulent fabrication by fabricating more documents directly under the nose of USDA," yet ruling that the documents nevertheless were properly withheld), aff'd, 231 F. App'x 563 (9th Cir. 2007); Alyeska Pipeline, 856 F.2d at 312 (ruling that disclosure could allow for destruction or alteration of evidence, fabrication of alibis, and identification of witnesses); Accuracy in
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circuit courts of appeals have approved the generic approach and the functional test for Exemption 7(A).⁷⁰

Notwithstanding the use of the generic approach to Exemption 7(A), the D.C. Circuit in 2000 ruled that the government must prove its case with respect to any other, underlying FOIA exemptions "at the same time," in the original court proceedings "in an Exemption 7(A) case in such a manner that the district court can rule on the issue."⁷¹ It then denied the defendant agency's motion to remand the case back to the district court once Exemption 7(A) became inapplicable.⁷²

This decision by the D.C. Circuit was a departure from its prior rulings,⁷³ as well as the prior rulings of the District Court for the District of Columbia and other circuit courts,⁷⁴ and did

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determination at the administrative level now that enforcement proceedings have ended").

⁷⁰ See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232-24, 236 (1978) (explaining that applicability of Exemption 7(A) may be made generically, based on categories); Lynch v. Dep't of the Treasury, No. 99-1697, 2000 WL 123236, at *2 (9th Cir. Jan. 28, 2000) (stating that specific factual showing is not necessary); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1038 (7th Cir. 1998) (reiterating that government may use generic categories); In re DOJ, 999 F.2d 1302, 1308 (8th Cir. 1993) (en banc) (approving use of categorical bases for nondisclosure), on remand sub nom. Crancer v. DOJ, No. 89-234, slip op. at 6 (E.D. Mo. Oct. 4, 1994) (magistrate's recommendation) (approving FBI's "generic" affidavit as sufficient), adopted, (E.D. Mo. Nov. 7, 1994); Spannaus v. DOJ, 813 F.2d 1285, 1288 (4th Cir. 1987) (stating that "Supreme Court has rejected . . . particularized showings of interference, holding instead that the Government may justify nondisclosure in a generic fashion"); Bevis v. Dep't of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (explaining that agency may take generic approach); Crooker v. ATF, 789 F.2d 64, 67 (D.C. Cir. 1986) (describing acceptable Robbins Tire category as "functional," allowing "court to trace a rational link between the nature of the document and the alleged interference"); Campbell v. HHS, 682 F.2d 256, 265 (D.C. Cir. 1982) (stating that categories are permitted); see also Gould Inc. v. GSA, 688 F. Supp. 689, 703-04 n.34 (D.D.C. 1988) (approving use of "functional test set forth in Bevis and Crooker"); cf. DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776-80 (1989) (holding that FOIA exemption determinations sometimes may be made "categorically" (citing Robbins Tire, 437 U.S. at 214)).

⁷¹ Maydak v. DOJ, 218 F.3d 760, 765 (D.C. Cir. 2000).

⁷² See id. at 769.

⁷³ See Computer Prof'ls, 72 F.3d at 906-07 (permitting application of exemptions other than Exemption 7(A) when underlying circumstances changed); Senate of P.R., 823 F.2d at 589 (approving district court's exercise of its discretion in remanding to agency for agency "to press additional FOIA exemptions" after Exemption 7(A)'s circumstances changed).

⁷⁴ See, e.g., Dickerson, 992 F.2d at 1430 n.4 (explaining that if Exemption 7(A) has become inapplicable, records may still be protected by other exemptions); Chilivis, 673 F.2d at 1208 (finding that government was not barred from invoking other exemptions after reliance on (continued...))

not permit any accommodation based on the temporal nature of the exemption.⁷⁵ The D.C. Circuit in Maydak ruled that the nature of the burden of proof under Exemption 7(A) does not relieve an agency from having to prove its case with respect to other, underlying exemptions in the original district court proceedings.⁷⁶ Indeed, the court declared that "nothing" in existing case law "should be construed as supporting the proposition that, when the government withdraws its reliance on Exemption 7(A) after the district court has reached a final decision and an appeal has been filed, the appropriate course of action is necessarily remand to the agency for reprocessing of the FOIA request in question."⁷⁷ Further, the court added that "merely stating that 'for example' an exemption might apply is inadequate to raise a FOIA exemption," even when underlying a temporal one such as Exemption 7(A).⁷⁸

Prior to the Maydak decision, when agencies found themselves in litigation in which "changed circumstances" (i.e., the end of underlying law enforcement proceedings) had placed into question the continuing viability of Exemption 7(A), they either voluntarily "reprocessed" the requested records using all other appropriate exemptions or were ordered to do so by the

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Exemption 7(A) was rendered untenable by changed circumstances); Curcio, No. 89-0941, slip op. at 4-6 (D.D.C. Mar. 24, 1995) (permitting agency to invoke new exemptions when Exemption 7(A) became no longer applicable); see also Bevis, 801 F.2d at 1390 (remanding to permit agency to "reformulate its generic categories in accordance with the Crooker requirement"); Crooker, 789 F.2d at 66-67 (explaining that agency's affidavit did not adequately establish applicability of Exemption 7(A), and remanding so that agency could "make a presentation"); Campbell v. HHS, 682 F.2d 256, 265 (D.C. Cir. 1982) (finding agency affidavits insufficient; remanding for agency to demonstrate how release of information "would interfere with the investigation").

⁷⁵ See Maydak, 218 F.3d at 766 (disagreeing with government's view that once "Exemption 7(A) is inapplicable, then the government should be allowed to start back at the beginning" -- by declaring that Exemption 7(A) is not "so unique" and should not be "singled out for preferential treatment"); see also FOIA Post, "Supreme Court Declines to Review Waiver Case" (posted 8/7/01) (discussing temporal nature of Exemption 7(A)).

⁷⁶ See Maydak, 218 F.3d at 765-66.

⁷⁷ Id. at 767; cf. Jefferson v. DOJ, 284 F.3d 172, 179 (D.C. Cir. 2002) (following Maydak and ruling that agency may not raise Exemption 6 for first time on remand after ruling that only exemption raised by agency, Exemption 7(C), did not cover all potential records within scope of request because "mixed function agency" investigates violation of law as well as breaches of professional standards and it made no showing of nature of records); Smith v. DOJ, 251 F.3d 1047, 1050 (D.C. Cir. 2001) (holding -- in situation in which government initially relied on Exemption 3 only, subsequently "changed its position," and then requested remand to raise other exemptions -- that government "must assert all exemptions at the same time, in the original district court proceedings" (quoting Maydak, 218 F.3d at 764)).

⁷⁸ Maydak, 218 F.3d at 767 (citing Ryan v. DOJ, 617 F.2d 781, 792 n.38a (D.C. Cir. 1980)).

court.⁷⁹ Now, however, whenever invoking Exemption 7(A) in litigation, agencies have chosen to seek and receive permission from the district court to invoke Exemption 7(A) alone (thereby reserving all other potentially invocable exemptions)⁸⁰ or have invoked Exemption 7(A) together with all other, underlying, exemptions in their initial Vaughn declarations.⁸¹ Indeed, in a case that attempted a third approach by describing "the exemptions being invoked solely on an in camera, ex parte basis," the District Court for the District of Columbia, relying on Maydak, ruled that "[t]his Circuit requires a defendant agency to 'genuinely assert' the exemptions upon which it plans to rely after Exemption 7(A) no longer is available to withhold information," and added that it could "find[] no precedent to permit a defendant agency to name and rely on the exemptions being invoked solely on an in camera, ex parte basis."⁸² (With any of these approaches, however, it is important to note that an agency is not bound by the exemptions it relied on at the administrative stage, as courts have routinely held that the need to raise all applicable exemptions only arises once the request goes to litigation.⁸³)

⁷⁹ See, e.g., Computer Prof'ls, 72 F.3d at 906-07 (permitting use of exemptions other than Exemption 7(A) when investigation was terminated during course of FOIA litigation); Dickerson, 992 F.2d at 1430 n.4 (explaining that when Exemption 7(A) has become inapplicable, records may be processed using other FOIA exemptions); Senate of P.R., 823 F.2d at 589 (finding that district court properly permitted DOJ to raise underlying FOIA exemptions once Exemption 7(A) ceased to apply); Chilivis, 673 F.2d at 1208 (holding government may invoke other exemptions after Exemption 7(A) was rendered untenable by conclusion of underlying law enforcement proceeding).

⁸⁰ See Senate of P.R., 823 F.2d at 589 (holding that "district court did not abuse its discretion in permitting [the agency] to press additional FOIA exemptions after its original, all-encompassing (7)(A) exemption claim became moot"); FOIA Post, "Supreme Court Declines to Review Waiver Case" (8/7/01) (advising of practical implications of, and response to, Maydak upon its issuance).

⁸¹ See, e.g., Lawyers' Comm. for Civil Rights v. U.S. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at *8 (N.D. Cal. Sept. 30, 2008) (discussing agency's use of eight exemptions while also relying on "Exemptions 7(A) and 7(F)"); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at *1 (D.D.C. Mar. 9, 2007) (noting agency maintained that all responsive materials were properly withheld under Exemption 7(A), but advanced other exemptions to avoid waiving them); Ayyad v. DOJ, No. 00 Civ. 960, 2002 U.S. Dist. LEXIS 6925, at *4 n.2 (S.D.N.Y. Apr. 18, 2002) (noting that agency invoked exemptions in addition to Exemption 7(A) "because of Maydak").

⁸² Haddam v. FBI, No. 01-434, slip op. at 26-27 (D.D.C. Sept. 8, 2004).

⁸³ See, e.g., Ford v. West, No. 97-1342, 1998 WL 317561, at *1 (10th Cir. June 12, 1998) (adjudicating exemption not raised at administrative level and raised for first time in litigation); Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992) (stating that "agency does not waive FOIA exemptions by not raising them during the administrative process"); Pohlman, Inc. v. SBA, No. 4:03CV01241, slip op. at 26 (E.D. Mo. Sept. 30, 2005) (agreeing that agency is "not precluded from relying on Exemption 3 simply because [it was not raised] at the administrative level"); Leforce & McCombs v. HHS, No. 04-176, slip op. at 13 (E.D. Okla. Feb. 3, 2005) (emphasizing that even if agency had "failed to invoke the attorney-client privilege

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In United We Stand America v. IRS, the request concerned a document that the IRS prepared at the direction of a congressional committee and which the agency maintained was not an "agency record" subject to the FOIA.⁹⁷ The agency stated to the district court that "[s]hould the Court determine that the documents in question constitute agency records for purposes of the FOIA . . . the defendant reserves the right, pursuant to the statute, to assert any applicable exemption claim(s), prior to disclosure, and to litigate further any such exemption claims."⁹⁸ The D.C. Circuit concluded that "only those portions of the IRS response that would reveal the congressional request are not subject to FOIA," and it then specifically remanded "with instructions" for the agency "to release any segregable portions that are not otherwise protected by one of FOIA's nine exemptions."⁹⁹

The District Court for the District of Columbia in Summers v. DOJ, stated that Maydak "provides that the government is required to raise all claimed exemptions at the district court proceedings, but does not hold that all exemptions must be raised at the same time"¹⁰⁰ – whereas Maydak in fact had stated that "[w]e have plainly and repeatedly told the government that, as a general rule, it must assert all exemptions at the same time."¹⁰¹ By this recasting of Maydak the Court allowed the agency in Summers to "substitute" exemptions when the underlying factual circumstances changed during the course of the litigation.¹⁰²

In 2007 the D.C. Circuit in Sussman v. U.S. Marshals Service addressed a situation in which Exemption 7(A) was not raised initially, but was asserted in the "subsequent opposition to [plaintiff's] motion for reconsideration."¹⁰³ The Court held that it "found no case in this circuit that definitively confirms or rejects the power of the government to avoid waiver by invoking a FOIA exemption for the first time in a motion for -- or opposition to -- reconsideration."¹⁰⁴ The Court added that "logic underlying our cases in this area suggests that invocation even at that late stage is proper, at least where the district court chooses to entertain the new

⁹⁷ 359 F.3d at 597.

⁹⁸ Id. at 598 (quoting government's brief).

⁹⁹ Compare United We Stand Am., 359 F.3d at 597, 605 (remanding case to release segregable portions of agency records commingled in file with congressional records not subject to FOIA), with Maydak, 218 F.3d at 765 ("We have said explicitly in the past that merely stating that 'for example' an exemption might apply is inadequate to raise a FOIA exemption." (citing Ryan v. DOJ, 617 F.2d 781, 792 n.38a (D.C. Cir. 1980))).

¹⁰⁰ Summers, No. 98-1837, slip. op. at 7 (D.D.C. Apr. 13, 2004).

¹⁰¹ Maydak, 218 F.3d at 764 (citing Wash. Post v. HHS, 795 F.2d 205, 208 (D.C. Cir. 1986)).

¹⁰² Summers, No. 98-1837, slip op. at 7-8 (D.D.C. Apr. 13, 2004) (discussing agency's "failure to claim the correct exemption" and consequences of disclosure of information by stating that "law does not require that third parties pay for the Government's mistakes" (quoting August, 328 F.3d at 701)).

¹⁰³ 494 F.3d at 1118.

¹⁰⁴ Id. at 1119.

argument."¹⁰⁵ The Court then remanded the case "to the district court for consideration of the merits" of Exemptions 6, 7(A), and 7(C).¹⁰⁶

Time Frame for Determining Exemption 7(A) Applicability

Finally, as to the "timing" of the applicability of Exemption 7(A), prior to Maydak v. DOJ,¹⁰⁷ courts could judge the applicability of Exemption 7(A) as of the time that the agency made its determination.¹⁰⁸ In 2007, however, the Court of Appeals for the District of Columbia Circuit held that the "relevant proceedings must be pending or reasonably anticipated at the time of the district court's eventual decision, not merely at the time of [the] original FOIA request, in order to support redaction under Exemption 7(A)."¹⁰⁹ Applying this ruling in 2008, the District Court for the District of Columbia held that any assessment of law enforcement proceedings must be made "as of the time of the submission of [the] renewed motion for summary judgment."¹¹⁰

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ 218 F. 3d 760 (D.C. Cir. 2000).

¹⁰⁸ See Tellier v. EOUSA, No. 96-5323, 1997 WL 362497, at *1 (D.C. Cir. May 15, 1997) (per curiam) (finding a law enforcement proceeding pending at time of request; affirming withholding of documents because "[t]o require an agency to adjust or modify its FOIA responses on post-response occurrences could create an endless cycle of . . . reprocessing" (quoting Bonner v. U.S. Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991))); Goodman v. U.S. Dep't of Labor, No. CV-01-515-ST, 2001 U.S. Dist. LEXIS 22748, at *9 (D. Or. Dec. 12, 2001) ("The determination as to whether a release of records could reasonably be expected to interfere with enforcement proceedings is to be made as of the time the agency decided to withhold the documents." (citing Bonner v. U.S. Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991))) (magistrate's recommendation), adopted, (D. Or. Jan. 14, 2002); Gomez v. U.S. Att'y, No. 93-2530, 1996 U.S. Dist. LEXIS 6439, at *2 (D.D.C. May 13, 1996) (reasoning that Exemption 7(A) is claimed properly as of receipt of request and that when circumstances change, plaintiff is "free to file a new FOIA request"), appeal dismissed voluntarily, No. 96-5185 (D.C. Cir. May 12, 1997); Lynch v. Dep't of the Treasury, No. 99-1697, 2000 WL 123236, at *3 (9th Cir. Jan. 28, 2000) (stating that judicial review is to be made as of time agency decided to withhold documents); Keen v. EOUSA, No. 96-1049, slip op. at 6-7 (D.D.C. July 14, 1999) (maintaining that court review is limited to time at which agency made its exemption determination), adopted, (D.D.C. Mar. 28, 2000); Local 32B-32J, Serv. Employees Int'l Union v. GSA, No. 97-8509, 1998 WL 726000, at *8 (S.D.N.Y. Oct. 15, 1998) (stating that judicial review of agency's decision must be made in light of status of enforcement proceedings at time at which agency responded).

¹⁰⁹ Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1115 (D.C. Cir. 2007) (citing August v. FBI, 328 F.3d 697, 698 (D.C. Cir. 2003)).

¹¹⁰ United Am. Fin. v. Potter, 531 F. Supp. 2d 29, 40 (D.D.C. 2008) (citing Sussman, 494 F.3d at 1114-15).

Exclusion Considerations

As a final Exemption 7(A)-related matter, agencies should be aware of the "(c)(1) exclusion,"¹¹¹ which was enacted by the FOIA Reform Act in 1986.¹¹² This special record exclusion applies to situations in which the very fact of a criminal investigation's existence is as yet unknown to the investigation's subject, and disclosure of the existence of the investigation (which would be revealed by any acknowledgment of the existence of responsive records) could reasonably be expected to interfere with enforcement proceedings.¹¹³ In such circumstances, an agency may treat the records as not subject to the requirements of the FOIA. (See the discussion of the operation of subsection (c)(1) under Exclusions, below.)

¹¹¹ 5 U.S.C. § 552(c)(1) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

¹¹² Pub. L. No. 99-570, § 1802, 100 Stat. at 3207-49.

¹¹³ See Attorney General's 1986 Amendments Memorandum at 18-22.