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 lessened the showing of harm originally required under this exemption from a demonstration that release "would interfere with" to a demonstration that release "could reasonably be expected to interfere with" enforcement proceedings.[2] Courts have recognized repeatedly that the change in the language for this exemption effectively broadened its protection.[3]

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* This section primarily includes case law, guidance and statutes up until August 31, 2023. While some legal authorities after this date may be included, for a comprehensive accounting of all recent court decisions, please visit OIP's Court Decisions webpage (https://www.justice.gov/oip/court-decisions-overview). Please also note that this section generally only includes subsequent case history in the citations when it is relevant to the point for which the case is being cited.

[1] 5 U.S.C. § 552(b)(7)(A) (2018).

[2] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 (1986).

[3] See 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) (stating that lower court's reliance on pre-amendment version of Exemption 7(A) "does not impact upon [its] disposition" as it "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 WL 34871354, at *3 (D.D.C. Sept. 28, 2001) (reiterating that "'could reasonably' . . . represents a relaxed standard; before 1986, the government had to show that disclosure *would* interfere with law enforcement"); Gould Inc. v. GSA, 688 F. Supp. 689, 703 n.33 (D.D.C. 1988) ("The 1986

Exemption 7(A) requires a two-step analysis, specifically, 1) there must be a "pending or reasonably anticipated" law enforcement proceeding, and 2) release of the information must be reasonably expected to cause some articulable harm to that proceeding.[4]

Pending or Reasonably Anticipated Law Enforcement Proceeding

Exemption 7(A) first requires that there must be a "pending or reasonably anticipated" law enforcement proceeding.[5]

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amendments relaxed the standard of demonstrating interference with enforcement proceedings.").

[4] See, e.g., Juarez v. DOJ, 518 F.3d 54, 58-59 (D.C. Cir. 2008) (explaining that government must show that records relate to law enforcement proceeding and that proceeding could be harmed by premature release of evidence or information); Sussman v. USMS, 494 F.3d 1106, 1113-14 (D.C. Cir. 2007) (discussing dual elements necessary to invoke Exemption 7(A): reasonably anticipated law enforcement proceeding and harm if information released); Lion Raisins, Inc. v. USDA, 231 F. App'x 565, 566 (9th Cir. 2007) (stating that applicable standard met where "criminal investigation remains ongoing" and release of information could "jeopardize that investigation"); Manna v. DOJ, 51 F.3d 1158, 1164 (3d Cir. 1995) ("To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm."); Campbell v. HHS, 682 F.2d 256, 259 (D.C. Cir. 1982) (stating that agency must demonstrate interference with pending enforcement proceeding); Amnesty Int'l v. CIA, 728 F. Supp. 2d 479, 525 (S.D.N.Y. 2010) (reiterating two-step analysis to assert Exemption 7(A)); Blackwell v. FBI, 680 F. Supp. 2d 79, 94 (D.D.C. 2010) (stating that agency must show that release "reasonably could be expected to cause some distinct harm to pending or imminent enforcement proceeding or investigation"), aff'd on other grounds, 646 F.3d 37 (D.C. Cir. 2011); Citizens for Resp. & Ethics in Wash. v. DOJ, 658 F. Supp. 2d 217, 225-26 (D.D.C. 2009) (stating that Exemption 7(A) analysis involves determining whether disclosure of records could reasonably be expected to interfere with enforcement proceedings that are pending or reasonably anticipated); Carter, Fullerton & Hayes v. FTC, 637 F. Supp. 2d. 1, 9 (D.D.C. 2009) (same).

[5] Mapother v. DOJ, 3 F.3d 1533, 1542 (D.C. Cir. 1993) (holding that "in the run of cases involving persons excluded from the United States . . . there is a reasonable likelihood of a challenge" and so holding that "Exemption 7(A)'s requirement that enforcement proceedings be reasonably anticipated is met"); see also Bevis v. Dep't of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986) ("[E]xemption 7(A) . . . cannot justify withholding unless the material withheld relates to a 'concrete prospective law enforcement proceeding.'" (quoting Carson v. DOJ, 631 F.2d 1008, 1018 (D.C. Cir. 1980))); cf. Boyd v. DOJ, 475 F.3d 381, 386 (D.C. Cir. 2007) (finding that "'potential criminal proceedings against individuals'" constitute law enforcement proceedings (quoting agency affidavit)); ACLU v. DOD, No. 18-154, 2019 WL 3945845, at *9 (D. Mont. Aug. 21, 2019) (holding that government's "general[] anticipat[ion] [of] law enforcement involvement" does not adequately support Exemption 7(A)); James v. U.S. Secret Serv., 811 F. Supp. 2d 351, 353 n.2 (D.D.C. 2011) ("A pending appeal of a criminal conviction qualifies as an enforcement proceeding for purposes

Types of Law Enforcement Proceedings

The types of "law enforcement proceedings" to which Exemption 7(A) may be applicable have been interpreted broadly by the courts; such proceedings have been held to include not only criminal actions,[6] including those connected with terrorism and

of Exemption 7(A)." (citing Kansi v. DOJ, 11 F. Supp. 2d 42, 44 (D.D.C. 1998))); Gray v. U.S. Army Crim. Investigation Command, 742 F. Supp. 2d 68, 73 (D.D.C. 2010) (concluding "that records compiled for pending administrative disciplinary action may fall within Exemption 7(A)").

[6] See, e.g., Boyd v. DOJ, 475 F.3d 381, 386 (D.C. Cir. 2007) (finding that "'potential criminal proceedings against individuals'" constitute law enforcement proceedings (quoting agency affidavit)); Manna v. DOJ, 51 F.3d 1158, 1164-65 (3d Cir. 1995) (finding that disclosure of prior criminal law enforcement proceedings involving requester's involvement in La Cosa Nostra "would interfere with prospective criminal" proceedings because prior information is relevant to contemplated prosecutions; thus, use of 7(A) was appropriate); Barrett v. DOJ, No. 09-2959, 2010 WL 4256366, at *3 (E.D. Cal. Oct. 21, 2010) ("[A] pending criminal investigation constitutes an 'enforcement proceeding.'"); Van Bilderbeek v. DOJ, No. 08-1931, 2010 WL 1049618, at *4-5 (M.D. Fla. Mar. 22, 2010) (explaining that Columbian government's allegation that requester was involved in international drug trade and money laundering created "plausible basis" for agency to open criminal investigation and upholding use of Exemption 7(A) because release of these documents would interfere with ongoing investigation); Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) (finding that FBI "properly applied" Exemption 7(A) in ongoing criminal investigation of organized crime activities including narcotics, gambling, stolen property, and loan sharking), summary affirmance granted, No. 95-5388, 1997 U.S. App. LEXIS 3129 (D.C. Cir. Jan. 24, 1997).

national security,[7] but civil actions[8] and regulatory proceedings[9] as well. The Court of Appeals for the District of Columbia Circuit has held that the proceedings encompassed within Exemption 7(A) include "cases in which the agency has the initiative in bringing enforcement action and those . . . in which it must be prepared to respond to a third

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[7] See, e.g., Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 926-28 (D.C. Cir. 2003) (holding that disclosure of requested information was reasonably likely to interfere with terrorism investigation and finding use of Exemption 7(A) proper); Jud. Watch, Inc. v. DHS, 59 F. Supp. 3d 184, 193 (D.D.C. 2014) (holding that "DHS properly withheld . . . documents [because it] demonstrates that the information in question is part of an ongoing investigation into the September 11, 2001 terrorist attacks"); Long v. DOJ, 479 F. Supp. 2d 23, 29 (D.D.C. 2007) (discussing "dilemma" in preserving "integrity of the Department's ongoing terrorism investigations without wholly undermining the purpose of the FOIA," and finding "appropriate balance" by permitting certain information to be redacted pursuant to Exemption 7(A)); Edmonds v. FBI, 272 F. Supp. 2d 35, 55 (D.D.C. 2003) (concluding that agency justified its withholding of records under Exemption 7(A) in case involving "national security issues").

[8] See, e.g., Manna, 51 F.3d at 1165 (holding that disclosure would interfere with contemplated civil proceedings so that records were properly withheld pursuant to Exemption 7(A)); Vento v. IRS, 714 F. Supp. 2d 137, 148 (D.D.C. 2010) (explaining that there is no distinction "in the law" between civil and criminal law enforcement and release of withheld information "could reasonably be expected to interfere" with ongoing investigation into requester's tax liability; thus, use of Exemption 7(A) is proper); Faiella v. IRS, No. 05-238, 2006 WL 2040130, at *4 (D.N.H. July 20, 2006) (explaining that distinction between "the civil audit and the criminal investigation is not meaningful" because Exemption 7(A) is "'applicable to investigation developed documents whether potentially civil or criminal in import'" (quoting White v. IRS, 707 F.2d 897, 901 (6th Cir. 1983))); Jud. 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)").

[9] See, e.g., Gray v. U.S. Army Crim. Investigation Command, 742 F. Supp. 2d 68, 73 (D.D.C. 2010) (holding that pending administrative proceeding "does qualify as a law enforcement proceeding" for Exemption 7 (A)); Carter, Fullerton & Hayes v. FTC, 637 F. Supp. 2d 1, 9-10 (D.D.C 2009) (holding FTC's investigations of "possible anticompetitive effects of state liquor control board regulations" qualify as law enforcement proceeding for Exemption 7(A)); Env't Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005) (finding 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"); Rosenglick v. IRS, No. 97-747, 1998 WL 773629, at *2 (M.D. Fla. Mar. 10, 1998) (noting that phrase "law enforcement purposes" includes "civil, criminal, and administrative statutes and regulations such as those promulgated and enforced by the IRS").

party's challenge."[10] Enforcement proceedings in state courts[11] and foreign courts[12] have also been held to qualify for Exemption 7(A) protection. (For a further discussion of "law enforcement proceeding," see Exemption 7.)

Related Proceedings

Even after an underlying enforcement proceeding is closed, the continued use of Exemption 7(A) may be proper, provided that "related" proceedings are still pending.[13]

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[10] Mapother v. DOJ, 3 F.3d 1533, 1540 (D.C. Cir. 1993) (holding that potential challenge by former Secretary-General of the United Nations of DOJ order barring them from entering United States constitutes "reasonably anticipated" enforcement proceeding).

[11] See, e.g., Hopkinson v. Shillinger, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989) (stating Exemption 7 applies "with equal force" to records involving local law enforcement authorities and explaining that this interpretation "encourages cooperation and information sharing" between local law enforcement agencies and the federal government); Butler v. Dep't of the Air Force, 888 F. Supp. 174, 182-83 (D.D.C. 1995) (explaining that release could jeopardize pending state criminal proceeding), aff'd per curiam, 116 F.3d 941 (D.C. Cir. 1997) (unpublished table decision).

[12] See, e.g., Bevis v. Dep't of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986) (holding that Exemption 7(A) makes no distinction between foreign and domestic enforcement proceedings and therefore applies to each); Lewis v. Dep't of the Treasury, No. 17-0943, 2020 WL 1667656, at *4 (D.D.C. Apr. 3, 2020) (explaining that Exemption 7 applies not only to domestic law enforcement proceedings, but also to foreign law enforcement proceedings), aff'd per curiam, 851 F. App'x 214 (D.C. Cir. 2021).

[13] See Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, at *18 (D.D.C. July 2, 2020) (holding Exemption 7(A) applied to specific records based upon government illustrating "logical link between the subjects at issue" and related ongoing investigations concerning "potential terrorism activities"); Al-Turki v. DOJ, 175 F. Supp. 3d 1153, 1191 (D. Colo. 2016) (finding that "the documents at issue, while not directly related to an ongoing investigation, contain information that is intertwined with or related to other ongoing investigations"); see also, e.g., Cucci v. DEA, 871 F. Supp. 508, 512 (D.D.C. 1994) (finding protection proper when information pertains to "multiple intermingled investigations and not just the terminated investigation" of subject).

This includes situations when proceedings are pending regarding additional defendants[14] or when additional proceedings are pending regarding the original defendant.[15]

Additionally, Exemption 7(A) has been held proper when there is a motion for a new trial, appeal of the court's action, or a collateral attack on conviction.[16] Exemption

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[14] See Solar Sources, Inc. v. United States, 142 F.3d 1033, 1040 (7th Cir. 1998) (explaining that although government has "closed" its cases against certain defendants by obtaining plea agreements and convictions, withholding is proper because information "compiled against them is part of the information" in ongoing cases against other targets); New Eng. Med. Ctr. Hosp. v. NLRB, 548 F.2d 377, 385-86 (1st Cir. 1976) (holding Exemption 7(A) applicable when "closed file is essentially contemporary with, and closely related to, the pending open case" against another defendant; applicability of exemption does not hinge on "open" or "closed" label agency places on file); Jud. Watch, Inc. v. DHS, 59 F. Supp. 3d 184, 194 (D.D.C. 2014) (holding that even though the subject of the request is deceased, Exemption 7(A) applies to the ongoing investigation into the 9/11 terrorist attacks, which may lead to future law enforcement proceedings); Watters v. DOJ, No. 10-270, 2013 WL 4482968, at *13 (N.D. Okla. Aug. 20, 2013) (determining that because subject's file contains information on third party of interest who is in fugitive status, "information was properly withheld" pursuant to Exemption 7(A)); DeMartino v. FBI, 577 F. Supp. 2d 178, 182 (D.D.C. 2008) (holding use of Exemption 7(A) proper where case remains open and pending because co-defendant is "scheduled to be retried" and "other unindicted co-conspirators" remain at large); Hidalgo v. FBI, 541 F. Supp. 2d 250, 256 (D.D.C. 2008) (finding "although [plaintiff was] convicted long ago . . . ongoing search for – and possible future trials of – indicted and unindicted fugitives satisfies" standard); Cucci, 871 F. Supp. at 512 (finding protection proper when information pertains to "multiple intermingled investigations and not just the terminated investigation" of subject).

[15] See Pinnavaia v. FBI, No. 04-5115, 2004 WL 2348155, at *1 (D.C. Cir. Oct. 19, 2004) (explaining that although FBI San Diego Field Office's investigation was closed, its New York Field Office records were part of investigatory files for separate, ongoing investigation, so use of Exemption 7(A) therefore was proper); Int'l Union of Elevator Constr. Loc. 2 v. U.S. Dep't of Lab., 804 F. Supp. 2d 828, 835-36 (N.D. Ill. 2011) (explaining that material responsive to request was originally compiled for civil investigations that are now closed, but material is being used in current criminal investigation, thus properly withheld under Exemption 7(A) because "release could reasonably be expected to interfere with the current investigation"); Seized Prop. Recovery, Corp. v. CBP, 502 F. Supp. 2d 50, 62 (D.D.C Aug. 17, 2007) (explaining that while underlying forfeiture proceedings have ended, possibility of different investigations, separate and apart from investigation attendant to seizure satisfies standard); Cudzich v. ICE, 886 F. Supp. 101, 106-07 (D.D.C. 1995) (holding that while INS investigation is complete, parts of file "containing information pertaining to pending investigations of other law enforcement agencies" are properly withheld); Kuffel v. BOP, 882 F. Supp. 1116, 1126 (D.D.C. 1995) (ruling that Exemption 7(A) remains applicable when inmate has criminal prosecutions pending in other cases).

[16] See, e.g., Stein v. SEC, 358 F. Supp. 3d 30, 34 (D.D.C. 2019) (finding that "[b]ecause the potential for interference remains even when a case is on appeal, the SEC is permitted to withhold law enforcement records 'until all reasonably foreseeable proceedings stemming from that investigation are closed'" (quoting Kay v. FCC, 976 F. Supp. 23, 38 (D.D.C.

7(A) has also been upheld when there are related civil proceedings[17] and when an investigation has been terminated, but an agency retains oversight or some other continuing enforcement-related responsibility.[18]

1997))); Johnson v. FBI, 118 F. Supp. 3d 784, 792 (E.D. Pa. 2015) (explaining that "logic suggests that the existence of a pending motion under [28 U.S.C.] § 2255 makes it reasonably foreseeable that an enforcement proceeding (i.e., a new trial) will take place, leading to the expectation that Exemption 7(A) may apply to protect materials whose release could reasonably be expected to interfere with that new trial"); Adionser v. DOJ, 811 F. Supp. 2d 284, 298 (D.D.C. 2011) ("For purposes of Exemption 7(A), a pending appeal of a criminal conviction qualifies as an ongoing law enforcement proceeding."); King v. DOJ, No. 08-1555, 2009 WL 2951124, at *6 (D.D.C. Sept. 9, 2009) ("This Court has previously applied FOIA exemption (b)(7)(A) to post-conviction motions to vacate a sentence. . . . Accordingly, [requester] cannot prevail on his argument that materials related to his § 2255 motion fall outside the scope of FOIA exemption (b)(7)(A)."); DeMartino, 577 F. Supp. 2d at 182 (concluding that "law enforcement proceeding has not concluded" because criminal conviction is not final); Kidder v. FBI, 517 F. Supp. 2d 17, 27 (D.D.C. 2007) (reiterating that "pending appeal of a criminal conviction qualifies as a pending or prospective law enforcement proceeding for purposes of Exemption 7(A)"); Kansi v. DOJ, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (explaining that "potential for interference . . . that drives the 7(A) exemption . . . exists at least until plaintiff's conviction is final"; thus, plaintiff's pending motion for new trial is pending law enforcement proceeding for purposes of FOIA).

[17] See Frank LLP v. CFPB, 480 F. Supp. 3d 87, 98 (D.D.C. 2020) (stating that records identified as responsive in two related civil enforcement proceedings, one active and one where agency had moved to re-open case following stay, were properly withheld under Exemption 7(A)); Cozen O'Conner v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 783-84 (E.D. Pa. 2008) (holding that agency "is entitled to invoke protection" even for documents "developed in preparation" for case against two entities that now no longer exist; noting that documents in those cases "would necessarily" discuss information developed during the investigation process and affect a pending delisting proceeding); Watkins Motor Lines, Inc. v. EEOC, No. 05-1065, 2006 WL 905518, at *5-6 (M.D. Fla. Apr. 7, 2006) (declaring that requested withdrawal of charge of discrimination "does not mean that there is no prospective law enforcement proceeding" because EEOC may pursue its own civil action; so requirement of harm for Exemption 7(A) is satisfied).

[18] See, e.g., Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419-20 (N.D. Cal. 1986) (holding Exemption 7(A) proper where, even though, "the representation election is over and the unfair labor practice case settled . . . disclos[ure] . . . would interfere with the authority of the NLRB to conduct representation elections, a responsibility delegated by Congress to the NLRB"); ABC Home Health Servs. v. HHS, 548 F. Supp. 555, 556, 559 (N.D. Ga. 1982) (explaining that "exemption is designed to protect contemplated proceedings, not particular allegations," thus holding documents protected when "final settlement" was subject to reevaluation for at least three years because "further proceedings are not foreclosed by the settlement"). But cf. Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 66-67 (D.D.C. 1999) (finding that release of audit statistics and details of settlement from closed investigation of one hospital would not interfere with possible future settlements with other institutions that were being audited but not investigated).

Duration

The Supreme Court has held that "the thrust of congressional concern" in enacting Exemption 7(A) was "to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file."[19] Thus, as a general rule, Exemption 7(A)

[19] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 230 (1978); see Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1097 (D.C. Cir. 2014) (holding that "Exemption 7(A) is temporal in nature," and "reliance on Exemption 7(A) may become outdated when the proceeding at issue comes to a close"); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1037 (7th Cir. 1998) (holding that "Exemption 7(A) does not permit the Government to withhold all information merely because that information was compiled for law enforcement purposes"); Dickerson v. DOJ, 992 F.2d 1426, 1431 (6th Cir. 1993) (reiterating that when investigation is over and purpose of it expired, disclosure would no longer cause interference).

may only be invoked so long as the law enforcement proceeding involved remains pending[20] or so long as an enforcement proceeding is fairly regarded as prospective.[21]

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[20] See, e.g., Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (stating that documents from unfair labor practice are not protected by Exemption 7(A) when no claim is pending or contemplated); Barney v. IRS, 618 F.2d 1268, 1273-74 (8th Cir. 1980) (explaining that once enforcement proceedings are "either concluded or abandoned, exemption 7(A) will no longer apply"); Moorefield v. U.S. Secret Serv., 611 F.2d 1021, 1025-26 (5th Cir. 1980) (holding 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 because law enforcement proceeding is ongoing and law enforcement purposes "include the prevention as well as the detection and punishment of violations of the law"); Stein v. SEC, 358 F. Supp. 3d 30, 34-35 (D.D.C. 2019) (finding that "[b]ecause the potential for interference remains even when a case is on appeal, the SEC is permitted to withhold law enforcement records 'until all reasonably foreseeable proceedings stemming from that investigation are closed'" (quoting Kay v. FCC, 976 F. Supp. 23, 38 (D.D.C. 1997))); Jud. Watch, Inc. v. DOJ, 282 F. Supp. 3d 242, 250 (D.D.C. 2017) (finding that "[u]ntil [the subject's] appeal is fully exhausted, disclosure of investigative materials could be reasonably expected to interfere with whatever occurs going forward"), vacated and remanded for consideration of other FOIA exemptions claimed by government due to conclusion of law enforcement proceeding underpinning use of Exemption 7(A), No. 17-5283, 2018 WL 10758508 (D.C. Cir. June 22, 2018); Barrett v. DOJ, No. 09-2959, 2010 WL 4256366, at *3 (E.D. Cal. Oct. 21, 2010) ("[A] pending criminal investigation constitutes an 'enforcement proceeding.'"); Gray v. U.S. Army Crim. Investigation Command, 742 F. Supp. 2d 68, 73 (D.D.C. 2010) (concluding that records compiled for pending administrative disciplinary action may fall within Exemption 7(A)); Blackwell v. FBI, 680 F. Supp. 2d 79, 94-95 (D.D.C. 2010), aff'd, 646 F.3d 37 (D.C. Cir. 2011) (holding that FBI properly relied on Exemption 7(A) because disclosure of records would interfere with "pending FBI investigation"); Carter, Fullerton & Hayes, LLC v. FTC, 637 F. Supp. 2d 1, 10 (D.D.C. 2009) (holding that defendant correctly withheld material where defendant had shown that law enforcement investigation into state liquor control boards was pending); cf. Kuzma v. DOJ, 692 F. App'x 30, 35 (2d Cir. 2017) (finding that requester's "unsupported personal opinion that this investigation is unlikely [pending] is not the contradictory evidence or evidence of bad faith required to overcome the presumption of good faith we afford the government's declarations"); Watters v. DOJ, 576 F. App'x 718, 725 (10th Cir. 2014) (finding that plaintiff's questioning of whether there is ongoing effort to capture fugitive insufficient to establish that undisclosed material was improperly withheld).

[21] See, e.g., Sussman v. USMS, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (explaining that "enforcement proceedings need not be currently ongoing; it suffices for them to be 'reasonable anticipated'"); Boyd v. DOJ, 475 F.3d 381, 386 (D.C. Cir. 2007) (holding that government's identification of targets of investigation satisfies concrete prospective law enforcement proceeding requirement); Ctr. for Nat. Sec. Stud. v. DOJ, 331 F.3d 918, 926 (D.C. Cir. 2003) ("Exemption 7(A) does not require a presently pending 'enforcement proceeding[;]' [r]ather, . . . it is sufficient that the government's ongoing September 11 terrorism investigation is likely to lead to such proceedings."); Manna v. DOJ, 51 F.3d 1158, 1165 (3d Cir. 1995) (ruling that when "prospective criminal or civil (or both) proceedings are contemplated," information is protected from disclosure); Vento v. IRS, No. 08-159, 2010

WL 1375279, at *7 (D.V.I. Mar. 31, 2010) (finding use of Exemption 7(A) reasonable where agency was "preparing a case"; thus, documents were created "in anticipation of an enforcement proceeding, even if a formal action had not yet been filed"); Citizens for Resp. & Ethics in Wash. v. DOJ, 658 F. Supp. 2d 217, 229-30 (D.D.C. 2009) (reiterating that "long line of cases" recognizes necessity of identifying concrete prospective law enforcement proceeding to justify use of Exemption 7(A) and explaining that accepting hypothetical proceedings would be in direct contravention of basic FOIA policy); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at *7 (D.D.C. Mar. 9, 2007) (holding that agency "has certainly met its burden of identifying a concrete prospective law enforcement proceeding" by representing that "'there are fugitives who have yet to be apprehended, interviews of persons are still being considered, [and] evidentiary documentary material is still being obtained through Federal Grand Jury subpoenas and from confidential sources'" (quoting agency affidavit)); In Def. of Animals v. HHS, No. 99-3024, 2001 WL 34871354, at *3 (D.D.C. Sept. 28, 2001) (concluding that "USDA's anticipated filing satisfies the FOIA's requirement of a reasonably anticipated, concrete prospective law enforcement proceeding" where"[p]revious USDA investigations of animal deaths at the Foundation resulted in formal charges . . . and there is no evidence that the agency would treat its most recent investigation differently"); Jud. Watch v. FBI, No. 00-745, 2001 WL 35612541, at *5 (D.D.C. Apr. 20, 2001) (explaining that "[a]lthough no enforcement proceedings are currently pending, the FBI has represented that such proceedings may become necessary as the investigation progresses").

Courts have found that Exemption 7(A) remains viable throughout the duration of long-term investigations,[22] even those that have become dormant over time.[23]

Courts have afforded protection under Exemption 7(A) despite the fact that discovery procedures may eventually allow access to certain records.[24] Further, some

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[22] See, e.g., Al-Turki v. DOJ, 175 F. Supp. 3d 1153, 1192 (D. Colo. 2016) (finding that while some of the information protected under Exemption 7(A) may stretch back ten years, "Exemption 7(A) has been held to apply to long-term investigations"); Hammouda v. OIP, 920 F. Supp. 2d 16, 24 (D.D.C. 2013) (holding that age of requested documents did not undercut agency showing that law enforcement proceeding remained pending); Barrett, 2010 WL 4256366, at *3-4 (finding Exemption 7(A) applicable because investigation into "Zodiac Killer" murders of 1968 and 1969 is unsolved, "is ongoing" in several California jurisdictions, and agency showed that release of information could interfere with those investigations); Cook v. DOJ, No. 04-2542, 2005 WL 2237615, at *2 (W.D. Wash. Sept. 13, 2005) (discussing length of time spent investigating airplane hijacking and 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," thus, finding that there is "no evidence" investigation is completed); 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); Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at *4 (S.D.N.Y. May 26, 1993) ("Documents that would interfere with a lengthy or delayed investigation that may still lead to a prospective law enforcement proceeding still fall within the protective ambit of Exemption 7A"); 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 protectable).

[23] See Nat'l Pub. Radio v. Bell, 431 F. Supp. 509, 514-15 (D.D.C. 1977) (explaining that although investigation into death of nuclear-industry whistleblower is "dormant," it "will hopefully lead to a 'prospective law enforcement proceeding'" and that disclosure "presents the very real possibility of a criminal learning in alarming detail of the government's investigation of his crime before the government has had the opportunity to bring him to justice"); see also Dickerson v. DOJ, 992 F.2d 1426, 1432 (6th Cir. 1993) (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); FOIA Update, Vol. V, No. 2, at 6 (explaining that, in some circumstances, Exemption 7(A) can be used to protect the records of dormant investigations).

[24] See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 241 & n.21 (1978) (explaining that "prehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an 'interference' with NLRB enforcement proceedings" even though NLRB under its discovery rules may later turn over portions of those statements); Shannahan v. IRS, 672 F.3d 1142, 1151 (9th Cir. 2012) (explaining that while information most likely would be released during or at the conclusion of criminal proceedings, criminal proceedings have not taken place; thus, release of information during pendency would interfere with law enforcement proceedings); Radcliffe v. IRS, 536 F. Supp. 2d 423, 438 (S.D.N.Y. 2008) (explaining that although "[i]t may be true that if this matter proceeds to trial plaintiff will be entitled to discovery of some or all of the documents at

courts have upheld the use of Exemption 7(A) against contentions that some documents may have been disclosed in discovery.[25] The D.C. Circuit has cautioned, however, that Exemption 7(A) does not permit the withholding of documents solely because they are protected by discovery rules and has required the agency to show interference with a law enforcement proceeding.[26]

Release of Information is Reasonably Expected to Cause Articulable Harm to that Proceeding

Exemption 7(A) next requires that release of the information must be reasonably expected to cause some articulable harm to that proceeding.[27]

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issue," withholding was still proper because Exemption 7(A) was "created specifically to avoid [] early disclosure of evidence and potential resulting impact that such disclosure would have on ongoing government investigation"); Warren v. United States, No. 99-1317, 2000 U.S. Dist. LEXIS 17660, at *18 (N.D. Ohio Oct. 31, 2000) (explaining that although plaintiffs "will likely be entitled to release of all the documents at issue in this proceeding, through the criminal discovery process, that fact does not prohibit reliance on Exemption 7 in the context of this case"); cf. Ameren Mo. v. EPA, 897 F. Supp. 2d 802, 814 (E.D. Mo. 2012) (describing purpose of Exemption 7(A) as protecting against "advance notice" and affirming its use in instant case, but adding that "[m]oreover, the FOIA is not intended as a substitute for civil discovery and the Court's determination here in no way affects Plaintiff's ability to employ civil discovery tools").

[25] See Cuban v. SEC, 744 F. Supp. 2d 60, 86 (D.D.C. 2010) (finding use of Exemption 7(A) proper despite contention that records were produced in discovery in state case); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at *5 (D.D.C. Mar. 9, 2007) (stating that "exemption claims" cannot be defeated "simply by pointing to a judicial proceeding in which some of the responsive documents may or could have been released").

[26] North v. Walsh, 881 F.2d 1088, 1097, 1100 (D.C. Cir. 1989) (holding that the mere fact that defendants in related ongoing criminal proceedings might obtain documents through the FOIA that were ruled unavailable "through discovery, or at least might obtain the documents before [they] could obtain them through discovery," does not itself "constitute interference with a law enforcement proceeding"); cf. Playboy Enter., Inc. v. DOJ, 677 F.2d 931, 936 (D.C. Cir. 1982) (holding, regarding withholdings pursuant to Exemption 5, that "the issues in discovery proceeding and the issues in the context of a FOIA action are quite different . . .[so t]hat for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA.").

[27] See, e.g., ACLU of Mich. v. FBI, 734 F.3d 460, 468 (6th Cir. 2013) (holding that "[b]ecause the FBI has adequately shown that release of racial and ethnic demographic data is reasonably likely to interfere with ongoing investigations by revealing FBI priorities and analytic methods, the district court properly applied Exemption 7(A)"); Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003) (holding that "government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it is reasonable"); N.Y. Times v. FBI, No. 22- 3590, 2023 WL 5098071, at *4 (S.D.N.Y. Aug. 9, 2023) (holding that "[t]he FBI has not identified a rational link from the content of [a withheld report] . . .

Types of Interference

The Supreme Court has held that Congress intended that Exemption 7(A) apply "whenever the government's case in court . . . would be harmed by the premature release of evidence or information"[28] or when disclosure would impede any necessary

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to a reasonable expectation of interference in the ongoing investigation" where "disclosing what the FBI did or did not know at least two years ago implies little plausible risk to the ongoing investigation"); Majuc v. DOJ, No. 18-00566, 2019 WL 4394843, at *3 (D.D.C. Sept. 13, 2019) (stating that summary judgment cannot be granted when faced with "glaring ambiguity about 'whether a related investigation is in fact ongoing,'" and rejecting the argument that the "mere pendency of post-conviction monitoring and compliance of a corporate defendant qualifies as 'a concrete prospective law enforcement proceeding'" (quoting Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1099 (D.C. Cir. 2014))); Hammouda v. OIP, 920 F. Supp. 2d 16, 24 (D.D.C. 2013) (finding that defendant properly invoked Exemption 7(A) because disclosure of information would "'allow [the targets of the investigation] to elude detection or tamper with evidence'" (quoting agency affidavit)); Abuhouran v. Dep't of State, 843 F. Supp. 2d 73, 82 (D.D.C. 2012) (holding that defendant properly withheld notes which "'could hamper an ongoing law enforcement action'"); Adionser v. DOJ, 811 F. Supp. 2d 284, 298 (D.D.C. 2011) (holding defendant properly asserted Exemption 7(A) because disclosure of material "'would reveal the scope, direction, nature and pace of the investigation as well as reveal information that could harm the government's prosecution in the criminal appellate process'" (quoting agency declaration)); Int'l Union of Elevator Const. Loc. 2 v. U.S. Dep't of Lab., 804 F. Supp. 2d 828, 835 (N.D. Ill. 2011) (finding that agency provided specific and detailed descriptions of harm to ongoing investigation necessary to justify use of Exemption 7(A)).

[28] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978) (holding that NLRB had established interference with its unfair labor practice enforcement proceeding by showing that release of witness statements would create greater potential for witness intimidation and could deter cooperation); see also, e.g., Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 929 (D.C. Cir. 2003) (reasoning that requested list of names "could be of great use" by terrorists in "intimidating witnesses"); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (stating that disclosure could result in "chilling and intimidation of witnesses"); Mapother v. DOJ, 3 F.3d 1533, 1543 (D.C. Cir. 1993) (holding that release of prosecutor's index of all documents he deems relevant would provide "critical insights into [government's] legal thinking and strategy"); Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir. 1980) (reiterating that one primary purpose of Exemption 7(A) was to prevent harm to government's case in court (citing Robbins Tire & Rubber Co., 437 U.S. at 224-25)); Fox News v. SEC, No. 09-2641, 2010 WL 3911453, at *2 (S.D.N.Y. Sept. 14, 2010) (noting that disclosure could prematurely provide "information on litigation strategy"); Radcliffe v. IRS, 536 F. Supp. 2d 423, 437-38 (S.D.N.Y. 2008) (explaining that agency's "declaration is sufficiently specific" to establish harm should matter proceed to trial and reiterating that one primary purpose of Exemption 7(A) was to "'prevent harm [to] the Governments' case in court by not allowing litigants earlier or greater access;" and to prevent "'prematurely revealing the government's case'" (quoting Barney, 618 F.2d at 1273)); Stolt-Nielsen Trans. Grp., Ltd. v. DOJ, 480 F. Supp. 2d 166, 180 (D.D.C. 2007) (noting that release of information "would provide potential witnesses with insights into the Division's strategy

investigation prior to the enforcement proceeding.[29] Courts have upheld the application of Exemption 7(A) when release of the protected information would reveal the nature,

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and the strength of its position, chill necessary investigative communications with foreign governments, and have a chilling effect on amnesty applications"), vacated and remanded on other grounds, 534 F.3d 728, 733-34 (D.C. Cir. 2008); Faiella v. IRS, No. 05-238, 2006 WL 2040130, at *3 (D.N.H. July 20, 2006) (stating that "disclosing information under active consideration" could undermine any future prosecution by "prematurely disclosing the government's potential theories, issues, and evidentiary requirements"); Jud. Watch of Fla., Inc. v. DOJ, 102 F. Supp. 2d 6, 19-20 (D.D.C. 2000) (reiterating that prematurely disclosing documents related to witnesses could result in witness tampering or intimidation and could discourage continued cooperation); Cujas v. IRS, No. 97-00741, 1998 WL 419999, at *4 (M.D.N.C. Apr. 15, 1998) (finding that release of information would "alert" plaintiff to scope and direction of case, thus interfering with agency's case because "suspected violator with advance access to the government's case could construct defenses'" (quoting Robbins Tire & Rubber Co., 437 U.S. at 241)), aff'd, 162 F.3d 1154 (4th Cir. 1998) (unpublished table decision).

[29] See Robbins Tire & Rubber Co., 437 U.S. at 224 (finding that "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations"); see also, e.g., ACLU of Mich. v. FBI, 734 F.3d 460, 466 (6th Cir. 2013) (explaining that release of demographic data "directly reveals a targeting priority, and indirectly reveals the methodologies and data used to make that selection"; thus determining withholding proper because disclosure could interfere in investigation by revealing "selection process," leads, and scope); Shannahan v. IRS, 672 F.3d 1142, 1149-50 (9th Cir. 2012) (reiterating standards to establish interference in tax enforcement proceedings and holding use of Exemption 7(A) proper where agency explained harm to ongoing investigation by showing that release could reveal identity of confidential informants and thus hinder other individuals from cooperating, violate terms of an international agreement, and expose scope of investigation); Lynch v. Dep't of the Treasury, 210 F.3d 384, 384 (9th Cir. 2000) (unpublished table decision) (stating that agency declarations "made clear" that release of records could harm "efforts at corroborating witness statements . . . alert potential suspects . . . [and] interfere with surveillance; or result in destruction of evidence"); Solar Sources, Inc., 142 F.3d at 1039 ("Public disclosure of information could result in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation"); Elec. Priv. Info. Ctr. v. DOJ, No. 19-810, 19-957, 2020 WL 5816218, at *13-14 (D.D.C. Sept. 30, 2020) (finding Exemption 7(A) appropriate for "withheld 'FBI file numbers' that 'are not known to the general public because the release of a file numbering convention identifies the investigative interest or priority given to such matters[,]' the disclosure of which 'could result in the acknowledgment of the existence of unknown investigations or proceedings and divulge the scope/volume of the FBI's investigative efforts'"(quoting agency affidavit)), aff'd in part & remanded in part on other grounds, 18 F.4th 712 (D.C. Cir 2021); Performance Coal Co. v. U.S. Dep't of Lab., 847 F. Supp. 2d 6, 16 (D.D.C. 2012) (agreeing with agency that disclosure could permit interference with ongoing criminal investigation by giving important information to potential witnesses or defendants, such as the content of potential testimony or information about the likely scope, direction, or focus of the investigation); Lowy v. IRS, No. 10-00767, 2011 WL 1211479, at *13 (N.D. Cal. Mar. 30, 2011) (accepting agency declarations that release "would impair" ongoing tax

scope, direction, or focus of an investigation,[30] which could damage the government's ability to control or shape its investigation.[31] The release of such information could allow

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law enforcement proceedings by revealing direction of investigation); Cook v. DOJ, No. 04-2542, 2005 WL 2237615, at *2 (W.D. Wash. Sept. 13, 2005) (holding that disclosure could make it "far more difficult" for FBI "(a) to verify and corroborate future witness statements and evidence, (b) to discern which tips, leads, and confessions have merit and deserve further investigation and which are inconsistent with the known facts and can be safely ignored, and (c) to conduct effective interrogations of suspects"); Kay v. FTC, 976 F. Supp. 23, 38-39 (D.D.C. 1997) (holding that agency "specifically established that release" would permit the requester to gain insight into FCC's evidence against him, to discern narrow focus of investigation, to assist in circumventing investigation, and to create witness intimidation, and that disclosure would "reveal the scope, direction and nature" of investigation); Pully v. IRS, 939 F. Supp. 429, 436 (E.D. Va. 1996) (explaining that requester's promise not to interfere with investigation is of "no consequence" because government "need not take into account the individual's propensity or desire to interfere"; objective showing that disclosure could lead to interference found sufficient).

[30] 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); Agrama v. IRS, No. 17-5270, 2019 WL 2067719, at *2 (D.C. Cir. Apr. 19, 2019) (finding Exemption 7(A) was properly applied to protect investigatory records where premature disclosure might "reveal the scope and direction of the investigation" (quoting North v. Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989))); Citizens for Resp. & Ethics in Wash. v. DOJ, No. 20-0212, 2022 WL 4598537, at *6-7 (D.D.C. Sept. 30, 2022) (finding the withholding of salaries, travel details, and expenditures pursuant to Exemption 7(A) proper where release would reveal "scope and breadth" of ongoing investigation); Frank LLP v. CFPB, 480 F. Supp. 3d 87, 100 (D.D.C. 2020) (upholding application of Exemption 7(A) to protect witness transcripts from an investigation since premature release would risk revealing the "focus and scope" of the proceedings); Arizechi v. IRS, No. 06-5292, 2008 WL 539058, at *6 (D.N.J. Feb. 25, 2008) (concluding that release could reveal "nature, scope, direction, and limits" of investigation); Watkins Motor Lines, Inc. v. EEOC, No. 05-1065, 2006 WL 905518, at *6 (M.D. Fla. Apr. 7, 2006) (agreeing with agency that "disclosure of the complete scope of the investigation would allow Plaintiff to construct defenses to the charge"); Youngblood v. Comm'r, No. 99-9253, 2000 U.S. Dist. LEXIS 5083, at *29 (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).

[31] See, e.g., 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"); Carter, Fullerton & Hayes v. FTC, 637 F. Supp. 2d. 1, 10 (D.D.C. 2009) (same); cf. Jud. Watch, Inc. v. DOJ, 306 F. Supp. 2d 58, 75-76 (D.D.C. 2004) (holding that release "could damage that agency's ability to obtain all relevant information and could reveal premature and/or unfounded questions that full investigation might resolve").

targets to elude detection;[32] enable targets to suppress, destroy, or fabricate evidence;[33] or prevent the government from obtaining information in the future.[34] Relatedly, some

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[32] See, e.g., ACLU, 734 F.3d at 466 (holding that "release of [racial and ethnic demographic data] may reveal what leads the FBI is pursuing and the scope of those investigations, permitting groups to change their behavior and avoid scrutiny"); 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"); Project for Priv. & Surveillance Accountability, Inc. v. DOJ, No. 20-3657, 2022 WL 4365745, at *9 (D.D.C. Sept. 19, 2022) (holding that acknowledging that certain individuals were the target of, or otherwise had their communications incidentally targeted by, FISA surveillance "'could give targets, their cohorts, foreign intelligence agencies, and others intent on interfering with NSD's and its partner's investigative efforts information necessary to take defensive actions to conceal criminal activities, develop and implement countermeasures to elude detection'" (quoting agency declaration)); Elec. Priv. Info. Ctr. v. FBI, No. 17-00121, 2018 WL 2324084, at *4 (D.D.C. May 22, 2018) (finding that disclosure of certain material involved in investigation of Russian interference in 2016 election "could impede the investigation by revealing its scope, its focus, its targets, and its techniques, which would help targets elude detection, destroy or fabricate evidence, and interfere with sources"); Mantilla v. Dept. of State, No. 12-21109, 2013 WL 424433, *6 (S.D. Fla. Feb. 1, 2013) (accepting agency's assertion that release of information concerning ongoing DEA investigations would allow "individuals and/or entities, who are of investigative interest to [the] DEA, [to] use the information to develop alibis, create fictitious defenses, or intimidate, harass, or harm potential witnesses" (quoting agency declaration)); Council on Am.-Islamic Rels. v. FBI, 749 F. Supp. 2d 1104, 1118 (S.D. Cal. 2010) (accepting agency's assertion that release could enable targets to evade detection); Azmy v, DOD, 562 F. Supp 2d 590, 605 (S.D.N.Y. 2008) (stating that disclosure could enable targets to "conceal their activities"); Mendoza v. DEA, 465 F. Supp. 2d 5, 11 (D.D.C. 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).

[33] See, e.g., Agrama, 2019 WL 2067719, at *2 (holding that disclosure of the withheld records could allow the target of an investigation to "'destroy or alter evidence, fabricate fraudulent alibis, and intimidate witnesses'" (quoting North, 881 F.2d at 1097)); 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, Inc., 142 F.3d at 1039 (stating that disclosure "could result in destruction of evidence"); Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 312 (D.C. Cir. 1988) (accepting agency's assertion that disclosure could allow for destruction or alteration of evidence, fabrication of alibis, and identification of witnesses); Performance Coal Co., 847 F. Supp. 2d at 16 (noting that prematurely revealing information might permit altering of evidence); Council on Am.-Islamic Rels., 749 F. Supp. 2d at 1119 (noting that release could permit targets to alter, destroy, or create false evidence); Lieff, Cabraser, Heimann & Bernstein v. DOJ, 697 F. Supp. 2d 79, 84-85 (D.D.C. 2010) (agreeing with agency that disclosure could provide details about illegal activities being investigated thus enabling targets to determine what evidence to destroy); Rosenglick v. IRS, No. 97-747, 1998 WL 773629, at *2 (M.D. Fla. Mar. 10, 1998) (reiterating that disclosure "could aid a wrongdoer in secreting or tampering with evidence").

courts have upheld the application of Exemption 7(A) to protect law enforcement records under a mosaic theory of harm, through which distinct pieces of information can be combined together to cause harm.[35]

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[34] See, e.g., Lewis v. U.S. Dep't of the Treasury, 851 F. App'x 214, 216 (D.C. Cir. 2021) (holding that agency "met its burden" when it "explained how release . . . would likely interfere with the ongoing proceedings . . . by chilling cooperation between FinCEN and its foreign counterparts"); Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 930 (D.C. Cir. 2003) (recognizing that witnesses "would be less likely to cooperate" and that a "potential witness or informant may be much less likely to come forward and cooperate with the investigation if he believes his name will be made public"); Alyeska Pipeline Serv., 856 F.2d at 311 (affirming district court's determination that assertion of Exemption 7(A) was proper where disclosure might identify who had provided documents and would "thereby subject them to potential reprisals and deter them from providing further information"); Lieff, Cabraser, Heimann & Bernstein, 697 F. Supp. 2d at 85 (reiterating that "D.C. Circuit has previously held" that withholding of information about investigation was proper where disclosure could provide details about "'particular types of allegedly illegal activities being investigated'" including "names of potential witnesses, who would then be 'less likely to cooperate'" (quoting Alyeska Pipeline Serv., 856 F.2d at 312)); EDUCAP, Inc. v. IRS, No. 07-2106, 2009 WL 416428, at *6 (D.D.C. Feb. 18, 2009) (explaining that agency's "expressed concern that release of the interview notes could deter potential witnesses from providing information is sufficient" to show interference); Stolt-Nielsen Trans. Grp., Ltd. v. DOJ, 480 F. Supp. 2d 166, 180 (D.D.C. 2007) (holding that since "release of this information would . . . chill necessary investigative communications with foreign governments, and have a chilling effect on amnesty applications" reliance on Exemption 7(A) was proper); Watkins Motor Lines, Inc., 2006 WL 905518, at *8 (accepting agency's enumerations of specific harms, including harm that release could prevent agency from obtaining information in the future, or make it more difficult to obtain from reluctant witnesses, by showing "that disclosure of these documents could reasonably be expected to interfere" (citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 241 (1978))); Kay, 976 F. Supp. at 39 (finding potential for "witness intimidation and . . . discourage[ment of] future witness cooperation" in ongoing investigation of alleged violation of FCC's rules); Wichlacz v. U.S. Dep't of Interior, 938 F. Supp. 325, 331 (E.D. Va. 1996) (accepting agency assertion that release would lead to "reduced cooperation by other potential witnesses after learning of the disclosure of the names of other witnesses"); Kay v. FCC, 867 F. Supp. 11, 19 (D.D.C. 1994) (explaining that witness "intimidation would likely dissuade informants from cooperating with the investigation as it proceeds"); Manna v. DOJ, 815 F. Supp. 798, 808 (D.N.J. 1993) (disclosing FBI reports could result in chilling effect on potential witnesses), aff'd, 51 F.3d 1158, 1165 (3rd Cir. 1995) (finding "equally persuasive the district court's concern for persons who have assisted or will assist law enforcement personnel"); Gould Inc. v. GSA, 688 F. Supp. 689, 704 (D.D.C. 1988) (disclosing information would have chilling effect on sources who are employees of requester).

[35] See, e.g., Ctr. for Nat'l Sec. Stud., 331 F.3d at 928-29 (finding Exemption 7(A) protected list of 9/11 detainees under a mosaic theory because release "would give terrorist organizations a composite picture of the government investigation" even if release of "any individual detainee may appear innocuous or trivial"); Elec. Priv. Info. Ctr. v. DOJ, 490 F. Supp. 3d 246, 270 (D.D.C. 2020) (protecting file names and serial numbers where "'[a]pplying a mosaic analysis, suspects and foreign adversaries could use these numbers

In certain unique circumstances, courts have allowed an agency to refuse to confirm or deny the existence of records ("Glomar" response) using Exemption 7(A). Specifically, a Glomar has been upheld where the existence of an investigation is publicly known, but acknowledging the existence of the specific records sought would disclose unknown details about the investigation's scope or direction, or the identities of targets or witnesses.[36] Courts have also upheld 7(A) Glomars for situations where the disclosure of the existence of records could harm national security or the integrity of ongoing surveillance operations.[37] However, even in the national security context, an agency must

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(indicative of investigative priority), in conjunction with other information known about other individuals and/or techniques, to formulate an exceptional understanding of the body of investigative intelligence available to the FBI; and where, who, what, and how it is investigating certain detected activities'" (quoting agency declaration)); Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, at *16 (D.D.C. July 2, 2020) (approving "mosaic" effect-based withholding of information which "may not have all come from active investigative files" but the release of which "could reasonably be expected to interfere with ongoing enforcement proceedings against some of the subjects at issue in [active] litigation"); N.Y. Times Co. v. FBI, 297 F. Supp. 3d 435, 446-47 (S.D.N.Y. 2017) (finding use of 7(A) appropriate because release of withheld portions of FBI 302s cross-referencing specific national security investigations and prosecutions of other terrorism suspects would "allow[] the FBI's adversaries to 'piece[] together' a 'mosaic of information' regarding the agency's investigative strategy" (quoting agency declaration)); cf. Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) (explaining the mosaic harm where an "individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself") (Exemption 3 case).

[36] See James Madison Project v. DOJ, 330 F. Supp. 3d 192, 203 (D.D.C. 2018) (holding that while government had confirmed existence of investigation regarding potential Russian interference in the 2016 presidential election and any links or coordination between Russia and Trump campaign, agency could still Glomar existence of records regarding whether President Trump was target, subject, or witness in that investigation).

[37] See Project for Priv. & Surveillance Accountability, Inc. v. DOJ, No. 20-3657, 2022 WL 4365745, at *13 (D.D.C. Sept. 19, 2022) (holding that existence of records regarding foreign intelligence "unmasking" requests regarding members of Congressional intelligence committees is properly classified, and also upholding agency's alternate argument that Exemption 7(A) Glomar response was appropriate because any responsive records would be investigative in nature); Eddington v. DOJ, 581 F. Supp. 3d 218, 234 (D.D.C. 2022) (accepting 7(A) Glomar response for alleged investigative counterterrorism records regarding foreign national in context where existence of related foreign intelligence records was properly classified for national security reasons); ACLU v. DOD, No. 18-154, 2019 WL 3945845 (D. Mont. Aug. 21, 2019) (finding that disclosing the existence or nonexistence of responsive records [regarding threats against the Keystone XL pipeline] "'would not only confirm threats have been detected, it would also disclose the scope of the FBI's investigative capabilities and vulnerabilities" and "would alert the public of the FBI's level of

be able to demonstrate that disclosure of the existence of records would cause harms protected against by Exemption 7(A).[38] In one case, an Exemption 7(A) Glomar was upheld outside the national security/surveillance context in a unique situation in which a candidate for political office made potentially threatening remarks about a political opponent, where disclosure of the existence of investigatory records would pose an ongoing threat to the integrity of any potential investigation.[39]

Courts have held that Exemption 7(A) ordinarily will not afford protection when the target of the investigation has possession of, or has submitted, the information in

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interest and scope of resources available to thwart the threat(s), and afford criminals and/or terrorists the opportunity to alter their behaviors'" (quoting agency declaration)); Buzzfeed, Inc. v. DOJ, 344 F. Supp. 3d 396, 404 (D.D.C. 2018) (finding that acknowledging existence of responsive records concerning aerial surveillance program associated with twenty-seven specific planes "would enable individuals involved in criminal activity to track planes, learn where the FBI is conducting an investigation, and alter their behavior to avoid detection or interrupt or impede ongoing law enforcement investigations" and "denying the existence of records could signal to criminals that certain planes are not FBI planes and certain routes are free from FBI surveillance").

[38] ACLU of Mass. v. CIA, No. 22-11532, 2023 WL 3394485, at *9 (D. Mass. May 11, 2023) (rejecting agency's Exemption 7(A) Glomar response for failure to explain "how additional confirmation from Defendants would lead to any interference with the FBI's investigation, where multiple other agencies have already disclosed the non-existence of responsive records in their respective possession" and "that knowledge is also in [the investigatory target's] possession"); Leopold v. DOJ, No. 17-2819, 2022 WL 4598596, at *9 (D.D.C. Sept. 30, 2022) (rejecting Exemption 7(A) Glomar response for non-targeted request for records regarding 152 news articles that allegedly contained leaks of classified information because disclosure of existence of records would not reveal whether any particular articles contained classified information, nor would it reveal existence of any investigation regarding specific news article, and finally, investigation of many of the news articles would be time-barred by applicable statute of limitations); Accuracy in Media, Inc. v. DOD, No. 14-1589, 2020 WL 9439354, at *11 (D.D.C. Aug. 27, 2020) (rejecting FBI's Glomar response to request for variety of FBI witness interview reports allegedly created in response to Benghazi attack, noting that "FBI's predictions of harm are owed significant deference," but finding that "premise that acknowledging the existence of any 302 report would necessarily reveal the existence of specific 302 reports may well be true, but it is unexplained").

[39] Leopold v. DOJ, 301 F. Supp. 3d 13, 29 (D.D.C. 2018) (upholding 7(A) Glomar regarding potential existence of investigation of comments made by presidential candidate regarding his political opponent, where confirmation of existence of investigation "'would tip off subjects and persons of investigative interest, thus giving them the opportunity to take defensive actions to conceal their criminal activities, elude detection, and suppress and/or fabricate evidence'" (quoting agency declaration)).

question[40] or the agency has made it public.[41] Courts have, however, upheld protection for "selected" information provided by the target which would suggest the nature and scope of the investigation.[42]

Generalized Showing of Harm

To fall within the protection of Exemption 7(A), courts have held that it is sufficient for an agency to make a generalized showing that release of the records would interfere

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[40] See, e.g., Lion Raisins v. USDA, 354 F.3d 1072, 1085 (9th Cir. 2004) (stating – in a situation in which investigatory target already possessed copies of documents sought – that "[b]ecause Lion already has copies . . . USDA cannot argue that revealing the information would allow Lion premature access to the evidence upon which it intends to rely at trial"); Wright v. OSHA, 822 F.2d 642, 646 (7th Cir. 1987) (observing that disclosure of information provided by plaintiff would not provide plaintiff "with any information that it does not already have"); Chesapeake Bay Found., Inc. v. Army Corps of Eng'rs, 677 F. Supp. 2d 101, 108 (D.D.C. 2009) (finding that the agency did not explain "how its investigation will be impaired by the release of information that the targets of the investigation *already possess*"); Est. of Fortunato v. IRS, No. 06-6011, 2007 WL 4838567, at *4 (D.N.J. Nov. 30, 2007) (explaining that because information appears to be either in plaintiff's possession or known to plaintiff, agency "has not met [its] burden of justifying the withholding of these documents under Exemption 7(A)"); Dow Jones Co. v. FERC, 219 F.R.D. 167, 174 (C.D. Cal. 2002) (stating that there cannot be harm because "each target company has a copy . . . and therefore is on notice as to the government's possible litigation strategy and potential witnesses"); Scheer v. DOJ, 35 F. Supp. 2d 9, 14 (D.D.C. 1999) (declaring that agency assertions of harm and "concern proffered . . . cannot stand" when agency itself disclosed information to target); Ginsberg v. IRS, No. 96-2265, 1997 WL 882913, at *3 (M.D. Fla. Dec. 23, 1997) (reiterating that "where the documents requested are those of the taxpayer itself rather than the documents of a third party . . . 'it is unlikely that their disclosure could reveal . . . anything [the requester] does not know already'" (quoting Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986))).

[41] See UtahAmerica Energy v. Dep't of Lab., 700 F. Supp. 2d 99, 108 (D.D.C. 2010) (finding withholding of investigatory reports into two mining accidents not justified where reports "have been available in full on [Mining Safety and Health Administration] website" and adding that agency's "failure to explain with greater particularity how that information could compromise those ongoing investigations some two years [after posting reports on website] should not be rewarded by this Court").

[42] See, e.g., Swan v. SEC, 96 F.3d 498, 500-01 (D.C. Cir. 1996) (holding that "harm in releasing ['information [two clients'] attorney conveyed to the [agency]'] flows mainly from the fact that it reflects the [agency] staff's selective recording . . . and thereby reveals the scope and focus of the investigation"); Willard v. IRS, 776 F.2d 100, 103 (4th Cir. 1985) (noting that although "refusal to disclose an individual's own statements is unusual in FOIA cases," the "selectivity in recording" those portions of interviews that agents considered relevant "would certainly provide clues . . . of the nature and scope of the investigation").

with enforcement proceedings.[43] Indeed, courts have found that publicly revealing too many details about an ongoing investigation could jeopardize the investigation.[44] While generalized showings of harm are normally acceptable, courts have also cautioned that the exemption does not permit "blanket" withholding of records without a clear demonstration of the harm that would be caused by the disclosure of such records.[45] The

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[43] See, e.g., Lazardis v. Dep't of State, 934 F. Supp. 2d 21, 37 (D.D.C. 2013) ("'Under exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding[;] . . . [r]ather, federal courts may make generic determinations that [disclosure of certain kind of records] would generally 'interfere with enforcement proceedings.'" (quoting Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir. 1980))); Cuban v. SEC, 744 F. Supp. 2d 60, 86-87 (D.D.C. 2010) (noting that agency "describes generally how disclosure of each category could cause harm to the defendant's investigatory interests," explaining that "extensive specificity is not required for Exemption 7(A)," and holding that agency "described in sufficient detail . . . the harm that could befall the agency if these records are prematurely released"); Kay v. FTC, 976 F. Supp. 23, 39 (D.D.C. 1997) (stating that agency "need not establish that witness intimidation is certain to occur, only that it is a possibility"); 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); 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."); Alyeska Pipeline Serv. v. EPA, No. 86-2176, 1987 WL 17071, at *2-3 (D.D.C. Sept. 9, 1987) (explaining that government need not "show that intimidation will certainly result," but it must "show that the possibility of witness intimidation exists"), aff'd, 856 F.2d 309 (D.C. Cir. 1988).

[44] Agrama v. IRS, No. 17-5270, 2019 WL 2067719, at *2 (D.C. Cir. Apr. 19, 2019) (finding that "[w]hile the IRS's public disclosures [concerning its use of Exemption 7(A)] are cursory, [the court has] held that 'there are occasions when extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed'" (quoting Lykins v. DOJ, 725 F.2d 1455, 1463 (D.C. Cir. 1984))); Int'l Union of Elevator Constr. Loc. 2 v. U.S. Dep't of Lab., 747 F. Supp. 2d 976, 982 (N.D. Ill. 2010) (explaining that agency need only provide enough information to permit court to review its claims that disclosure "could compromise" investigation; thus, compelling production of Vaughn Index could effectively defeat very purpose of Exemption 7(A)); Cuban, 744 F. Supp. 2d at 86 (stating that "extensive specificity is not required for Exemption 7(A) where providing such detail would undermine the precise reason for the non-disclosure"); Blackwell v. FBI, 680 F. Supp. 2d 79, 94 (D.D.C. 2010) (explaining that agency "need not submit declarations that reveal the exact nature and purpose of its investigations in order to satisfy FOIA-exemption 7(A)").

[45] See North v. Walsh, 881 F.2d 1088, 1100 (D.C. Cir. 1989) (stating that "Exemption 7(A), in sum, does not provide a blanket exemption for all the information [relevant to an enforcement proceeding]" but rather only where "disclosure can reasonably be expected to interfere in a palpable, particular way with . . . the enforcement proceedings"); see also, Cuban, 744 F. Supp. 2d at 85 (stressing that exemption does not permit blanket withholding for all records relevant to investigation and finding that defendant "has . . . described in

Court of Appeals for the District of Columbia Circuit has held that an agency must show how disclosure of the records would interfere with an enforcement proceeding.[46]

Generic Categories

When invoking Exemption 7(A), the Supreme Court has held that the government may justify its withholdings by reference to generic categories of documents, rather than document-by-document.[47]

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sufficient detail the nature of the records it has withheld and the harm that could befall the agency if these records are prematurely released"); UtahAmerica Energy v. U.S. Dep't of Lab., 700 F. Supp. 2d 99, 109 (D.D.C. 2010) (reiterating that "'automatic or wholesale withholdings'" are not authorized simply because law enforcement proceeding is ongoing (quoting North 881 F.2d at 1097)); United Am. Fin. v. Potter, 531 F. Supp. 2d 29, 38-40 (D.D.C. 2008) (reiterating that agency "should be mindful of the standards applicable in this Circuit" and that even under categorical approach, agency must review each document because there is "no 'blanket exemption'" (quoting Crooker v. ATF, 789 F.2d 64, 65 (D.C. Cir. 1986))); Gould Inc. v. GSA, 688 F. Supp. 689, 703, 704 n.34 (D.D.C. 1988) (describing generic categories approach as steering "middle ground" between detail required by Vaughn Index and blanket withholding); cf. Patino-Restrepo v. DOJ, No. 17-5143, 2019 WL 1250497, at *2 (D.C. Cir. Mar. 14, 2019) (holding that FBI properly withheld in full investigative file concerning crime organizations under Ex. 7(A) because release of any portion of file would be reasonably likely to compromise an ongoing investigation by creating chilling effect on witnesses and possibly revealing scope of investigation, alerting potential targets).

[46] See Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (remanding for further fact finding because "it is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; 'it must rather demonstrate how disclosure' will do so" (quoting Sussman v. USMS, 494 F.3d 1106, 1114 (D.C. Cir. 2007))); Sussman, 494 F.3d at 1114 (holding that an agency must demonstrate how disclosure would reveal the focus of an investigation); Campbell v. HHS, 682 F.2d 256, 259 (D.C. Cir. 1982) (holding that the government must show "how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding").

[47] See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 236 (1978) (explaining that statute draws distinction "between subdivision (A) and subdivisions (B), (C), and (D)" of Exemption 7, holding that 7(A) "appears to contemplate that certain generic determinations might be made," and finding that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings'"); see also Batton v. Evers, 598 F.3d 169, 182 (5th Cir. 2010) (reiterating that "Supreme Court has held that generic categorical determinations may be made under Exemption 7(A)"); Solar Sources Inc. v. United States, 142 F.3d 1033, 1038 (7th Cir. 1998) ("It is . . . well-established that the Government may justify its withholdings by reference to generic categories of documents, rather than document-by-document." (citing Robbins Tire & Rubber Co., 437 U.S. at 236)); Leopold v. DOJ, 301 F. Supp. 3d 13, 26 (D.D.C. 2018) (finding categorical approach permissible because "even a *Vaughn* index or other precise description of the records being

When an agency elects to use the "generic" approach, the D.C. Circuit has held that the agency "has a three-fold task":[48]

> First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings.[49]

(For a further discussion, see Litigation Considerations, Vaughn Index.)

Courts traditionally accept agency declarations in Exemption 7(A) cases that specify the distinct, generic categories of documents at issue and the harm that would result from their release, rather than requiring extensive, detailed itemizations of each document.[50]

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withheld would 'reveal non-public information about the targets and scope of the investigation' which 'could reasonably be expected to' interfere with it" (quoting agency affidavit)).

[48] Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1098 (D.C. Cir. 2014); accord Bevis v. Dep't of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986).

[49] Citizens for Resp. & Ethics in Wash., 746 F.3d at 1098 (quoting Bevis, 801 F.2d at 1389-90); accord In re DOJ, 999 F.2d 1302, 1309-10 (8th Cir. 1993) (en banc) ("To satisfy its burden with regard to Exemption 7(A), the government must define functional categories of documents, it must conduct a document-by-document review to assign documents to proper categories; and it must explain to the court how the release of each category would interfere with enforcement proceedings." (citing Bevis, 801 F. 2d at 1389)); Int'l Union of Elevator Constructors Loc. 2 v. DOJ, 804 F. Supp. 2d 828, 834 (N.D. Ill. 2011) (same) (quoting In re DOJ, 999 F.2d at 1309-10); Bilderbeek v. DOJ, No 08-1931, 2010 WL 1049618, at *5 (M.D. Fla. Mar. 22, 2010), aff'd sub nom. Van Bilderbeek v. DOJ, 416 F. App'x 9 (11th Cir. 2011) (discussing that "D.C. Circuit stated that in order to use a categorical approach when withholding records, an agency must define the categories to be used, conduct a document-by-document review before assigning documents to the appropriate category, and 'explain to the court how the release of each category would interfere with enforcement proceedings'" (quoting Bevis, 801 F.2d at 1389-90)).

[50] See, e.g., Lynch v. Dep't of the Treasury, No. 99-1697, 2000 WL 123236, at *2 (9th Cir. Jan. 28, 2000) (explaining that "government need not 'make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding'" (quoting Lewis v. IRS, 823 F.2d 375, 380 (9th Cir. 1987))); Solar Sources, Inc., 142 F.3d at 1038 (reiterating that government "need not establish that release of a particular document would actually interfere, [but] may justify its withholdings by reference to generic categories of documents, rather than document-by-document"); In re DOJ, 999 F.2d at 1308 ("[T]he Supreme Court has consistently interpreted Exemption 7 of the FOIA (specifically so far subsections 7(A), 7(C), and 7(D)) to permit the government to

Courts have emphasized, however, that agencies are still required to conduct a document-by-document review in order to assign documents to their proper categories.[51]

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proceed on a categorical basis" and to not require a document-by-document Vaughn Index.); Dickerson v. DOJ, 992 F.2d 1426, 1431 (6th Cir. 1993) (stating that it is "often feasible for the courts to make 'generic determinations' about interference"); Spannaus v. DOJ, 813 F.2d 1285, 1288 (4th Cir. 1987) (stating that Supreme Court "has rejected the argument that the statute requires particularized showings of interference, holding instead that the Government may justify nondisclosure in a generic fashion"); Curran v. DOJ, 813 F.2d 473, 475 (1st Cir. 1987) (holding that generic determinations of likely interference are permitted); Bevis, 801 F.2d at 1389 (finding that agency "need not proceed on a document-by-document basis, detailing to the court the interference that would result from disclosure," but may take "generic approach, grouping documents into relevant categories"); Crooker v. ATF, 789 F.2d 64, 67 (D.C. Cir. 1986) ("Because generic determinations are permitted, the government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document."); Farahi v. FBI, No. 15-2122, 2022 WL 17338008, at *5 (D.D.C. Nov. 30, 2022) (approving agency's use of generic categories where agency "[explained] each . . . 'functional category . . . which permit[ted] the Court to 'trace a rational link between the nature of the document and the alleged likely interference'" (quoting Crooker, 789 F.2d at 67)); Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, at *17 (D.D.C. July 2, 2020) (accepting agency's categorical description[s] because agency averred that "'providing a document-by-document description or listing of the records responsive to Plaintiff's request[s] ... would ... undermine[ ] the very interests that the FBI [seeks] to protect'"); Int'l Union of Elevator Constr. Loc. 2 v. U.S. Dep't of Lab., 747 F. Supp. 2d 976, 982 (N.D. Ill. 2010) (explaining that use of generic categories to justify withholdings is well-established and that "[c]ompelling the production of a *Vaughn* index could also effectively defeat the very purpose of Exemption 7(A)"); see also FOIA Update, Vol. V, No. 2, at 3-4 ("FOIA Counselor: The 'Generic' Aspect of Exemption 7(A)") (discussing use of generic categories under Exemption 7(A)).

[51] See, e.g., Bevis, 801 F.2d at 1389 (explaining that agency "must itself review each document to determine the category in which it properly belongs"); Banks v. DOJ, 700 F. Supp. 2d 9, 17 (D.D.C. 2010) (finding that agency must determine, document-by-document, the category into which each document falls); Van Bilderbeek, 2010 WL 1049618, at *5 (determining that agency used categorical approach properly because it reviewed each document responsive to request and placed document in its appropriate category); Laws.' Comm. for C.R. v. Dep't of the Treasury, No. 07-2590, 2009 WL 1299821, at *3 (N.D. Cal. May, 11, 2009) ("In order to apply an exemption categorically, there must be some indicia that the individual documents within the class of documents are similar; and that the agency has reviewed and ensured that the individual documents it seeks to include in the class of documents are indeed similar."); United Am. Fin., 531 F. Supp. 2d at 40 (stating that under generic category approach, agency must review each document to determine in which category it properly belongs); Kidder v. FBI, 517 F. Supp. 2d 17, 28 (D.D.C. 2007) (determining that agency used categorical approach properly because it reviewed each document responsive to request and placed document in its appropriate category); Gavin v. SEC, No. 04-4522, 2006 WL 2975310, at *2-3 (D. Minn. Oct. 13, 2006) (explaining that agency must conduct "document-by-document review of responsive documents for categorization"); Edmonds v. FBI, 272 F. Supp. 2d 35, 54 (D.D.C. 2003) (explaining that

Indeed, courts have held that the burden is on agencies to "identif[y] either specific documents or functional categories of information that are exempt from disclosure, and disclos[e] any reasonably segregable, non-exempt" portions.[52]

Several Courts of Appeals have provided specific guidance as to what constitutes an adequate "generic category" in an Exemption 7(A) declaration.[53] The general principle

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agency may group documents into categories, but that "[i]n order to utilize this categorical approach, [an agency] must 'conduct a document-by-document review' of all responsive documents to assign documents to the proper category'" (quoting Bevis, 801 F.2d at 1389-90)); Kay v. FTC, 976 F. Supp. 23, 35 (D.D.C. 1997) (same).

[52] Long v. DOJ, 450 F. Supp. 2d 42, 76 (D.D.C. 2006) (explaining that to do otherwise "would eviscerate the principles of openness in government that the FOIA embodies"); see, e.g., Inst. for Just. v. IRS, 941 F.3d 567, 574 (D.C. Cir. 2019) (finding that defendant failed to "tailor the categories of information withheld to what Exemption 7(A) protects: law enforcement records that 'could reasonably be expected to interfere with enforcement proceedings'" (quoting Citizens for Resp. & Ethics in Wash., 746 F.3d at 1091, 1096)); Gatson v. FBI, 779 F. App'x 112, 116-17 (3d Cir. 2019) (stating that the FBI provided sufficient detail as to how the withheld records fell into one or more of three "functional" categories and that "(1) [defendant's] explanations for any redactions, (2) the very fact that the withholding was partial, and (3) the amenability of all of that information to construction of a basic Vaughn index . . . leaves [the court] satisfied that there is sufficient 'connective tissue' between the document[s], the deletion[s], the exemption[s] and the explanation[s]'" (quoting Davin v. DOJ, 60 F.3d 1043 (3d Cir. 1995))); Batton v. Evers, 598 F.3d 169, 182 (5th Cir. 2010) (reiterating that while Supreme Court has held that generic categorical determinations are permissible, it "expressly refused to find that an agency can simply claim [Exemption 7(A)] for everything in a file labeled 'investigative'" and attempt to do so is "plainly insufficient to satisfy [agency's] burden"); Smith v. ICE, 429 F. Supp. 3d 742, 765-66 (D. Colo. 2019) (explaining that while Exemption 7(A) may categorically apply to some types of records in specific database at issue, agency failed to demonstrate that specific database contains only these types of records); Gray v. U.S. Army Crim. Investigation Command, 742 F. Supp. 2d 68, 75 (D.D.C. 2010) (stating that "boilerplate statements, without reference to specific documents or even categories of documents, fail to support" Exemption 7(A)); Banks, 700 F. Supp. 2d at 18 (repeating that "mere fact that the underlying investigation remains open is not a sufficient basis for withholding the entire case file; such a decision is justified only on a showing that the release of each category of documents could reasonably be expected to interfere with enforcement proceedings"); Gavin, 2006 WL 2975310, at *3-4 (refuting agency's assertion that categorization eliminates duty to segregate; explaining that agency must conduct "document-by-document review of responsive documents for categorization and segregation purposes").

[53] See Gatson, 779 F. App'x at 117 (approving the "functional" categories provided by the government to support withholding records in full under Exemption 7(A) and finding that "those categories, either facially or through detailed explanation . . ., plainly provided the District Court with ample information to assess the applicability of Exemption 7A, including an inquiry as to whether disclosure would interfere with the then-pending criminal prosecution"); Curran v. DOJ, 813 F.2d 473, 475 (1st Cir. 1987) ("The chief characteristic of an acceptable taxonomy should be functionality – that is, the classification should be clear

is that agency declarations must provide at least a general, "functional" description of the types of documents at issue sufficient to indicate the type of interference threatening the law enforcement proceeding.[54]

Deference

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enough to permit a court to ascertain 'how each . . . category of documents, if disclosed, would interfere with the investigation.'" (quoting Campbell v. HHS, 682 F.2d 256, 265 (D.C. Cir. 1982))); Bevis v. Dep't of State, 801 F.2d 1386, 1390 (D.C. Cir. 1986) (holding that "identities of possible witnesses and informants, reports on the location and viability of potential evidence, and polygraph reports" are sufficient categories, whereas categories "identified only as 'teletypes,' 'airtels,' or 'letters'" are insufficient because the former "allow the court to assess the FBI's representations of how release of the documents would result in interference to the [enforcement] proceedings").

[54] See Bevis, 801 F.2d at 1389 (describing proper "functional" categories as those that allow "'court to trace a rational link between the nature of the document and the alleged likely interference'" (quoting Crooker v. ATF, 789 F.2d 64, 67 (D.C. Cir. 1986))); see also e.g., Batton, 598 F.3d at 182 (regarding category labeled "certain documents," discussing how "the problem here is that it is impossible to determine the exact type of documents that the IRS asserts are exempt under 7(A)"); Curran, 813 F.2d at 475 ("Withal, a tightrope must be walked: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag."); Crooker, 789 F.2d at 67 ("The hallmark of an acceptable Robbins category is thus that it is *functional*; it allows the court to trace a rational link between the nature of the document and the alleged likely interference."); Farahi v. FBI, 643 F. Supp. 3d 158, 170-71 (D.D.C. 2022) (finding that FBI's division of records into two functional categories was adequate because accompanying description was enough to permit court to link nature of documents and likely interference); Lewis v. U.S. Dep't of Treasury, No. 17-0943, 2020 WL 1667656, at *5 (D.D.C. Apr. 3, 2020) (upholding use of functional categories where agency "provided sufficient detail about its functional categories to address how the disclosure of documents in each category would frustrate enforcement proceedings"); Owens v. DOJ, No. 04-1701, 2006 WL 3490790, at *6 (D.D.C. Dec. 1, 2006) (observing that "courts reviewing the withholding of agency records under Exemption 7 cannot demand categories 'so distinct as prematurely to let the cat out of the investigative bag'" (quoting Curran, 813 F.2d at 475)); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *3 (D. Minn. Oct. 24, 2005) (stating that "[p]roper utilization of the categorical approach requires" categories to be "functional," which is defined as allowing "'court to trace a rational link between the nature of the document and the alleged likely interference'" (quoting Bevis, 801 F.2d at 1389)); cf. Inst. for Just. & Hum. Rts. v. EOUSA, No. 96-1469, 1998 WL 164965, at *5 (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").

The D.C. Circuit has recognized that "Exemption 7(A) explicitly requires a predictive judgment of the harm that will result from disclosure of information."[55] In Center for National Security Studies v. DOJ,[56] the D.C. Circuit held that in the national security context, "the long-recognized deference to the executive" utilized by the courts when applying Exemptions 1 and 3 should also apply in the Exemption 7(A) context.[57] While granting greater deference to agencies in the national security area, courts still carefully review the government's submissions to determine if they meet Exemption

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[55] Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003); see also Elec. Priv. Info. Ctr. v. DHS, 82 F. Supp. 3d 307, 320 (D.D.C. 2015) (same).

[56] 331 F.3d 918 (D.C. Cir. 2003).

[57] Id. at 928, 932 (explaining that courts "must defer" to executive on national security matters; therefore, "we owe the same deference under Exemption 7(A)" when national security is at issue); see also ACLU of Mich. v. FBI, 734 F.3d 460, 467 (6th Cir. 2013) (discussing deference and holding that demographic data was properly withheld pursuant to Exemption 7(A) because it concerns "matter of national security as to which the agency is owed deference"); Jud. Watch, Inc. v. DHS, 59 F. Supp. 3d 184, 193 (D.D.C. 2014) (holding that "[i]n light of the deference owed to the agency . . . the Court concludes that DHS properly withheld the documents" because they "are part of an ongoing investigation . . . which may lead to future law enforcement proceedings" concerning the 9/11 attacks); Council on Am.-Islamic Rels. v. FBI, 749 F. Supp. 2d 1104, 1117, 1119 (S.D. Cal. 2010) (reiterating, in context of case related to national security investigation, that courts should be hesitant to second guess law enforcement agencies and agreeing with agency that release of records would cause specific, potential harms); Am.-Arab Anti-Discrimination Comm. v. DHS, 516 F. Supp. 2d 83, 89 (D.D.C. 2007) (holding information about individuals arrested on national security criteria withholdable under Exemption 7(A) and explaining that "Center for National Security Studies may have ratcheted up the degree of deference that must be accorded the executive, but it was clear long before that decision that the courts are not simply to use their own best judgment in a national security context"); L.A. Times Commc'ns v. Dep't of the Army, 442 F. Supp. 2d 880, 899 (C.D. Cal. 2006) (stating that the "[c]ourt defers to [an Army officer's] predictive judgments" about Exemption 7(A) harm in insurgency setting); Edmonds v. FBI, 272 F. Supp. 2d 35, 55 (D.D.C. 2003) (stating that deference "must be extended to Exemption 7(A) in cases like this one, where national security issues are at risk" (citing Ctr. for Nat'l Sec. Stud., 331 F.3d at 927-28)); cf. Lowy v. IRS, No. 10-00767, 2011 WL 1211479, at *12, 15 (N.D. Cal. Mar. 30, 2011) (finding, in cases involving tax information exchanged between IRS and foreign tax offices, that "IRS's determination about potential harms to tax administration was 'entitled to some deference'" (quoting Shannahan v. IRS, 680 F. Supp. 2d 1270, 1276 (W.D. Wash. 2010))); Shannahan, 680 F. Supp. 2d at 1276 (holding that "conclusions [in agency declarations] are entitled to some deference as the court is not in a position to independently evaluate what actions on the part of the IRS or the United States government would impair relations between Hong Kong and the United States"; because disclosure would interfere with ongoing enforcement proceedings, agency "has met its burden under Exemption 7(A)"), aff'd, 672 F.3d 1142 (9th Cir. 2012).

7(A)'s standards.[58] Courts have also afforded deference to agencies' predictive judgment of harm when asserting Exemption 7(A) in non-national security contexts.[59] However, the D.C. Circuit has cautioned that "it is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; 'it must rather demonstrate *how* disclosure' will do so."[60]

Applying Exemption 7(A) in Litigation

The Court of Appeals for the District of Columbia Circuit has held that the law enforcement proceeding supporting the use of Exemption 7(A) "must remain pending at

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[58] See Ctr. for Nat'l Sec. Stud., 331 F.3d at 926-32 (while stating that "[w]e have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated," nonetheless stressing that "we do not abdicate the role of the judiciary"); see also Am.-Arab Anti-Discrimination Comm., 516 F. Supp. 2d at 89 (noting that "courts have consistently deferred to executive affidavits predicting harm to the national security," but nonetheless reviewing agency submissions to determine if agency "satisfies" test of reasonableness and provides "sufficient detail"); Kidder v. FBI, 517 F. Supp. 2d 17, 27-28 (D.D.C. 2007) (mentioning deference given to law enforcement agencies, but stressing that agency must show, even in case involving terrorism and intelligence gathering, how release of records could interfere with proceedings); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at *7 (D.D.C. Mar. 9, 2007) (noting "sensitive investigations" involving terrorist bombings in Tanzania and Kenya, yet requiring agency to provide sufficient detail to allow court to trace link between document and purported interference with "potential criminal proceedings"); cf. Shearson v. DHS, No. 06-1478, 2007 WL 764026, at *4 (N.D. Ohio Mar. 9, 2007) (finding that actual enforcement proceedings must be reasonably contemplated for national security deference to be applicable, and that deference afforded to law enforcement agencies fluctuates depending on extent to which withheld information implicates matters of national security).

[59] See Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (discussing "deference to an agency's predictive judgment of the harm" in a public corruption matter); Prop. of the People, Inc. v. DOJ, 539 F. Supp. 3d 16, 25 (D.D.C. 2021) (observing that court must "give deference to an agency's predictive [harm] judgment," and crediting agency assertion that single case number written on newspaper article may allow individual currently under investigation to analyze pertinent documents and potentially identify witnesses or counteract evidence); Robbins Geller Rudman & Dowd LLP v. SEC, 419 F. Supp. 3d 523, 534-35 (E.D.N.Y. 2019) (giving deference to SEC assertions that release of investigatory documents would interfere with enforcement proceedings despite plaintiff's assertion that some investigatory targets are on notice of potential investigation); Cable News Network, Inc. v. FBI, 298 F. Supp. 3d 124, 129 (D.D.C. 2018) (recognizing that, in some instances, "the Government must be somewhat obscure in its public filings about the effect of disclosure so as not to risk spilling the very information it seeks to keep secure").

[60] Citizens for Resp. & Ethics in Wash., 746 F.3d at 1098 (quoting Sussman v. USMS, 494 F.3d 1106, 1114 (D.C. Cir. 2007)).

the time of [the court's] decision, not only at the time of the initial FOIA request."[61] The D.C. Circuit declared that Exemption 7(A) is "temporal in nature,"[62] and reliance on it "may become outdated when the proceeding at issue comes to a close."[63]

When a change in circumstances associated with a law enforcement proceeding impacts the applicability of Exemption 7(A), a court may order further review, and possible release, of the withheld material.[64] In Maydak v. DOJ,[65] the D.C. Circuit denied the government's motion for remand "so that it might defend the applicability of other FOIA exemptions" when Exemption 7(A) became inapplicable and instead "order[ed] the release of all requested documents," ruling that the government "must assert all exemptions at the same time, in the original court proceedings."[66]

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[61] Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1097 (D.C. Cir. 2014) (citing Sussman v. USMS, 494 F.3d 1106, 1115 (D.C. Cir. 2007)); see Sussman, 494 F.3d at 1115 (holding that "relevant proceedings must be pending or reasonably anticipated at the time of the district court's eventual decision, not merely at the time of [plaintiff's] original FOIA request, in order to support redaction under Exemption 7(A)" (citing August v. FBI, 328 F.3d 697, 698 (D.C. Cir. 2003))); see also Cuban v. SEC, 744 F. Supp. 2d 60, 87 (D.D.C. 2010) (explaining that Exemption 7(A) "is only temporary" and given passage of time since it was first invoked, agency must establish at upcoming hearing whether investigation is still ongoing").

[62] Citizens for Resp. & Ethics in Wash., 746 F.3d at 1097 (citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 230-32 (1978)).

[63] Id. (citing Coastal States Gas Corp. v. DOE, 617 F.2d 854, 870 (D.C. Cir. 1980)).

[64] See Jud. Watch v. DOJ, No. 17-5283, 2018 WL 10758508, at *1 (D.C. Cir. June 22, 2018) (vacating and remanding case involving FBI 302s to the district court after finding that law enforcement proceeding that served as basis for assertion of Exemption 7(A) was no longer pending); Citizens for Resp. & Ethics in Wash., 746 F.3d at 1097 (finding that "reliance on Exemption 7(A) may become outdated when the proceeding at issue comes to a close," and remanding case to clarify whether investigation was ongoing in light of concluded sentencings and appeals); August v. FBI, 328 F.3d 697, 698 (D.C. Cir. 2003) (ordering further review of records previously withheld under Exemption 7(A) and in camera consideration of other applicable FOIA exemptions due to conclusion of law enforcement proceedings); Conti v. DHS, No. 12-5827, 2014 WL 1274517, at *22 (S.D.N.Y. Mar. 24, 2014) (ordering production of un-redacted records withheld under Exemption 7(A) due to conclusion of law enforcement proceeding). But cf. Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, at *19 (D.D.C. July 2, 2020) (holding that where number of responsive records is large enough to warrant sampling procedure, agency action should be gauged based on propriety of withholdings at time they were made).

[65] 218 F.3d 760 (D.C. Cir. 2000).

[66] Id. at 765, 769 (noting that delay caused by permitting agency to raise FOIA exemption claims one at a time interferes with statutory goals of efficient and prompt disclosure of information and finding that agency offered no convincing reason why it could not have raised other exemptions in district court proceeding); see, e.g., Farahi v. FBI, No. 15-2122,

The D.C. Circuit subsequently declared in August v. FBI[67] that "we have repeatedly acknowledged that there are some 'extraordinary' circumstances in which courts of appeals may exercise their authority . . . to require 'such further proceedings to be had as may be just under the circumstances,' in order to allow the government to raise FOIA exemption claims it failed to raise the first time around."[68] It further explained that "[g]iven the drafters' recognition that the harms of disclosure may in some cases outweigh its benefits, we have avoided adopting a 'rigid press it at the threshold, or lose it for all times' approach to . . . agenc[ies'] FOIA exemption claims."[69]

Exclusion Considerations

2017 WL 11662716, at *2-3 (D.D.C. Jan. 23, 2017) (rejecting defendant's request, based on time-saving considerations, to only brief applicability of Exemption 7(A), while still preserving the right to later brief other exemptions, and explaining that situation does not override general rule that government must assert all exemptions at same time); 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. 00-960, 2002 WL 654133, at *1 n.2 (S.D.N.Y. Apr. 18, 2002) (noting that agency invoked exemptions in addition to Exemption 7(A) "because of Maydak").

[67] 328 F.3d 697 (D.C. Cir. 2003).

[68] Id. at 700 (holding that because failure to raise all FOIA exemptions at the outset resulted from human error, because wholesale disclosure would pose a significant risk to the safety and privacy of third parties, and because agency had taken steps to ensure that it does not make the same mistake again, remand is appropriate for consideration of other potentially applicable exemptions (quoting Maydak, 218 F.3d at 767)); see also Smith v. DOJ, 251 F.3d 1047, 1050 (D.C. Cir. 2001) (stating that "'as a general rule, [agency] must assert all exemptions at the same time, in the original district court proceeding,'" and noting that while "'extraordinary circumstances' or 'interim developments'" could warrant "departure from this rule," finding that no such circumstances were identified by agency; therefore, agency "must produce the [records] notwithstanding any other FOIA exemptions it may assert in a future case of this sort" (quoting Maydak, 218 F.3d at 764, 767)) (Exemption 3 case).

[69] August, 328 F.3d at 699 (quoting Sen. of P.R. v. DOJ, 823 F.2d 574, 581 (D.C. Cir. 1987); see e.g., Gawker Media, LLC v. FBI, 145 F. Supp. 3d 1100, 1106 (M.D. Fla. 2015) (finding that "[a]s soon as the FBI no longer claimed that their entire investigative file was being withheld under exemption 7(A), the FBI identified more specific exemptions in its Vaughn Index and supporting declaration;" "[Plaintiff] has had an opportunity to object to those exemptions and the Court has had an opportunity to consider the exemptions along with [Plaintiff's] objections;" and "[Plaintiff's] objections and response to summary judgment does not change the Court's decision to consider the additional exemptions"); Conti v. DHS, No. 12-5827, 2014 WL 1274517, at *22 (S.D.N.Y. Mar. 24, 2014) (noting that agency "may apply other exemptions" to records withheld under Exemption 7(A) upon conclusion of the law enforcement proceeding triggering the application of 7(A)).

Finally, the FOIA affords special protection to certain ongoing law enforcement proceedings through the "(c)(1) exclusion."[70] When there is reason to believe that the subject of a criminal law enforcement investigation is not aware of the existence of the investigation and disclosure of the existence of the investigation could reasonably be expected to interfere with enforcement proceedings, the agency may treat the records as not subject to the requirements of the FOIA.[71] (See discussion of the operation of subsection (c)(1) under Exclusions.)

[70] 5 U.S.C. § 552(c)(1) (2018).

[71] Id.