



## **Exemption 7**

### **Introduction**

Exemption 7 of the Freedom of Information Act protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual."<sup>1</sup>

The threshold requirement for Exemption 7 has been modified by Congress twice since the enactment of the FOIA. The last amendments occurred in 1986 with the passage of the Freedom of Information Reform Act of 1986, often referred to as the 1986

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<sup>1</sup> [5 U.S.C. § 552\(b\)\(7\) \(2006 & Supp. IV 2010\)](#); see, e.g., [Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord [Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 51879 (Oct. 8, 2009); see *FOIA Post*, "[OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government](#)" (posted 4/17/09).

FOIA amendments, which broadened the threshold of Exemption 7.<sup>2</sup> That amendment eliminated the requirement that the records be "investigatory" files and made Exemption 7 protection potentially available to all "records or information compiled for law enforcement purposes."<sup>3</sup> In addition, except for Exemption 7(B) and part of Exemption 7(E), the 1986 FOIA amendments changed the requirement that an agency demonstrate that disclosure "would" cause the harm each subsection seeks to prevent, by substituting a new standard that disclosure "could reasonably be expected to" cause the specified harms.<sup>4</sup> Thus, as a result of the 1986 FOIA amendments, records or information compiled for law enforcement, even if not actually investigatory, satisfy the exemption's threshold requirement.<sup>5</sup> As such, courts have found the threshold satisfied

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<sup>2</sup> See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see also Tax Analysts v. IRS, 294 F.3d 71, 79 (D.C. Cir. 2002) (explaining that 1986 FOIA amendments broadened threshold for Exemption 7); North v. Walsh, 881 F.2d 1088, 1098 n.14 (D.C. Cir. 1989) (stating that Congress in 1986 "changed the threshold requirement for withholding information under exemption 7" so that "it now applies more broadly"); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989) ("The 1986 amendment[s] broadened the scope of exemption 7's threshold requirement . . ."); Wash. Post Co. v. DOJ, No. 84-3581, 1987 U.S. Dist. LEXIS 14936, at \*26 (D.D.C. Sept. 25, 1987) (magistrate's recommendation) (noting that "[a]gency's burden of proof in this threshold test has been lightened considerably"), adopted, (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96 (D.C. Cir. 1988).

<sup>3</sup> Pub. L. No. 99-570, § 1802, 100 Stat. at 3207-48; see also Jordan v. DOJ, No. 10-1469, 2011 WL 6739410, at \*7 (D.C. Cir. Dec. 23, 2011) (noting that "Congress modified Exemption 7" to broaden its scope by replacing word "files" with word "records" and deleting word "investigatory"); Abdelfattah v. DHS, 488 F.3d 178, 184 (3d. Cir. 2007) (explaining that "1986 FOIA amendments broadened the applicability of Exemption 7 by expressly removing the requirement that the records be 'investigatory'"); Tax Analysts, 294 F.3d at 79 (explaining that 1986 FOIA amendments deleted "any requirement" that information be investigatory and emphasizing that "legislative history makes it clear that Congress intended the amended exemption to protect both investigatory and non-investigatory materials, including law enforcement manuals and the like" (citing S. Rep. No. 98-221, at 23 (1983))); Stanko v. BOP, No. 10-724, 2012 WL 336173, at \*3 (D.D.C. Feb. 3, 2012) (stating that "protection" afforded to records compiled for law enforcement purpose "extends to both investigatory and non-investigatory records"); Anderson v. BOP, No. 10-413, 2011 U.S. Dist. LEXIS 95125, at \*8 (D.D.C. Aug. 25, 2011) (same).

<sup>4</sup> Pub. L. No. 99-570, § 1802, 100 Stat. at 3207-48; see also DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989) (recognizing that shift from "would constitute" standard to "could reasonably be expected to constitute" standard "represents a congressional effort to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7]"); Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 9-13 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum 9-13].

<sup>5</sup> See Attorney General's 1986 Amendments Memorandum at 7; see, e.g., Tax Analysts, 294 F.3d at 79 (explaining that "legislative history makes it clear that Congress intended the amended exemption to protect both investigatory and non-investigatory materials,

for non-investigatory records provided they involve a law enforcement purpose<sup>6</sup> but have denied protection when the agency failed to establish a connection between the records and any law enforcement function.<sup>7</sup> Despite the change in the statutory

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including law enforcement manuals and the like"); PHE, Inc. v. DOJ, 983 F.2d 248, 249, 251 (D.C. Cir. 1993) (holding portions of FBI's Manual of Investigative Operations and Guidelines properly withheld pursuant to Exemption 7(E)); Peter S. Herrick's Custom & Int'l Trade Newsletter v. Customs and Border Prot., No. 04-0377, 2006 U.S. Dist. LEXIS 44802, at \*1, \*20-21 (D.D.C. June 30, 2006) (explaining that "if the personnel oversight and investigation procedures [in the agency's forfeiture handbook] concern misconduct that violates the law, then the information may be deemed to meet the threshold requirement of Exemption 7"); Sussman v. U.S. Marshals Serv., No. 03-610, 2005 WL 3213912, at \*9 (D.D.C. Oct. 13, 2005) (finding that "administrative and operational guidelines and procedures" that are used to investigate threats against federal court employees satisfy law enforcement requirement), summary judgment granted in pertinent part, No. 06-5085, 2006 U.S. App. LEXIS 26317 (D.C. Cir. Oct. 20, 2006); Mosby v. U.S. Marshals Serv., No. 04-2083, 2005 U.S. Dist. LEXIS 18914, at \*13-14 (D.D.C. Sept. 1, 2005) (explaining that "administrative and operational guidelines and procedures" meet threshold, because "[t]his information facilitates monitoring investigations, the flow and maintenance of investigative records, and aids in detecting and apprehending fugitives"); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993) (concluding that parts of IRS Law Enforcement Manual were exempt from disclosure pursuant to Exemption 7(E)); Ctr. for Nat'l Sec. Studies v. INS, No. 87-2068, 1990 WL 236133, at \*6 (D.D.C. Dec. 19, 1990) (reiterating that documents relating to INS's law enforcement procedures meet threshold requirement as "purpose in preparing these documents relat[es] to legitimate concerns that federal immigration laws have been or may be violated").

<sup>6</sup> See, e.g., Karantsalis v. DOJ, No. 10-10229, 2011 WL 846242, at \*3 (11th Cir. Mar. 11, 2011) (explaining that "it is clear the booking photographs were compiled for law enforcement purposes" because Marshals Service is "tasked" with receipt, processing, and transportation of prisoners, and photographs "were taken pursuant to this duty"); Anderson, 2011 U.S. Dist. LEXIS 95125 at \*9-10 (finding that statutory duty to manage federal correctional institutions satisfies threshold where, after incident at prison, "BOP determines that it is necessary to transfer an inmate to prevent future violence"); Griffin v. EOUSA, No. 09-1517, 2011 WL 1211354, at \*1-2 (D.D.C. Mar. 31, 2011) (finding "Individual Custody/Detention Report" satisfies threshold because it was compiled to assist Marshals Service in carrying out its responsibilities for execution of federal arrest warrants, housing, transportation, and safekeeping of federal prisoners).

<sup>7</sup> See, e.g., Kubik v. BOP, No. 10-6078, 2011 U.S. Dist. LEXIS 71300, at \*30-31 (D. Or. July 1, 2011) (explaining that because BOP failed to connect records of inmate's "transfer, his behavior issues and the riot" to violations of law, these documents were not created for law enforcement purpose); Rather v. BOP, No. 09-526, 2011 WL 2014875, at \*9 (D. Or. May 24, 2011) (finding that although disclosure of information pertaining to security electronics, security inspection system, and staffing vulnerabilities raise security concerns with respect to BOP's custodial functions, agency had not explained how withheld documents pertain to law enforcement functions); see also Maydak v. DOJ, 254 F. Supp. 2d 23, 38 (D.D.C. 2003) (finding that BOP failed to satisfy law enforcement threshold for records in its Inmate Central Records System, which it described as concerning day-to-day activities and events

language, some decisions still refer to Exemption 7 by using its pre-1986 FOIA amendments' "investigatory" language.<sup>8</sup>

In making their determinations of threshold Exemption 7 applicability, courts have focused on the content and purpose for compiling each item of information involved, regardless of the overall character of the record in which it happens to be maintained.<sup>9</sup>

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occurring during inmates' confinement); Cowsen-El v. DOJ, 826 F. Supp. 532, 533 (D.D.C. 1992) (explaining that threshold is not met by BOP guidelines covering how prison officials should count and inspect prisoners).

<sup>8</sup> See, e.g., Families for Freedom v. Customs and Border Prot., No. 10-2705, 2011 U.S. Dist. LEXIS 63829, at \*43-45 (S.D.N.Y. June 16, 2011) (stating that "[c]ourts have generally interpreted Exemption 7 as applying to records that pertain to specific investigations conducted by agencies" and finding that "the documents are not investigatory, and thus, were not 'compiled for law enforcement purposes'"); Allnutt v. DOJ, 99 F. Supp. 2d 673, 680 (D. Md. 2000) (stating that Tax Division records at issue "must generally arise during the course of an investigation" and "must involve the detection or punishment of violations of law" to satisfy the Exemption 7 threshold), renewed motion for summary judgment granted, No. Y-98-901, 2000 WL 852455, at \*20-21 (D. Md. Oct. 23, 2000), aff'd sub nom. Allnutt v. Handler, 8 F. App'x 225 (4th Cir. 2001).

<sup>9</sup> See FBI v. Abramson, 456 U.S. 615, 624, 626 (1982) (explaining that "threshold requirement for qualifying under Exemption 7 turns on the purpose for which the document sought to be withheld was prepared" because focus is on nature of information); accord Jefferson v. DOJ, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (reiterating that "this circuit has long emphasized that the focus is on how and under what circumstances the requested files were compiled"); see also, Pub. Emps. for Envtl. Responsibility v. U.S. Sec'y Int'l Boundary & Water Comm'n, No. 11-261, 2012 WL 933709, at \*13 (D.D.C. Mar. 20, 2012) (explaining that in "assessing whether records were compiled for law enforcement purposes, the 'focus is on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding'" (quoting Jefferson v. DOJ, 284 F.3d 172, 176-77 (D.C. Cir. 2002))); Mingo v. DOJ, No. 10-1673, 2011 WL 2559221, at \*3 (D.D.C. June 29, 2011) (same); Holt v. DOJ, No. 09-1515, 2010 WL 3386016, at \*8 (D.D.C. Aug. 26, 2010) (same); Richardson v. DOJ, No. 09-01916, 2010 WL 319796, at \*5 (D.D.C. Aug. 13, 2010) (same); Seller v. DOJ, No. 08-0840, 2010 WL 545939, at \*4 (D.D.C. Feb. 17, 2010) (same); Sinsheimer v. DHS, 437 F. Supp. 2d 50, 55 (D.D.C. 2006) (stressing that "[i]t is the purpose of the record, not the role of the agency, that is determinative"); Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 1313, 1319 (D. Utah 2003) (finding that records created to protect dams from terrorism satisfy Exemptions 7's threshold, and reasoning that "the context in which an agency has currently compiled a document . . . determines whether it is 'compiled for law enforcement purposes'" (quoting John Doe Agency v. John Doe Corp., 493 U.S. 146, 153-54 (1989))); Hogan v. Huff, No. 00 Civ. 6753, 2002 WL 1359722, at \*11 (S.D.N.Y. June 21, 2002) (declaring that "[d]ue to the nature of the origin" of documents used to determine target's "status as a potential unregistered agent for the Cuban government, the documents in question meet the requirement of being gathered for law enforcement purposes").

### **Timing of Compilation for Law Enforcement Purposes**

Federal agencies "must meet the threshold requirements of Exemption 7 before they may withhold requested documents on the basis of any of its subparts."<sup>10</sup> That threshold requires the records or information to be "compiled for law enforcement purposes."<sup>11</sup> The Supreme Court has ruled that an item of information originally compiled by an agency for a law enforcement purpose does not lose Exemption 7 protection merely because it is maintained in or recompiled into a non-law enforcement record.<sup>12</sup>

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<sup>10</sup> Pratt v. Webster, 673 F.2d 408, 416 (D.C. Cir. 1982); *see, e.g.*, Abramson v. FBI, 456 U.S. 615, 622, (1982) (explaining that in order to assert "Exemption 7 privilege" requested record must have been compiled for law enforcement purposes); Parker v. EOUSA, No. 10-2068, 2012 WL 1038615, at \*7 (D.D.C. Mar. 29, 2012) (declaring that for Exemption 7(C) to apply, "agency must first demonstrate that the documents were compiled for a law enforcement purpose"); Rosenfeld v. DOJ, No. 07-3240, 2012 WL 710186, at \*3 (N.D. Cal. Mar. 5, 2012 (same)); Schoenman v. FBI, 575 F. Supp. 2d 136, 163 (D.D.C. 2008) (finding that agency "failed to establish" law enforcement purpose; "therefore [records] do not demonstrate . . . threshold requirement for the application of Exemption 7(C)"); Antonelli v. ATF, 555 F. Supp. 2d 16, 24 (D.D.C. 2008) (explaining that agency "withheld information under FOIA exemption 7(C)," but did not demonstrate that records were "compiled for law enforcement purposes"; therefore agency "is not entitled to judgment on this claim"); Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1318-20 (D. Utah 2003) (explaining that before determining if "dam inundation" maps created by the Department of the Interior's Bureau of Reclamation (BOR) were withheld properly pursuant to either Exemption 7(E) or Exemption 7(F), agency first had to demonstrate that Exemption 7's threshold requirement was met).

<sup>11</sup> [5 U.S.C. § 552\(b\)\(7\) \(2006 & Supp. IV 2010\)](#).

<sup>12</sup> *See* Abramson, 456 U.S. at 631-32 ("We hold that information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where that recorded information is reproduced or summarized in a new document for a non-law-enforcement purpose."); Lesar v. DOJ, 636 F.2d 472, 487 (D.C. Cir. 1980) (holding that documents compiled from review of previous FBI surveillance meet threshold); *see also* Jordan v. DOJ, No. 07-02303, 2009 WL 2913223, at \*9 (D. Colo. Sept. 8, 2009) (declaring that "records originally developed for law enforcement purposes and later recompiled into a document not used for law enforcement still qualify for withholding under the series of exemptions covered by § 552(b)(7)" (citing Abramson, 456 U.S. at 631-32)), *aff'd*, No. 10-1469, 2011 WL 6739410 (10th Cir. Dec. 23, 2011); Assassination Archives & Research Ctr. v. CIA, 903 F. Supp. 131, 132-33 (D.D.C. 1995) (finding that information from criminal investigations recompiled into administrative file to assist FBI in responding to Senate committee hearings "certainly satisfies" threshold requirement), dismissed without prejudice, No. 94-0655 (D.D.C. May 31, 1996); Exner v. DOJ, 902 F. Supp. 240, 242 & n.3 (D.D.C. 1995) (protecting law enforcement document even if copy is maintained in non-law enforcement file), appeal dismissed, No. 95-5411, 1997 WL 68352 (D.C. Cir. Jan. 15, 1997).

Furthermore, the Supreme Court in 1990 resolved a conflict in lower court decisions<sup>13</sup> by holding that information not initially obtained or generated for law enforcement purposes may still qualify under Exemption 7 if it is subsequently compiled for a valid law enforcement purpose at any time prior to "when the Government invokes the Exemption."<sup>14</sup> Rejecting the distinction between documents originally compiled or obtained for law enforcement purposes and those later assembled for such purposes, the Court held that the term "compiled" must be accorded its ordinary meaning -- which includes "materials collected and assembled from various sources or other documents" -

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<sup>13</sup> Compare Crowell & Moring v. DOD, 703 F. Supp. 1004, 1009-10 (D.D.C. 1989) (holding that solicitation and contract bids may be protected), and Gould Inc. v. GSA, 688 F. Supp. 688, 691 (D.D.C. 1988) (finding that routine audit reports may be protected), with John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) (ruling that routine audit reports are not protectible), rev'd & remanded, 493 U.S. 146 (1989), and Hatcher v. USPS, 556 F. Supp. 331, 335 (D.D.C. 1982) (holding that routine contract negotiation and oversight material is not protectible).

<sup>14</sup> John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989); see also Lion Raisins v. USDA, 354 F.3d 1072, 1082 (9th Cir. 2004) ("Information need not have been originally compiled for law enforcement purposes in order to qualify for the 'law enforcement' exemption, so long as it was compiled for law enforcement at the time the FOIA request was made."); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (applying John Doe Agency to hold that information regarding personnel interview conducted before investigation commenced and later recompiled for law enforcement purposes satisfied Exemption 7 threshold); Lawyers' Comm. for Civil Rights v. Dep't of the Treasury, No. 07- 2590, 2008 WL 4482855, at \*11-12 (N.D. Cal. Sept. 30, 2008) (reiterating that records need not have been originally compiled for law enforcement purposes so long as they were compiled for law enforcement purposes at time FOIA request was made); Ruston v. DOJ, No. 06-0224, 2007 U.S. Dist. LEXIS 18147, at \*14 (D.D.C. Mar. 15, 2007) (psychological evaluations deemed "compiled" for law enforcement purposes because prison staff "used those records in carrying out" its law enforcement mission); ACLU v. DOD, 389 F. Supp. 2d 547, 570 (S.D.N.Y. 2005) (ruling that photographs taken for "personal use" were compiled for law enforcement purposes, because Army Criminal Investigation Command opened investigation immediately upon receipt of photographs and agents used them to conduct that investigation), reconsideration denied, 396 F. Supp. 2d 459 (S.D.N.Y. 2005); Living Rivers, 272 F. Supp. 2d at 1319-20 (finding that it is the context in which agency has currently compiled a document, rather than the purpose for which the document was originally created, determines whether it is 'compiled for law enforcement purposes'; Kansi v. DOJ, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (explaining that once documents become assembled for law enforcement purposes, "all [such] documents qualify for protection under Exemption 7 regardless of their original source"); Hayes v. U.S. Dep't of Labor, No. 96-1149, 1998 U.S. Dist. LEXIS 14120, at \*12 (S.D. Ala. June 10, 1998) ("Records that are incorporated into investigatory files also qualify . . . even though those records may not have been created originally for law enforcement purposes."), adopted, (S.D. Ala. Aug. 10, 1998); Perdue Farms, Inc. v. NLRB, No. 2:96-27, 1997 U.S. Dist. LEXIS 14579, at \*37 (E.D.N.C. Aug. 5, 1997) (magistrate's recommendation) (stating that language of statute "contains no requirement that the compilation be effected at a specific time" (citing John Doe Agency, 493 U.S. at 153)), adopted, (E.D.N.C. Jan. 20, 1998).

- and it found that the plain meaning of the statute contains "no requirement that the compilation be effected at a specific time."<sup>15</sup>

### **Types of Law Enforcement Covered by Exemption 7**

The "law" to be enforced within the meaning of the term "law enforcement purposes" includes both civil<sup>16</sup> and criminal statutes,<sup>17</sup> as well as those statutes

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<sup>15</sup> John Doe Agency, 493 U.S. at 153.

<sup>16</sup> See, e.g., Rugiero v. DOJ, 257 F.3d 534, 550 (6th Cir. 2001) (explaining that "Court has adopted a per se rule" that applies not only to criminal enforcement actions, but to "records compiled for civil enforcement purposes as well"); Rural Hous. Alliance v. USDA, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974) (holding that "character of the statute violated would rarely make a material distinction, because the law enforcement purposes . . . include both civil and criminal purposes"); Vento v. IRS, 714 F. Supp. 2d 137, 148 (D.D.C. 2010) (holding that distinguishing between civil and criminal enforcement is incorrect because there "is no warrant in the law for that distinction and the federal courts have rejected it"); Jordan v. DOJ, No. 07-02303, 2009 WL 2913223, at \*9 (D. Colo. Sept. 8, 2009) ("Courts interpret 'law enforcement purposes' to include enforcement of both criminal and civil law."), aff'd, No. 10-1469, 2011 WL 6739410 (10th Cir. Dec. 23, 2011); Morley v. CIA, No. 03-2545, 2006 WL 2806561, at \*14 (D.D.C. Sept. 29, 2006) (noting law enforcement "extends to civil investigations and proceedings"); Faiella v. IRS, No. 05-238, 2006 WL 2040130, at \*4 (D.N.H. July 20, 2006) (noting that there is no distinction between civil and criminal enforcement); Env'tl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 587 (N.D. W. Va. 2005) (reiterating that law enforcement standard includes "civil laws"); Martinez v. EEOC, No. 04-CA-0391, 2004 WL 2359895, at \*2 (W.D. Tex. Oct. 19, 2004) (restating that requirement of "law enforcement purpose" is satisfied by both criminal and civil laws); Judicial Watch, Inc. v. Rossotti, No. 01-2672, U.S. Dist. 2002 LEXIS 25213, at \*19-20 (D. Md. Dec. 16, 2002) (ruling that letters written by citizens concerned about plaintiff's compliance with IRS laws were compiled for "civil law enforcement purposes"), aff'd sub nom. Judicial Watch, Inc. v. United States, 84 F. App'x 335 (4th Cir. 2004); Youngblood v. Comm'r of Internal Revenue, No. 2:99-9253, 2000 WL 852449, at \*10 (C.D. Cal. Mar. 7, 2000) (holding that IRS "investigations or proceedings in the civil or criminal context" satisfy threshold).

<sup>17</sup> See, e.g., Beard v. Espy, No. 94-16748, 1995 WL 792071, at \*1 (9th Cir. Dec. 11, 1995) (protecting complaint letter and notes compiled during criminal investigation involving USDA loans); Ortiz v. HHS, 70 F.3d 729, 730 (2d Cir. 1995) (holding that unsigned, unsolicited letter used to launch criminal investigation by SSA meets threshold for law enforcement purposes); Stanko v. BOP, No. 10-724, 2012 WL 336173, at \*3 (D.D.C. Feb. 3, 2012) (finding that criminal investigation into inmate's threats of filing liens against BOP staff satisfies law enforcement requirement); Sellers v. DOJ, No. 08-0840, 2010 WL 545939, at \*4 (D.D.C. Feb. 17, 2010) (finding that records compiled during interstate kidnapping investigation meet threshold requirement); Lasko v. DOJ, No. 08-1850, 2010 WL 537551, at \*8 (D.D.C. Feb. 17, 2010) (holding that records compiled in criminal investigation into drug trafficking meet threshold); Mavadia v. Caplinger, No. 95-3542, 1996 WL 592742, at \*2 (E.D. La. Oct. 11, 1996) (finding that both civil and criminal investigations of possible violations of immigration laws satisfy threshold); Cappabianca v. Comm'r. U.S. Customs Serv., 847 F. Supp. 1558, 1565 (M.D. Fla. 1994) (stating that records of internal

authorizing administrative (i.e., regulatory) proceedings.<sup>18</sup> In addition to federal law enforcement, Exemption 7 also has been found to apply to records compiled to enforce state law,<sup>19</sup> and even foreign law.<sup>20</sup>

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investigation focusing specifically on alleged acts that could result in civil or criminal sanctions were compiled for law enforcement purposes).

<sup>18</sup> See, e.g., Jefferson v. DOJ, 284 F.3d 172, 178 (D.C. Cir. 2002) (reiterating that Exemption 7 "'covers investigatory files related to enforcement of all kinds of laws,' including those involving 'adjudicative proceedings'" such as OPR conducts if such inquiries are for "violations of law" and not for "oversight of the performance of duties" (quoting Rural Hous., 498 F.2d at 81 n.46)); Ctr. for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974) (holding that administrative determination has "salient characteristics of 'law enforcement' contemplated" by Exemption 7 threshold requirement); Gray v. U.S. Army Criminal Investigation Command, No. 09-1310, 2010 WL 3833937, at \*3 (D.D.C. Sept. 30, 2010) (holding that "administrative disciplinary action" qualifies as law enforcement proceeding); Carter, Fullerton & Hayes v. FTC, 637 F. Supp. 2d 1, 9 (D.D.C. 2009) (explaining that FTC's "law enforcement investigation of possible anticompetitive effects of state liquor control board regulations falls within its authority under the FTC Act"); Schoenman v. FBI, 573 F. Supp. 2d 119, 146 (D.D.C. 2008) (finding that Exemption 7 threshold applies to files related to enforcement of all kinds of laws including "administrative matters"); Env'tl. Prot. Servs., 364 F. Supp. 2d at 587 (finding that records compiled in EPA's administrative proceeding satisfy law enforcement threshold, because Exemption 7 applies to "enforcement of civil laws, such as regulations"); Schiller v. INS, 205 F. Supp. 2d 648, 659 (W.D. Tex. 2002) (stating that "law enforcement" for purposes of FOIA includes regulatory proceedings (citing Rugiero, 257 F.3d at 550)); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at \*8 (S.D.N.Y. Sept. 30, 1999) (stating that "it is well-settled that documents compiled by the INS in connection with the administrative proceedings authorized by the Immigration and Naturalization Act are documents compiled for 'law enforcement purposes'"); Johnson v. DEA, No. 97-2231, 1998 U.S. Dist. LEXIS 9802, at \*9 (D.D.C. June 25, 1998) (reiterating that "law being enforced may be . . . regulatory"); Kay v. FCC, 867 F. Supp. 11, 16-18 (D.D.C. 1994) (explaining that FCC's statutory authority to revoke licenses or deny license applications is qualifying law enforcement purpose).

<sup>19</sup> See Hopkinson v. Shillinger, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989) (holding that Exemption 7 applies "to FBI laboratory tests conducted at the request of local law enforcement authorities"); Shaw v. FBI, 749 F.2d 58, 64 (D.C. Cir. 1984) (explaining that authorized federal investigation into commission of state crime constitutes valid criminal law enforcement investigation); see also Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257-58 (D.D.C. 2005) (determining that "local police arrest reports [and] bail bond information" met threshold), motion to amend denied, 421 F. Supp. 2d 104 (D.D.C. 2006); Antonelli v. ATF, No. 04-1180, 2005 U.S. Dist. LEXIS 17089, at \*12 (D.D.C. Aug. 16, 2005) (declaring that records "compiled during the course of an investigation by a local police department, with ATFE assistance," satisfy threshold); Palacio v. DOJ, No. 00-1564, 2002 U.S. Dist. LEXIS 2198, at \*16 (D.D.C. Feb. 11, 2002) (explaining that records of investigation conducted by city task force were "created or compiled" for law enforcement purposes and thus satisfy threshold), summary affirmance granted, No. 02-5247, 2003 U.S. App. LEXIS 1804 (D.C. Cir. Jan. 31, 2003); Code v. FBI, No. 95-1892, 1997 WL 150070, at

Courts have also recognized that "law enforcement" within the meaning of Exemption 7 can extend beyond the traditional realms of civil and criminal proceedings into the realms of national security and homeland security-related government activities as well.<sup>21</sup> For example, in 2003 the Court of Appeals for the District of Columbia Circuit

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\*5 (D.D.C. Mar. 26, 1997) (finding that documents compiled in connection with FBI's efforts to assist local police in homicide investigations meet threshold); Butler v. Dep't of the Air Force, 888 F. Supp. 174, 180, 182 (D.D.C. 1995) (finding that Air Force personnel background report -- requested by local law enforcement agency for its investigation into murder -- was compiled for law enforcement purposes); Kuffel v. BOP, 882 F. Supp. 1116, 1124 (D.D.C. 1995) (ruling that information from state law enforcement agency investigating various state crimes qualifies); Wojtczak v. DOJ, 548 F. Supp. 143, 146-48 (E.D. Pa. 1982) ("This Court must therefore interpret the statute as written and concludes that Exemption 7 applies to all law enforcement records, federal, state, or local, that lie within the possession of the federal government.").

<sup>20</sup> See, e.g., Bevis v. Dep't of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986) (finding no distinction between foreign and domestic enforcement purposes in language of statute); Miller v. DOJ, 562 F. Supp. 2d 82, 117-18 (D.D.C. 2008) (reiterating that FBI records were compiled for law enforcement purposes because agency assisted foreign police; concluding that records located at Criminal Division's Office of International Affairs concerning events in foreign country met law enforcement purpose because office is charged with extraditing international fugitives as well as international evidence gathering; finding that DEA files pertaining to its foreign activity were compiled for law enforcement purposes because DEA is authorized to investigate trafficking in controlled substances, dangerous drugs, and precursor chemicals at interstate and international levels); Donovan v. FBI, 579 F. Supp. 1111, 1119-20 (S.D.N.Y. 1983) (stating that an FBI investigation undertaken and laboratory tests performed in support of a foreign government's efforts to identify and prosecute perpetrators of crimes satisfy threshold, and reasoning that "refusing to apply Exemption 7 to foreign law enforcement might have the practical effect of interfering with cooperation and information sharing"), vacated on other grounds on motion for reconsideration, 579 F. Supp. 1124 (S.D.N.Y.), appeal dismissed as moot, 751 F.2d 368 (2d Cir. 1984).

<sup>21</sup> See, e.g., Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1272 (2011) (Alito, J., concurring) (explaining that "law enforcement includes not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity and to maintain security"; thus, steps "to prevent terrorism surely fulfill 'law enforcement purposes'"); Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 926 (D.C. Cir. 2003) (finding law enforcement threshold met for records compiled in course of investigation into "breach of this nation's security"); Strang v. Arms Control & Disarmament Agency, 864 F.2d 859, 862 (D.C. Cir. 1989) (explaining that law enforcement is not limited to criminal law enforcement; "rather, we read the term as encompassing the enforcement of national security laws as well"); Pratt v. Webster, 673 F.2d 408, 421 (D.C. Cir. 1982) (explaining that "to pass the FOIA Exemption 7 threshold," agencies must establish that their activities are based on a concern that "federal laws have been or may be violated or that national security may be breached"); Pub. Emps. for Env'tl. Responsibility v. U.S. Sec'y. Int'l Boundary & Water Comm'n, No. 11-261, 2012 WL 933709, at \*15-17 (D.D.C. Mar. 20, 2012) (declaring that "courts recognize that law enforcement within the meaning of the Exemption 7 threshold extends to matters of homeland security" and finding that threshold

explained that the names of post-9/11 detainees, found on documents that traditionally have been public, were properly withheld because they were compiled for the law enforcement purpose of pursuing a "violation of federal law as well as a breach of national security."<sup>22</sup>

Courts have held that Exemption 7's law enforcement purpose encompasses a wide variety of records and information.<sup>23</sup> As such, records compiled as part of violent

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requirement met given "potential for harm to public safety" by providing terrorists with ability to deduce zones and populations most affected by dam failure); Schoenman v. FBI, No. 04-02202, 2011 WL 446857, at \*18 (D.D.C. Feb. 9, 2011) (describing FBI's investigation into suspected threats to national security within anti-war movement of 1960s as satisfying law enforcement threshold); Kidder v. FBI, 517 F. Supp. 2d 17, 27 (D.D.C. 2007) (stressing that intelligence gathering is law enforcement activity because "[i]nvestigating terrorism is 'one of DOJ's chief law enforcement duties at this time'" (quoting Ctr. for Nat'l Sec. Studies, 331 F.3d at 926 )); Gordon v. FBI, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (extending law enforcement threshold to include memoranda and e-mail messages created by FBI in its handling of various aviation "watch lists" created to "protect the American flying public from terrorists"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 960, 963 (C.D. Cal. 2003) (explaining that agency uses charts containing number of examinations performed at seaports to evaluate its border security responsibilities; thus, such information is compiled for law enforcement purpose and satisfies Exemption 7's threshold), appeal dismissed voluntarily, No. 03-55833 (9th Cir. Aug. 26, 2003).

<sup>22</sup> Ctr. for Nat'l Sec. Studies, 331 F.3d at 929 ("While the name of any individual detainee may appear innocuous or trivial, it could be of great use to al Qaeda in plotting future terrorist attacks or intimidating witnesses in the present investigation."); see also Pub. Emps. for Env'tl. Responsibility, 2012 WL 933709, at \*15-17 (explaining that law enforcement extends to matters of homeland security given potential for harm to public by terrorists knowing locations and populations most affected by dam failure); L.A. Times v. Dep't of the Army, 442 F. Supp. 2d 880, 898 (C.D. Cal. 2006) (ruling that incident reports from private security contractors in Iraq meet law enforcement threshold because purpose is to improve intelligence information, thus enhancing security); Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1319-21 (D. Utah 2003), (explaining that agency has "statutory law enforcement mandate" to maintain law and order and to protect persons and property; its use of "inundation maps" to carry out its mandate satisfies Exemption 7's threshold); Coastal Delivery, 272 F. Supp. 2d at 963-65 (finding law enforcement purpose because agency has mandate to protect commerce and borders and noting that "[w]hile it is true that knowing the rate of examination at different ports may not be the best way to avoid detection when smuggling contraband," argument that "smugglers could not and would not use the information . . . is unpersuasive").

<sup>23</sup> See, e.g., Higgins v. DOJ, No. 10-1485, 2013 WL 358177, at \*9 (D.D.C. Jan. 30, 2013) (finding that Secret Service records compiled as part of counterfeit investigation satisfy law enforcement threshold); Vazquez v. DOJ, 887 F. Supp. 2d 114, 117 (D.D.C. 2012) (finding that records maintained in FBI's National Crime Information Center are compiled for law enforcement purposes); Mingo v. DOJ, No. 10-1673, 2011 WL 2559221, at \*3 (D.D.C. June 29, 2011) (holding that records pertaining to "altercation involving over 50 inmates" were created for law enforcement purposes); Johnson v. DOJ, No. 06-1248, 2007 WL 3408458,

crime investigations,<sup>24</sup> or drug trafficking investigations,<sup>25</sup> including records pertaining to the use of informants,<sup>26</sup> have been found to easily meet Exemption 7's threshold.

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at \*3 (E.D. Wis. Nov. 14, 2007) (noting that statements "taken in preparation for a criminal prosecution" were compiled for law enforcement purposes); Ruston v. DOJ, No. 06-0224, 2007 U.S. Dist. LEXIS 18147, at \*14 (D.D.C. Mar. 15, 2007) (concluding that records generated as result of threats made against federal official were compiled for law enforcement purposes); Balderrama v. DHS, No. 04-1616, 2006 WL 889778, at \*1, \*7-9 (D.D.C. Mar. 30, 2006) (explaining that "Pre-Sentencing Investigation Reports," which are routinely prepared regarding all convicted felons during prosecution process, are part of law enforcement file and thus satisfy law enforcement requirement); Ray v. FBI, 441 F. Supp. 2d 27, 33-34 (D.D.C. 2006) (determining that documents generated by FBI efforts to prevent distribution of pornography, combat insurance fraud, and battle drug trafficking meet law enforcement threshold); Antonelli v. ATF, No. 04-1180, 2006 WL 141732, at \*4 (D.D.C. Jan. 18, 2006) (stating that records "maintained in the Prisoner Processing and Population Management/Prison Tracking System and in the Warrant Information Network" were compiled for ATF's law enforcement purposes of processing and transporting prisoners, executing arrest warrants, and investigating fugitive matters, and that they "therefore satisfy . . . [the] threshold requirement"); Delta Ltd. v. Customs and Border Prot., 384 F. Supp. 2d 138, 142-43, 152 (D.D.C. 2005) (finding "no question" that records created during seizure of merchandise exported from China were compiled for law enforcement purpose).

<sup>24</sup> See Roth v. DOJ, 642 F.3d 1161, 1173 (D.C. Cir. 2011) (finding that request for information about "real killers" is confirmation that request is for information "compiled for law enforcement purposes"); see also Holt v. DOJ, No. 09-1515, 2010 WL 3386016, at \* 9 (D.D.C. Aug. 26, 2010) (holding that records maintained in criminal case file pertaining to prosecution for murder and firearms violations were compiled for law enforcement purposes); Richardson v. DOJ, No. 09-01916, 2010 WL 3191796, at \*5 (D.D.C. Aug. 13, 2010) (noting that records located in criminal prosecution for "assault with intent to kill using a knife" were compiled for law enforcement purpose); DeMartino v. FBI, 577 F. Supp. 2d 178, 181 (D.D.C. 2008) (finding that law enforcement requirement satisfied because records pertain to multi-subject investigation of Columbo crime family and murder); Thomas v. DOJ, 531 F. Supp. 2d 102, 107 (D.D.C. 2008) (finding records pertaining to investigation and prosecution for assault with intent to kill, assault with a dangerous weapon, and kidnapping satisfy law enforcement threshold); Baez v. FBI, 443 F. Supp. 2d 717, 724 (E.D. Pa. 2006) (declaring that "there is no question" that documents pertaining to "investigation of crimes," including murder, were compiled for law enforcement purposes).

<sup>25</sup> See Roberts v. FBI, No. 11-0575, 2012 WL 604178, at \*4-5 (D.D.C. Feb. 24, 2012) (stating that it "is apparent from the nature of plaintiff's FOIA request that the information he seeks was compiled for law enforcement purposes, namely, the criminal prosecution of plaintiff" for drug and organized crime offenses); Skinner v. DOJ, No. 09-0725, 2010 WL 3832602, at \*18-19 (D.D.C. Sept. 30, 2010) (declaring that joint investigation into drug production and distribution "easily meets exemption 7's threshold requirement"); Lewis v. DOJ, No. 09-0746, 2010 WL 3271283, at \*12 (D.D.C. Aug. 19, 2010) (finding that records from investigation of drug trafficking were compiled for law enforcement); Wilson v. DEA, No. 04-1814, 2006 WL 212138, at \*1, \*5, \*7 (D.D.C. Jan. 27, 2006) (stating that "[g]iven the nature of the request" for conspiracy records and drug laboratory reports, "DEA clearly meets the threshold requirement").

Furthermore, records compiled as part of investigations into non-violent illegal activity have been found to satisfy the threshold<sup>27</sup> as have records used in efforts to prevent wrongful activity.<sup>28</sup>

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<sup>26</sup> See Robinson v. Attorney Gen. of the U.S., 534 F. Supp. 2d 72, 81 (D.D.C. 2008) (explaining that "it is clear" that records pertaining to "alleged confidential informants and information they provided . . . would have been compiled for law enforcement purposes"); Valdez v. DOJ, No. 04-0950, 2007 U.S. Dist. LEXIS 10566, at \*10 (D.D.C. Feb. 16, 2007) (concluding that records pertaining to alleged confidential informants "would be law enforcement records"); Deglance v. DEA, No. 05-2276, 2007 WL 521896, at \*2 (D.D.C. Feb. 15, 2007) (finding that records systems pertaining to confidential sources satisfy threshold); Dipietro v. EOUSA, 357 F. Supp. 2d 177, 184 (D.D.C. 2004) (declaring that "[g]iven the nature of [the] request" for criminal files including confidential informant records, requested records satisfy "law enforcement" threshold), summary judgment granted, 386 F. Supp. 2d 80 (D.D.C. 2005); Boyd v. ATF, No. 05-1096, 2006 U.S. Dist. LEXIS 71857, at \*1, \*22 (D.D.C. Sept. 29, 2006) (stating that policies/procedures pertaining to confidential informants were compiled for law enforcement purposes); Hogan v. Huff, No. 00 6753, 2002 WL 1359722, at \*11 (S.D.N.Y. June 21, 2002) (explaining that records concerning "information provided by a confidential source" satisfy Exemption 7's threshold); cf. Clemente v. FBI, No. 08-1252, 2010 WL 3832047, at \*15 (D.D.C. Sept. 28, 2010) (explaining that investigation into "activities of a criminal informant" serves law enforcement purpose).

<sup>27</sup> See, e.g., Concepcion v. Customs and Border Prot., No. 10-0599, 2012 WL 6019299, at \*4 (D.D.C. Dec. 4, 2012) (explaining that passenger activity reports compiled as part of agency's mission to secure borders of U.S. by collecting and reviewing travel information satisfies law enforcement threshold); Ameren Mo. v. EPA, No. 4:11-02051, 2012 WL 4372518, at \*8 (E.D. Mo. Sept. 25, 2012) (finding that records compiled as result of "statutory responsibility" to enforce Clean Air Act were compiled for law enforcement purposes); Miller v. DOJ, 872 F. Supp. 2d 12, 25 (D.D.C. 2012) (agreeing that documents created for extradition proceedings were compiled for law enforcement); Gerstein v. CIA, No. 06-4643, 2011 WL 89337, at \*2 (N.D. Cal. Jan. 11, 2011) (holding that documents compiled in "OPR investigation into potentially illegal release of information" satisfy law enforcement threshold); Associated Press v. DOD, No. 05-5468, 2006 WL 2707395, at \*3 (S.D.N.Y. Sept. 20, 2006) (stating that "records of investigations to determine whether to charge U.S. military personnel with misconduct . . . were compiled for law enforcement purposes" (citing Aspin v. DOD, 491 F.2d 24, 26-28 (D.C. Cir. 1973) (explaining that records from investigation "directed toward discovering and toward obtaining evidence of possible offenses under the Uniform Code of Military Justice" were compiled for law enforcement purposes)); Maydak v. DOJ, No. 00-0562, 2006 U.S. LEXIS 58409, at \*8-9 (D.D.C. Aug. 21, 2006) (observing that records concerning fraudulent access device applications and unauthorized telecommunications access devices satisfy law enforcement threshold); Faiella, 2006 WL 2040130, at \*4 (observing that "an IRS audit is a law enforcement activity"); Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992) (agreeing that IRS audit guidelines satisfy threshold).

<sup>28</sup> See, e.g., ACLU v. DOJ, No. 11-2553, 2012 WL 4000515, at \*8, 10 (D.N.J. Oct. 2, 2012) (finding that maps of New Jersey, "used as a tool by special agents to pinpoint areas of

While courts grant agencies wide latitude in defining their law enforcement purposes, they have denied protection under Exemption 7 when the agency did not adequately demonstrate that the records were compiled as part of the agencies' stated law enforcement purposes and duties;<sup>29</sup> or the records existed independently of the

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concern, by analysts to establish areas of focus and by the field office to allocate resources" in order to gather intelligence necessary to prevent crime and terrorist activity by extremist groups, satisfy law enforcement threshold); Vazquez, 887 F.2d at 117 (explaining that National Crime Information Center's databases store information to support law enforcement, to warn of potential danger, and to promote exchange of information, and thus are "compiled for law enforcement purposes"); Pub. Emps. for Envtl. Responsibility, 2012 WL 933709, at \*13, \*15 (agreeing that because dams might be attractive targets for terrorists, agency's responsibilities for dam safety, including protective measures satisfy law enforcement threshold); Benavides v. BOP, No. 09-2026, 2011 WL 1195800, at \*4 (D.D.C. Mar. 30, 2011) (noting that BOP mission of protecting inmates, staff, and community satisfies law enforcement purpose); Banks v. DOJ, No. 06-1950, 2010 WL 5313292, at \*2-3 (D.D.C. Dec. 23, 2010) (stating that BOP's mission includes protecting society and victims; thus, "records compiled in order to effect notice to crime victims" are compiled for law enforcement purpose); Thomas v. DOJ, No. 1:04-112, 2006 WL 722141, at \*2 (E.D. Tex. Mar. 15, 2006) (reiterating that inmate telephone calls are monitored "to preserve the security of the institution and to protect the public" and that recordings thus satisfy law enforcement requirement); Pendergrass v. DOJ, No. 04-112, 2005 WL 1378724, at \*4 (D.D.C. June 7, 2005) (explaining that prisons monitor and record telephone calls in order "to preserve the security and orderly management of the institution and to protect the public"; consequently, recordings are "functional equivalent of law enforcement records").

<sup>29</sup> See, e.g., Pratt, 673 F.2d at 420-21 (reiterating that Exemption 7 is not intended to "include investigatory activities wholly unrelated to law enforcement agencies' legislated functions of preventing risks to the national security and violations of the criminal laws and of apprehending those who do violate the laws"); Rosenfeld v. DOJ, No. 07-3240, 2012 WL 710186, at \*3-4 (N.D. Cal. Mar. 5, 2012) (finding that agency's assertion that document generated in 1975 shows subject's connection to Communist Party is "wholly unbelievable" and "does not constitute a sufficient law enforcement purpose"); Grandison v. DOJ, 600 F. Supp. 2d 103, 113 (D.D.C. 2009) (rejecting agency's attempt to tie deposition transcripts and interrogatories pertaining to current Federal Torts Claim Act lawsuit to underlying murder conviction; stating that information pertaining to tort claim was not "compiled for law enforcement purposes"); Cawthon v. DOJ, No. 05-0567, 2006 WL 581250, at \*4 (D.D.C. Mar. 9, 2006) (explaining that malpractice records for two BOP doctors "appear to come from personnel records" and therefore do not meet Exemption 7's law enforcement threshold); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (finding "no evidence that the paralegal names and work numbers" appearing in communications related to monitoring federal elections were "compiled for law enforcement purposes"), motion to amend denied, 421 F. Supp. 2d 104 (D.D.C. 2006); Maydak v. DOJ, 362 F. Supp. 2d 316, 321-23 (D.D.C. 2005) (concluding that psychological test maintained in BOP files, documents pertaining to accidents and injuries sustained in recreation department at prison, and list of staff names and titles of prison employees were not compiled for law enforcement purposes); Phillips v. ICE, 385 F. Supp. 2d 296, 306 (S.D.N.Y. 2005) (finding law enforcement requirement not met for report involving immigration status of two former military officials from El Salvador accused of atrocities,

stated law enforcement purpose;<sup>30</sup> or the connection to law enforcement was pretextual;<sup>31</sup> or was conducted for an improper purpose.<sup>32</sup> Accordingly, courts require some detail as to the law enforcement purpose behind the compilation of the requested records.<sup>33</sup> Finally, there is no requirement that the matter culminate in actual administrative, civil, or criminal enforcement.<sup>34</sup>

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because report "was prepared for Congress"); Taylor v. DOJ, 257 F. Supp. 2d 101, 108 (D.D.C. 2003) (reiterating that investigations must be "'within the agency's law enforcement authority'" (quoting Whittle v. Moschella, 756 F. Supp. 589, 593 (D.D.C. 1991))), reconsideration denied, 268 F. Supp. 2d 34 (D.D.C. 2003), appeal dismissed for failure to prosecute, No. 03-5111, 2003 WL 2205968 (D.C. Cir. Aug. 19, 2003).

<sup>30</sup> See, e.g., Lardner v. DOJ, No. 09-5337, 2010 U.S. Dist. LEXIS 22557, at \*5 (D.C. Cir. Oct. 28, 2010) (discussing that there is "a distinction between the list of the names of persons denied a pardon or commutation of sentence" and records compiled as part of Office of the Pardon Attorney's investigation, and finding that list of names "exists independently" and is "unrelated to any law enforcement investigation").

<sup>31</sup> See Quiñon v. FBI, 86 F.3d 1222, 1228-29 (D.C. Cir. 1996) (explaining that agency's connection between target and asserted law enforcement duty cannot be pretextual or wholly unbelievable); Rosenfeld v. DOJ, 57 F.3d 803, 808-09 (9th Cir. 1995) (finding no law enforcement purpose when "documents all support a conclusion that . . . any asserted purpose for compiling these documents was pretextual");

<sup>32</sup> See, e.g., Shaw, 749 F.2d at 63 (D.C. Cir. 1984) (stating that "mere existence of a plausible criminal investigatory reason to investigate would not protect the files of an inquiry explicitly conducted . . . for purposes of harassment"); Weissman v. CIA, 565 F.2d 692, 696 (D.C. Cir. 1977) (ruling that CIA's actions were unauthorized; thus, "law-enforcement exemption is accordingly unavailable"); Rosenfeld v. DOJ, No. 07-3240, 2010 WL 3448517, at \*10 (N.D. Cal. Sept. 1, 2010) (explaining that while investigation of specific individuals who advocated violent overthrow of government might be conducted for legitimate law enforcement purpose, investigation of mere association with Communist Party is not for legitimate law enforcement purpose; consequently, "there exists no rational nexus" and thus, law enforcement threshold not satisfied); Rosenfeld v. DOJ, 761 F. Supp. 1440, 1445-48 (N.D. Cal. 1991) (explaining that FBI investigation of Free Speech Movement "was begun in good faith and with a plausible basis," but ceased to have "colorable claim [of rationality] as the evidence accumulated" and became "a case of routine monitoring . . . for intelligence purposes"; date at which FBI's initial law enforcement-related suspicions were "demonstrably unfounded" was "cut-off point for the scope of a law enforcement purpose" under Exemption 7), aff'd in pertinent part, rev'd in part & remanded, 57 F.3d 803 (9th Cir. 1995) cf. Clemente, 2010 WL 3832047, at \*15 (finding that despite allegations that agency actions contravened law, "there is no evidence that the records in question were compiled in violation of the law or for the purpose of furthering a violation of the law"); Carter, Fullerton & Hayes, 637 F. Supp. 2d at 9 (stating that contrary to assertion that investigation was not within agency's authority, FTC has authority to investigate "anticompetitive effects of state liquor control board regulations").

<sup>33</sup> See, e.g., Parker v. EOUSA, No. 10-2068, 2012 WL 1038615, at \*7 (D.D.C. Mar. 29, 2012) (explaining that to satisfy threshold, "DOJ must actually provide evidence" that records

### **Personnel Actions and Law Enforcement Purpose**

"Background security investigations by governmental units which have authority to conduct such functions"<sup>35</sup> have been held by the courts to meet the threshold test under Exemption 7.<sup>36</sup> Further, personnel investigations of government employees have

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were compiled for law enforcement purposes); Raher v. BOP, No. 09-526, 2011 WL 2014875, at \*10 (D. Or. May 24, 2011) (stating that agency "has submitted nothing to explain why withheld documents pertain to law enforcement functions"); Schoenman v. FBI, 575 F. Supp. 2d 136, 162 (D.D.C. 2008) (finding that mere statement that agency document "inherently relates to a law enforcement purpose will not suffice"); Miller, 562 F. Supp. 2d at 118 (finding that agency "neither explains adequately the manner and circumstances under which the telegrams were compiled nor links these telegrams to any enforcement proceeding"); United Am. Fin. v. Potter, 531 F. Supp. 2d 29, 45-46 (D.D.C. 2008) (describing agency's explanation as "fall[ing] far short of establishing" that records were compiled for law enforcement purposes); Antonelli v. ATF, No. 04-1180, 2006 WL 3147675, at \*1 (D.D.C. Nov. 1, 2006) (explaining that although records pertained to bombing of residence, initially BOP proffered no evidence from which the Court could find for them on threshold requirement; however, subsequent BOP submissions established that record was compiled as part of investigation into prisoner's escape plans, satisfying law enforcement threshold).

<sup>34</sup> See, e.g., Jordan v. DOJ, No. 10-1469, 2011 WL 6739410, at \*4 (10th Cir. Dec. 23, 2011) (explaining that "statute refers to 'law enforcement purposes,' not 'law enforcement proceedings,' and it does not mention anything about enforcing a sanction" except Exemption 7(A) "which describes one of the six possible harms to law enforcement purposes, [thus n]o 'enforcement proceeding' is necessary to 'to satisfy the law enforcement purpose criterion'" (quoting Pratt, 673 F.2d at 421)); Ortiz, 70 F.3d at 730 (holding that unsigned, unsolicited letter used to launch criminal investigation by SSA meets threshold for law enforcement purposes, although no charges filed against target); Ctr. for Nat'l Policy Review on Race & Urban Issues, 502 F.2d at 373 (explaining that likelihood of "adjudication is not the decisive determinant of whether a file has been compiled for law enforcement purposes"); Nat'l Whistlerblower Ctr. v. HHS, No. 10-2120, 2012 WL 1026725, at \*10 (D.D.C. Mar. 28, 2012) ("It is of no moment that both investigations resulted in findings of no misconduct and that no sanctions were ultimately imposed by OIG."); Lazaridis v. DOJ, No. 09-1177, 2011 WL 652469, at \*6 (D.D.C. Feb. 24, 2011) (explaining that "fact that the office 'declined prosecution' does not change the law enforcement purpose for which the records were compiled"); Berger v. IRS, 487 F. Supp. 2d 482, 489, 500 (D.N.J. 2007) (finding that records compiled during IRS civil and criminal tax investigations satisfy threshold even though "[n]o charges were ever brought against Plaintiff as a result of these investigations"), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008).

<sup>35</sup> S. Conf. Rep. No. 93-1200, at 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6291.

<sup>36</sup> See, e.g., Mittleman v. OPM, 76 F.3d 1240, 1241-43 (D.C. Cir. 1996) (OPM background investigation); Rosenfeld v. DOJ, 57 F.3d 803, 809 (9th Cir. 1995) ("FBI government appointment investigations"); Wolk v. United States, No. 04-CV-832, 2005 WL 465382, at \*4 (E.D. Pa. Feb. 28, 2005) (concluding that "enforcement" encompasses conducting a "security background check" by reasoning that "'enforcement of the law fairly includes not

also been found to have been compiled for law enforcement purposes if they focus on "specific and potentially unlawful activity by particular employees" of a civil or criminal nature.<sup>37</sup>

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merely the detection and punishment of violations of law but their prevention" (quoting Miller v. United States, 630 F. Supp. 347, 349 (E.D.N.Y. 1986)); Melius v. Nat'l Indian Gaming Comm'n, No. 92-2210, 1999 U.S. Dist. LEXIS 17537, at \*6, \*15 (D.D.C. Nov. 3, 1999) ("suitability investigations" for gaming contracts); Assassination Archives & Research Ctr. v. CIA, 903 F. Supp. 131, 132 (D.D.C. 1995) (FBI "background investigations"), dismissed without prejudice, No. 94-0655 (D.D.C. May 31, 1996); Doe v. DOJ, 790 F. Supp. 17, 20-21 (D.D.C. 1992) (background investigation of individual conditionally offered employment as attorney); Miller v. United States, 630 F. Supp. 347, 349 (E.D.N.Y. 1986) (USIA background-security investigation of federal job applicant).

<sup>37</sup> Stern v. FBI, 737 F.2d 84, 89 (D.C. Cir. 1984); see, e.g., Perlman v. DOJ, 312 F.3d 100, 105 (2d Cir. 2002) (finding investigation into allegations of preferential treatment and undue access and influence in INS Investor Visa Program satisfied law enforcement threshold because inquiry focused on possible violations of law and whether particular employee committed acts that could subject that employee to criminal or civil penalties), cert. granted, vacated, and remanded, 541 U.S. 970, aff'd, 380 F.3d 110 (2d Cir. 2004); Kimberlin v. DOJ, 139 F.3d 944, 947-48 (D.C. Cir. 1998) (concluding that investigation "to discover" whether employee had violated "any law" satisfied threshold when it "focused upon a specific, potentially illegal release of information by a particular, identified official"); Strang v. Arms Control & Disarmament Agency, 864 F.2d 859, 862 (D.C. Cir. 1989) (characterizing agency investigation into particular employee's violation of national security laws as law enforcement); Wonders v. McHugh, No. 11-1130, 2012 WL 3962750, at \*4 (D.D.C. Sept. 11, 2012) (finding that investigation into allegations of ethics charges against military attorney satisfied threshold because it focused directly on specifically alleged illegal acts of identified official which could result in civil or criminal sanctions (citing Stern, 737 F.2d at 89)); Nat'l Whistleblower Ctr. v. HHS, No. 10-2120, 2012 WL 1026725, at \*10 (D.D.C. Mar. 28, 2012) (concluding that records "compiled to investigate allegations that specific individuals at FDA had engaged in specific acts that could constitute violations of criminal and civil laws" were compiled for law-enforcement purposes); Mueller v. Dep't of the Air Force, 63 F. Supp. 2d 738, 742 (E.D. Va. 1999) (holding that investigation into prosecutorial misconduct was for law enforcement purposes because "agency investigation of its own employees is for law enforcement purposes . . . if it focuses directly on specifically alleged illegal acts, illegal acts of a particular identified official, acts which could, if proved, result in civil or criminal sanctions" (quoting Stern, 737 F.2d at 89)); Hayes v. U.S. Dep't of Labor, No. 96-1149, 1998 U.S. Dist. LEXIS 14120, at \*11-12 (S.D. Ala. June 10, 1998) (explaining that records of "internal agency investigations are considered to be compiled for 'law enforcement purposes' when the investigations focus on specifically alleged acts, which, if proved, could amount to violations of civil or criminal law"), adopted, (S.D. Ala. Aug. 10, 1998); Lurie v. Dep't of the Army, 970 F. Supp. 19, 36 (D.D.C. 1997) (explaining that threshold met because investigation focused directly on specifically alleged illegal acts of identified officials (citing Rural Hous. Alliance v. USDA, 498 F.2d 73, 81 (D.C. Cir. 1974)), appeal dismissed voluntarily, No. 97-5248 (D.C. Cir. Oct. 22, 1997).

Indeed, courts have stressed repeatedly the difference between the two general categories of files on employees that "government agencies compile: (1) files in connection with government oversight of the performance of duties by agency employees, and (2) files in connection with investigations that focus directly on specific alleged illegal acts which could result in civil or criminal sanction."<sup>38</sup> Thus, the law enforcement threshold of Exemption 7 has been found to be satisfied when agencies demonstrate that they were focusing on an alleged illegal act,<sup>39</sup> rather than merely

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<sup>38</sup> Jefferson v. DOJ, 284 F.3d 172, 176-77 (D.C. Cir. 2000) (citing Rural Hous. Alliance v. USDA, 498 F.2d 73, 81 (D.C. Cir. 1974)), appeal dismissed voluntarily, No. 97-5248 (D.C. Cir. Oct. 22, 1997); see, e.g., Patterson v. IRS, 56 F.3d 832, 837-38 (7th Cir. 1995) (declaring that agency must "distinguish between internal investigations conducted for law enforcement purposes and general agency monitoring" (quoting Stern, 737 F.2d at 89)); Stern, 737 F.2d at 89 (dictum) (repeating that "it is necessary to distinguish between those investigations conducted 'for a law enforcement purpose' and those in which an agency, acting as the employer, simply supervises its own employees"); Rural Hous. Alliance v. USDA, 498 F.2d 73, 81 (D.C. Cir. 1974) (distinguishing between agency oversight of performance of employees and investigations focusing on specific illegal acts of employees), appeal dismissed voluntarily, No. 97-5248 (D.C. Cir. Oct. 22, 1997); Nat'l Whistleblower Ctr., 2012 WL 1026725 at \*9-10 (reiterating analysis used to distinguish between supervision and investigation of employees and explaining that because records at issue "were compiled to investigate allegations that specific individuals at FDA had engaged in specific acts that could constitute violations of criminal and civil laws," rather than "a case involving personnel files maintained in the ordinary course of monitoring employees' performance," that records were compiled for law enforcement purposes); McCann v. HHS, No. 10-1758, 2011 WL 6251090, at \*5 (D.D.C. Dec. 15, 2011) (discussing difference between supervising job performance and investigating for law enforcement purposes by explaining that if inquiry "'is for a possible violation of law, then the inquiry is for law enforcement purposes, as distinct from customary surveillance of the performance of duties by government employees'" (quoting Jefferson, 284 F.3d at 177)); MacLean v. U.S. Dep't of the Army, No. 05-1519, 2007 U.S. Dist. LEXIS 16162, at \*27 (S.D. Cal. Mar. 6, 2007) (explaining critical distinction between investigation of particular employee for particular violation of law and customary surveillance of performance of duties); Fine v. DOE, 823 F. Supp. 888, 907-08 (D.N.M. 1993) (explaining difference between investigation of specific allegations that could result in sanctions and routine oversight).

<sup>39</sup> See, e.g., Jefferson v. DOJ, No. 04-5226, 2005 U.S. App. LEXIS 23360, at \*2 (D.C. Cir. Oct. 26, 2005) (affirming district court's ruling that law enforcement threshold is met by investigation concerning Department of Justice attorney accused of failing to comply with court order); Wonders, 2012 WL 3962750, at \*5 (noting that investigation into ethical violation of misrepresentation "was not limited to determining whether there was a violation of an internal agency policy or regulation," but rather involved investigation that could have resulted in civil sanctions); Nat'l Whistleblower Ctr., 2012 WL 1026725, at \*10 (stating that records compiled to investigate allegations that specific employees wrongfully disclosed information satisfied law enforcement threshold); McCann, 2011 WL 6251090, at \*5 (stating that law enforcement requirement is met by investigation of HHS employee for HIPAA violations); Gerstein v. CIA, No. 06-4643, 2011 WL 89337, at \*2 (N.D. Cal. Jan. 11, 2011) (finding that records compiled in OPR investigation into release of information by certain agency officials were compiled for law enforcement purposes); Williams v. Comm'r

supervising their employees for performance of their assigned duties, which does not satisfy Exemption 7's threshold.<sup>40</sup>

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of Internal Revenue, No. 08-522, 2010 U.S. Dist. LEXIS 128385, at \*8 (M.D. La. Dec. 3, 2010) (explaining that records compiled in response to allegations of misconduct by IRS employees are part of agency's law enforcement duties and are thus compiled for law enforcement purposes), aff'd, No. 11-30008, 2011 U.S. App. LEXIS 20627 (5th Cir. Oct. 11, 2011); Stanley v. Dep't of Treasury, No. 2:06-072, 2007 U.S. LEXIS 49737, at \*2, \*9 (N.D. Ind. July 9, 2007) (finding that "records relating to the investigation of a complaint" against IRS employee for "fraud and intimidation" were compiled for law enforcement purposes because such records "arose from an investigation related to the enforcement of the tax laws, and [such] investigation[s are] part and parcel of [] law enforcement duties"); MacLean, 2007 U.S. Dist. LEXIS 16162, at \*28-29 (determining that "evidence is sufficient to show that the requested investigation-related documents did not arise from an 'internal audit' or 'customary surveillance,' but instead arose from 'specifically alleged illegal acts'"; thus, information was compiled for law enforcement purposes (citing Kimberlin, 139 F.3d at 947-48)); O'Keefe v. DOD, 463 F. Supp. 2d 317, 320, 324 (E.D.N.Y. 2006) (finding that report detailing investigation of complaint alleging misconduct by commanding officers on multiple occasions was compiled for law enforcement purposes); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1194-96 (N.D. Cal. 2006) (finding that records compiled as part of internal investigation into complaints of discrimination made against specific agency employees were compiled for law enforcement purposes); Herrick's Custom & Int'l Trade Newsletter v. Customs and Border Prot., No. 04-0377, 2006 WL 1826185, at \*6 (D.D.C. June 30, 2006) (discussing law enforcement threshold for portion of government manual that concerns "employee oversight and internal affairs" and explaining that information at issue satisfies standard because it pertains to "tampering with and theft of evidence and illegal contraband," actions that "violate[] the law"; Trentadue v. Integrity Comm., No. 2:03-339, 2006 WL 1184636, at \*5 (D. Utah May 2, 2006) (finding threshold met for documents prepared during investigation into allegations of misconduct by federal employees surrounding death of requester's brother; Dohse v. Potter, No. 8:04CV355, 2006 WL 379901, at \*1, \*7 (D. Neb. Feb. 15, 2006) (ruling that investigation by Postal Service of independent contractor for "interpersonal conflicts," including "alleged threats to postal personnel," satisfies law enforcement threshold); Judicial Watch v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 179 (D.D.C. 2004) (finding that investigations of certain agency personnel for possible violations of campaign finance laws and trade mission improprieties qualify as law enforcement).

<sup>40</sup> See, e.g., Parker v. EOUSA, No. 10-2068, 2012 WL 1038615, at \*7 (D.D.C. Mar. 29, 2012) (explaining that records created by agency acting as employer and supervising its employees do not satisfy law enforcement threshold); Nat'l Whistleblower Ctr., 2012 WL 1026725, at \*10 (finding that personnel files maintained in ordinary course of monitoring employees' performances do not satisfy law enforcement threshold); Coleman v. Lappin, No. 06-2255, 2007 U.S. Dist LEXIS 47647, at \*9 (D.D.C. July 3, 2007) (stating that "nothing in the BOP's motion and supporting documents establishes that the disciplinary records pertaining to a former BOP employee are law enforcement records"); Wood v. FBI, 312 F. Supp. 2d 328, 345 (D. Conn. 2004) (reiterating that "'investigation conducted by a federal agency for the purpose of determining whether to discipline employees for activity which does not constitute a violation of law is not for law enforcement purposes under Exemption 7'" (quoting Stern, 737 F.2d at 90)), aff'd in part & rev'd in part on other grounds, 432 F.3d 78

To meet the threshold, agencies must provide the court with sufficient detail as to the purpose of their actions that gave rise to the documents.<sup>41</sup>

### **Standards for Demonstrating Law Enforcement Threshold Met**

When determining whether a record was "compiled for law enforcement purposes" under Exemption 7, courts have generally distinguished between agencies which have as their principal function the enforcement of criminal law and those agencies which have both law enforcement and administrative functions.<sup>42</sup> For those agencies whose principal function is criminal law enforcement, the courts have established a "less exacting" standard.<sup>43</sup>

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(2d Cir. 2005); Varville v. Rubin, No. 3:96CV00629, 1998 WL 681438, at \*14 (D. Conn. Aug. 18, 1998) (explaining that threshold was not met by report discussing possible ethical violations and prohibited personnel practices because inquiry "more closely resembles an employer supervising its employees than an investigation for law enforcement purposes").

<sup>41</sup> See Parker, 2012 WL 1038615, at \*1, \*7 (explaining that in order to evaluate whether particular disciplinary records meet law enforcement threshold, agency "must actually provide evidence that the disciplinary investigation focused on illegal activity which could result in civil or criminal sanctions"); Cotton v. Adams, 798 F. Supp. 2d, 25 (D.D.C. 1992) (stating that Court cannot infer law enforcement purpose); see also Patterson, 56 F.3d at 837-38 (stating that "it is not completely obvious" from IRS's "vague and unsubstantiated" explanation that its investigation of employee was for law enforcement purpose); Coleman v. Lappin, 535 F. Supp. 2d 96, 98 (D.D.C. 2008) ("vague and general references" to BOP Program Statement do not establish law enforcement purpose)

<sup>42</sup> See, e.g., Birch v. USPS, 803 F.2d 1206, 1209 (D.C. Cir. 1986) ("At the onset, it is important to distinguish an agency serving principally the cause of criminal law enforcement from one having [a mixture] of law enforcement and administrative functions."); Pratt v. Webster, 673 F.2d 408, 416 (D.C. Cir. 1982) (explaining that "[w]hile FOIA makes no distinction on its face between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions, it would be unnecessarily wooden to treat both groups identically"); Raher v. BOP, No. 09-526, 2011 WL 2014875, at \*8 (D. Or. May 24, 2011) (describing difference between law enforcement agency and mixed-function agency); Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1194 (N.D. Cal. 2006) (noting difference between agencies with clear law enforcement mandate and agencies with mixed function as to requirements to establish law enforcement purpose).

<sup>43</sup> Pratt, 673 F.2d at 418 (describing "less exacting judicial scrutiny" of criminal law enforcement agency); see also Council on Am.-Islamic Relations v. FBI, 749 F. Supp. 2d 1104, 1117-118 (S.D. Cal. 2010) (noting that burden to satisfy Exemption 7 threshold is easier for law enforcement agencies as they "need only be held to a minimal showing"); Living Rivers v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1319 (D. Utah 2003) (stating that "standard for establishing a law enforcement purpose" is "lower [for per se law enforcement agency] than it is for . . . mixed-function agency").

The Court of Appeals for the District of Columbia Circuit applies this "less exacting standard" by using a "rational nexus" test, a two-part test for determining whether the threshold for Exemption 7 had been met which requires courts to determine (1) whether the agency's investigatory activities that give rise to the documents sought are related to the enforcement of federal laws or to the maintenance of national security; and (2) whether the nexus between the investigation and one of the agency's law enforcement duties is based on information sufficient to support at least a colorable claim of rationality.<sup>44</sup> The Ninth Circuit also applies the rational nexus test to criminal law enforcement agencies in order to determine whether the records at issue meet Exemption 7's threshold.<sup>45</sup> In 2007 the Court of Appeals for the Third Circuit specifically "adapted" the rational nexus test to reflect the 1986 FOIA Amendments which removed the term "investigatory" from Exemption 7's threshold.<sup>46</sup>

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<sup>44</sup> Pratt, 673 F.2d at 420-21; *see, e.g., Blackwell v. FBI*, 646 F.3d 37, 40 (D.C. Cir. 2011) (reiterating that to "show that the disputed documents were 'compiled for law enforcement purposes,' the FBI need only 'establish a rational nexus between the investigation and one of the agency's law enforcement duties and a connection between an individual or incident and a possible security risk or violation of federal law'" (quoting Campbell v. DOJ, 164 F.3d 20, 32 (D.C. Cir. 1998))); Ctr. for Nat'l. Sec. Studies v. DOJ, 331 F.3d 918, 926 (D.C. Cir. 2003) (holding that declarations must establish (1) rational nexus between investigation and one of agency's law enforcement duties and (2) connection between individual or incident and a possible security risk or violation of federal law); Campbell v. DOJ, 164 F.3d 20, 32 (D.C. Cir. 1998) (stating that agency declarations "must establish a rational 'nexus between the investigation and one of the agency's law enforcement duties'" and connection between "'individual or incident and a possible security risk or violation of federal law'" (quoting Pratt, 673 F.2d at 420-21)); King v. DOJ, 830 F.2d 210, 229-30 (D.C. Cir. 1987) (stating that "'agency must establish that its investigatory activities are realistically based on a legitimate concern . . . and have a rational connection to the object of the agency's investigation'" (quoting Pratt, 673 F.2d at 421)); Hammouda v. DOJ, No. 12-0130, 2013 WL 303191, at \*4 (D.D.C. Jan. 31, 2013) (finding threshold requirement satisfied where agency established rational nexus (citing Blackwell, 646 F.3d at 40)).

<sup>45</sup> *See, e.g., Rosenfeld v. DOJ*, 57 F.3d 803, 809 (9th Cir. 1995) (explaining that because FBI has "clear law enforcement mandate," government "'need only establish a rational nexus between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed'" (quoting Church of Scientology v. Dept' of Army, 611 F.2d 738, 748 (9th Cir. 1979))); Council on Am.-Islamic Relations, 749 F. Supp. 2d at 1117 (reiterating that agencies with clear law enforcement purpose need only establish rational nexus between their law enforcement duties and document); Gordon v. FBI, 388 F. Supp. 2d 1028, 1035 (N.D. Cal. 2005) (stating that FBI "'need only establish a rational nexus'" (quoting Rosenfeld, 57 F.3d at 808)).

<sup>46</sup> *See Abdelfattha v. DHS*, 488 F.3d 178, 184-85 (3d Cir. 2007) (modifying Third Circuit's earlier standard by emphasizing that while 1986 FOIA amendments "broadened the applicability of Exemption 7 by expressly removing the requirement that the records be 'investigatory,' . . . amendments did not affect that portion of the Pratt test which requires a 'nexus'" and thus, use of modified "two-prong 'rational nexus' test" is proper test); *see also Finkel v. Dep't of Labor*, No. 05-5525, 2007 U.S. Dist. LEXIS 47307, at \*30 (D.N.J. June 29, 2007) (explaining that while Third Circuit clarified rational nexus test to reflect 1986 FOIA

Other circuits, by comparison, specifically the First, Second, Sixth, Eighth, and Eleventh, apply the "less exacting standard" for criminal law enforcement agencies by using a per se rule, which qualifies all "investigative" records of criminal law enforcement agencies for protection under Exemption 7.<sup>47</sup> In 2011, the Tenth Circuit,

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amendments, agency must still demonstrate that relationship between its authority to enforce statute or regulation and activity giving rise to requested documents is based upon information sufficient to support at least colorable claim of rationality).

<sup>47</sup> See First Circuit: Curran v. DOJ, 813 F.2d 473, 475 (1st Cir. 1987) (holding that investigatory records of law enforcement agencies are "inherently" compiled for law enforcement purposes); Irons v. Bell, 596 F.2d 468, 474-76 (1st Cir. 1979) (holding that "investigatory records of law enforcement agencies are inherently records compiled for 'law enforcement purposes' within the meaning of Exemption 7"); Second Circuit: Halpern v. FBI, 181 F.3d 279, 296 (2d Cir. 1999) (applying rule that when records are compiled in course of law enforcement investigation, purpose of investigation is not subject to review by court); Ferguson v. FBI, 957 F.2d 1059, 1070 (2d Cir. 1992) (finding that there is "no room for [a] district court's inquiry into whether the FBI's asserted law enforcement purpose was legitimate"); Peltier v. FBI, No. 03-CV-905S, 2005 WL 735964, at \*14 (W.D.N.Y. Mar. 31, 2005) (explaining that "legitimacy of the investigation is immaterial [because] the rule in this Circuit is that the Government need only show that the records were compiled by a law enforcement agency in the course of a criminal investigation"); Sixth Circuit: Rugiero v. DOJ, 257 F.3d 534, 550 (6th Cir. 2001) ("This court has adopted a per se rule under which any documents compiled by a law enforcement agency fall within the first part of the section 552(b)(7)."); Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 96 (6th Cir. 1996) (holding that "mug shots" are created for law enforcement purpose, and applying per se rule adopted previously in Sixth Circuit); Jones v. FBI, 41 F.3d 238, 245 (6th Cir. 1994) (noting that First, Second, and Eighth Circuits have adopted per se rule and then adopting it in Sixth Circuit by explaining that "per se rule comports more fully with the policies Congress enacted in FOIA" and that "concern about overbroad withholding should . . . be addressed by proper scrutiny of the claimed exemptions"); ACLU v. FBI, No. 11-13154, 2012 WL 4513626, at \*8 (E.D. Mich. Sept. 30, 2012) ("The Sixth Circuit has adopted a per se rule that designates any documents compiled by a law enforcement agent [including an FBI agent] as being 'compiled for law enforcement purposes.'" (quoting Jones, 41 F.3d at 245-46)); Eighth Circuit: Kuehnert v. FBI, 620 F.2d 662, 666 (8th Cir. 1980) (discussing and applying per se standard of First Circuit to determine that FBI need not show law enforcement purpose of particular investigation as precondition to invoking Exemption 7); Eleventh Circuit: Robinson v. DOJ, No. 00-11182, slip op. at 10 (11th Cir. Mar. 15, 2001) (holding that investigative records concerning search and seizure of drug-carrying vessel are "'inherently records compiled for law enforcement purposes'" (quoting Curran, 813 F.2d at 475)); Arenberg v. DEA, 849 F.2d 579, 581 (11th Cir. 1988) (suggesting that courts should be "hesitant" to reexamine law enforcement agency's decision to investigate if there is plausible basis for agency's decision). But see Van Bilderbeek v. DOJ, No. 6:08-1931, 2010 WL 1049618, at \*4 (M.D. Fla. Mar. 22, 2010) (stating that "[t]o establish a law enforcement purpose, [an agency's] declarations must establish (1) a rational nexus between the investigation and one of the agency's law enforcement duties; and (2) a connection between an individual or incident and a possible security risk or violation of federal law" (quoting Ctr. For Nat'l Sec. Studies, 331 F.3d at 926)).

after reviewing the elements of the per se rule and the rational nexus test, decided to adopt the per se rule.<sup>48</sup>

By contrast, courts have held that an agency whose functions are "mixed" has a higher standard to satisfy<sup>49</sup> in that it usually has to show that the records at issue involved the enforcement of a statute or regulation within its authority and that the records were compiled for adjudicative or enforcement purposes.<sup>50</sup> Nevertheless,

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<sup>48</sup> Jordan v. DOJ, No. 10-1469, 2011 WL 6739410, at \*3-6 (10th Cir. Dec. 23, 2011) (discussing elements of rational nexus test and per se rule and concluding that "the per se rule is the proper approach"); see Watters v. DOJ, 2013 WL 4482968, at \*11 (N.D. Okla. Aug. 20, 2013) (stating that "Tenth Circuit of Appeals has endorsed the 'per se rule' for determining whether materials have been 'compiled for law enforcement purposes'").

<sup>49</sup> See, e.g., Tax Analysts v. IRS, 294 F.3d 71, 77 (D.C. Cir. 2002) (noting that IRS is "mixed-function agency, subject to an exacting standard when it comes to the threshold requirement of Exemption 7"); Pratt, 673 F.2d at 416, 418 (noting "more exacting scrutiny of Exemption 7 claims by agencies whose principal function is not law enforcement"); Raher, 2011 WL 2014875, at \*7 (stating that agencies having mixed function have higher standard); United Am. Fin. v. Potter, 531 F. Supp. 2d 29, 46 (D.D.C. 2008) (explaining that "this Circuit's admonition" mandates that courts give thoughtful consideration to whether mixed-function agencies satisfy law enforcement purpose); Mayer, Brown, Rowe & Maw v. IRS, No. 04-2187, 2006 U.S. Dist. LEXIS 58410, at \*23 (D.D.C. Aug. 21, 2006) (explaining that mixed-function agencies are subject to exacting standards to establish law enforcement threshold); Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., No. 6:02-CV-126, 2003 WL 21146674, at \*17 (M.D. Fla. May 13, 2003) (reiterating that agency "with mixed law enforcement and non-law enforcement functions requires the Court to consider the purpose of the investigation and to determine whether the information was gathered as part of an inquiry about a potential violation of the law, rather than in the course of the agency's administrative function of overseeing compliance with its rules and regulations"), remanded on other grounds, 376 F.3d 1270 (11th Cir. 2004).

<sup>50</sup> See, e.g., Cooper Cameron Corp. v. Dep't of Labor, 280 F.3d 539, 545 (5th Cir. 2002) (finding that because OSHA acted pursuant to its statutory mandate to inspect workplaces, question employees, and cite employers regarding safety and health regulations, records were compiled for law enforcement purposes); Lewis v. IRS, 823 F.2d 375, 379 (9th Cir. 1987) (holding that threshold met when the IRS "had a purpose falling within its sphere of enforcement authority in compiling particular documents"); Birch, 803 F.2d at 1210-11 (explaining that threshold was met because "Postal Service has statutory authority to investigate and enforce laws regarding use of mails and other postal matters"); Ameren Mo. v. EPA, No. 4:11 02051, 2012 WL 4372518, at \*8-9 (E.D. Mo. Sept. 25, 2012) (finding data and calculations from power plant emissions were compiled for law enforcement purpose because agency has "statutory responsibility" under Clean Air Act for "enforcement of those laws and regulations"); Lawyers' Comm. for Civil Rights v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at \*11 (N.D. Cal. Sept. 30, 2008) (reiterating that mixed-function agency "must demonstrate that its purpose in compiling the particular document fell within its sphere of enforcement activity"); Stanley v. U.S. Dep't of the Treasury, No. 2:06-CV-072, 2007 LEXIS 49737, at \*8-9 (N.D. In. July 9, 2007) (finding that threshold satisfied because

district courts in the Fourth, Seventh, and Ninth Circuits have applied the "rational nexus" test to evaluate mixed-function agencies' claims of a law enforcement purpose.<sup>51</sup> Further, the D.C. Circuit has explained that the standard in "this circuit has long emphasized that the focus is on how and under what circumstances the requested files were compiled" and whether the records relate to anything that can fairly be characterized as an enforcement proceeding, adding that if the activity "is for a possible

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"records arose from an investigation related to the enforcement of the tax laws, and the investigation was part and parcel of [agency's] law enforcement duties"); Finkel, 2007 U.S. Dist. LEXIS 47307, at \*31 (finding records were compiled for law enforcement purpose "because they were collected in the course of OSHA acting pursuant to its statutory authority" to inspect, question, and cite businesses regarding safety and health regulations"); L.A. Times v. Dep't of the Army, 442 F. Supp. 2d 880, 898 (C.D. Cal. 2006) (explaining that mixed-function agency must demonstrate purpose falling within its sphere of enforcement authority in compiling records).

<sup>51</sup> See, e.g., Kubic v. BOP No. 10-6078, 2011 U.S. Dist. LEXIS 71300 at \* 28-29 (D. Or. 2011) (explaining "two part test: (1) the agency's investigative activities that gave rise to the documents must be related to the enforcement of federal laws; and (2) the nexus between the investigation and one of the agency's law enforcement duties must be based on sufficient information to support at least a colorable claim of its rationality"; finding that nexus is met for certain BOP documents (citing Pratt v. Webster, 673 F.2d 408, 413 (D.C. Cir. 1982)); Reno Newspaper, Inc. v. Parole Comm'n, No. 3:09-CV-683, 2011 U.S. Dist. LEXIS 33957, at \*18-20 (D. Nev. Mar. 29, 2011) (reiterating that "term 'law enforcement purpose' has been construed to require an examination of the agency itself to determine whether the agency may exercise a law enforcement function," and finding that Parole Commission has law enforcement mandate "for purposes of Exemption 7" and thus used rational nexus test to establish threshold (quoting Church of Scientology v. Dep't of Army, 611 F.2d 738, 748 (9th Cir. 1979))); Stanley, 2007 U.S. Dist. LEXIS 49737, at \*7-9) (applying rational nexus test to establish law enforcement purpose for records generated by allegations of IRS employee misconduct); George v. IRS, No. C05-0955, 2007 WL 1450309, at \*6 (N.D. Cal. May 14, 2007) (noting that "Supreme Court has explained" that IRS has power to investigate and then applying rational nexus test to mixed-function agency to determine that threshold met); Van Mechelen v. Dept' of Interior, No. C05-5393, 2005 WL 3007121, at \*4 (W.D. Wash. Nov. 9, 2005) (explaining that phrase "law enforcement purpose" has been defined as records "created in the course of an investigation 'related to the enforcement of federal laws . . . and [the] nexus between [the] investigation and [the] agency's law enforcement duties [is] based on information sufficient to support at least a colorable claim of its rationality'" to establish threshold for records compiled during mixed-function agency's "OIG investigation into possible violations of federal law by the [Bureau of Indian Affairs]" (quoting Pratt, 673 F.2d 420-21)); Wichlacz v. Dep't of Interior, 938 F. Supp. 325, 330 (E.D. Va. 1996) (explaining that to meet threshold, records generated by National Park Police and Office of Independent Counsel investigations into death on national park property must be related to enforcement of federal law, and there must be rational connection between investigative activities and agency's law enforcement duties), aff'd 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision).

violation of law, then the inquiry is for law enforcement purposes."<sup>52</sup> The District Court for the District of Columbia has applied the rational nexus test to what are usually considered mixed-function agencies.<sup>53</sup> Thus, the phrase "law enforcement purpose" has been interpreted broadly by courts in assessing whether records compiled by agencies with mixed functions satisfy Exemption 7's threshold, especially, for example, when records are used by mixed-function agencies in furtherance of their duties to prevent violence and safeguard the public.<sup>54</sup>

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<sup>52</sup> Jefferson v. DOJ, 284 F.3d 172, 176-77 (D.C. Cir. 2002); see also, e.g., Miller v. DOJ, 872 F. Supp. 2d 12, 24-25 (D.D.C. 2012) (explaining that focus is on circumstances of compilation and whether records relate to enforcement proceeding (citing Jefferson 284 F.3d at 176-177)); Rural Hous. Alliance v. USDA, 498 F.2d 73, 82 (D.C. Cir. 1974) (explaining that purpose of investigatory files is critical factor in establishing law enforcement threshold); Wonders v. McHugh, No. 11-1130, 2012 WL 3962750, at \*4 (D.D.C. Sept. 11, 2012) (finding that records collected by Army Professional Responsibility Branch satisfied law enforcement threshold because "scope of the investigation was not limited to determining whether there was a violation of an internal agency policy or regulation," but focused on illegal acts); Pub. Emps. for Envtl. Responsibility v. U.S. Sec'y. Int'l Boundary & Water Comm'n, No. 11-261, 2012 WL 933709, at \*13 (D.D.C. Mar. 20, 2012) (explaining that in "assessing whether records were compiled for law enforcement purposes, the 'focus is on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding'" (quoting Jefferson, 284 F.3d at 176-77)); Ruston v. DOJ, No. 06-0224, 2007 U.S. Dist. LEXIS 18147, at \*14 (D.D.C. Mar. 15, 2007) (reiterating that "'focus is on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding,'" (quoting Jefferson, 284 F.3d at 176-77)); cf. Sinsheimer v. DHS, 437 F. Supp. 2d 50, 55 (D.D.C. 2006) (repeating that law enforcement proceedings "may arise in the course of carrying out an agency's administrative duties – as opposed to a duty tied directly to the substantive mission of the agency," and reiterating that "[i]t is the purpose of the record, not the role of the agency, that is determinative").

<sup>53</sup> See, e.g., Concepcion v. Customs and Border Prot., No. 10-0599, 2012 WL6019299, at \*4 (D.D.C. Dec. 4, 2012) (describing component of mixed-function agency as "preventing the entry of terrorists" and "securing the borders," and finding that records generated in furtherance of these responsibilities satisfy threshold by applying rational nexus test and explaining that agency "'need only establish a rational nexus between the investigation and one of the agency's law enforcement duties and a connection between an individual or incident and a possible security risk or violation of federal law'" (quoting Blackwell, 464 F.3d at 40)); McCann v. HHS, No. 10-1758, 2011 WL 6251099, at \*4 (D.D.C. Dec. 15, 2011) (using rational nexus test to determine threshold for records generated by mixed-function agency's investigation into allegations of violations of HIPAA, because violations could result in civil or criminal penalties, and explaining that to satisfy law enforcement requirement, agencies need to establish nexus between investigation and law enforcement duties as well as between incident and possible violation of law).

<sup>54</sup> See, e.g., Miller v. DOJ, 872 F. Supp. 2d at 24-25) (finding State Department records satisfy law enforcement threshold because records were created to facilitate agency's extradition of fugitive felon wanted in investigation for violent crimes); Pub. Emps. for

## **Deference**

In the case of criminal law enforcement agencies, the courts have accorded the government varying degrees of deference when considering whether their particular records meet the threshold requirement of Exemption 7.<sup>55</sup> Indeed, in recognizing the propriety of judicial deference, the Court of Appeals for the District of Columbia Circuit

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Envtl. Responsibility, 2010 WL 933709, at \*1, \*13, \*15-16 (explaining that mixed-function agency is responsible for "boundary and water treaties" as well as federal programs, policies, and guidelines on dam safety, and finding that emergency action plans and inundation maps were compiled for law enforcement purposes given potential for threats against dams, "harm to public safety," and agency's activities related to dam safety); Ruston, 2007 U.S. Dist. LEXIS 18147, at \*14 (finding that psychological evaluations were compiled for law enforcement purposes because prison staff "used those records" to determine inmate's competency to stand trial for threatening federal official); L.A. Times, 442 F. Supp. 2d at 898 (stating that mixed-function component's database falls within cognizable law enforcement mandate because it was compiled to "improve intelligence information that will enhance security" in Iraq); Living Rivers, 272 F. Supp. 2d at 1318-20 (explaining that while standard for establishing law enforcement purpose is high for mixed-function agency, here, inundation maps were directly related to agency's statutory mandate to "maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands," thus, standard satisfied (quoting 43 U.S.C.A. § 373b(a)(2006))).

<sup>55</sup> See, e.g., Blackwell v. FBI, 646 F.3d 37, 40 (D.C. Cir. 2011) (declaring that FBI's assertion that records concerning insider trading investigation were compiled for law enforcement purposes "is entitled to deference"); Campbell v. DOJ, 164 F.3d 20, 32 (D.C. Cir. 1998) (stating that FBI specializes in law enforcement and thus its "decision to invoke exemption 7 is entitled to deference"); Binion v. DOJ, 695 F.2d 1189, 1193 (9th Cir. 1983) ("Some circuits, including this, have decided that law enforcement agencies such as the FBI should be accorded special deference in an Exemption 7 determination."); Gardels v. CIA, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982) (explaining that "test" is not whether court agrees with agency; rather, test is "whether on the whole record the Agency's judgment objectively survives" because court must "accord" weight to agency determination); Espino v. DOJ, 869 F. Supp. 2d 25, 29 (D.D.C. 2012) (stating that claim made by "law enforcement agency, such as the FBI, is accorded greater deference than a similar claim made by a mixed-function agency"); Schoenman v. FBI, No. 04-02202, 2011 WL 446857, at \*18 (D.D.C. Feb. 9, 2011) (noting that FBI's decision to invoke Exemption 7 is entitled to deference); Council on Am.-Islamic Relations v. FBI, No. 09-823, 2010 WL 4024806, at \*11 (S.D. Cal. Oct. 12, 2010) (stating that "[i]n the Ninth Circuit, law enforcement agencies such as the FBI are accorded 'special deference' in an Exemption 7 determination" (citing Binion, 695 F.2d at 1193)); Lardner v. DOJ, 638 F. Supp. 2d 14, 31 (D.D.C. 2009) (stating that agencies specializing in law enforcement are entitled to deference in invoking Exemption 7), aff'd, No. 09-5337, 2010 U.S. App. LEXIS 22557 (D.C. Cir. Oct. 28, 2010); Barnard v. DHS, 598 F. Supp. 2d 1, 14 (D.D.C. 2009) (stating "[a]t the outset the Court notes" that law enforcement agency is entitled to deference); Long v. DOJ, 479 F. Supp. 2d 23, 27 (D.D.C. 2007) (noting that agency is "'entitled to 'some measure of deference . . . in cases implicating national security'" (quoting Ctr. for Nat'l. Sec. Studies v. DOJ, 331 F.3d 918, 926 (D.C. Cir. 2003))).

in Center for National Security Studies v. DOJ<sup>56</sup> observed that it was acting "in accord with several federal courts" that defer to the executive on decisions of national security and explained that "[j]ust as we have deferred to the executive when it invokes FOIA Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases."<sup>57</sup>

Although acknowledging the role of deference in evaluating the government's positions, courts nevertheless scrutinize agency actions,<sup>58</sup> especially in the area of administrative or routine tasks performed by even criminal law enforcement agencies, and have required the agencies to justify thoroughly their use of Exemption 7 in these instances.<sup>59</sup>

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<sup>56</sup> 331 F.3d 918, 932 (D.C. Cir. 2003).

<sup>57</sup> *Id.* at 927-28; see, e.g., L.A. Times v. Dep't of the Army, 442 F. Supp. 2d 880, 896-99 (C.D. Cal. 2006) (finding that mixed-function agency was providing intelligence information "to aid the Army in fulfilling its mission in Iraq," which includes security and "maintenance of law and order"; adding that it is "well-established that the judiciary owes some measure of deference to the executive in cases implicating national security"); Edmonds v. FBI, 272 F. Supp. 2d 35, 55 (D.D.C. 2003) (stating that "the Circuit Court recently chronicled in detail the 'weight of authority counseling deference . . .'" and concluded that the deference that has historically been given to the executive when it invokes FOIA Exemption 1 must be extended to Exemption 7(A) in cases like this one, where national security area issues are at risk" (quoting Ctr. for Nat'l Sec. Studies, 331 F.3d at 927-28)).

<sup>58</sup> See, e.g., Friedman v. U.S. Secret Serv., No. 06-2125, 2013 WL 588228, at \*20 (D.D.C. Feb. 14, 2013) (noting that "deference does not amount to blind acceptance of the agency's assertions"); McRae v. DOJ, 869 F. Supp. 2d 151, 164 (D.D.C. 2012) (explaining that it is clear that claims by law enforcement agencies are entitled to deference, but "deference is not blind acceptance" and broad statements are insufficient); Shannahan v. IRS, 680 F. Supp. 2d 1270, 1275-76 (W.D. Wash. 2010) (stating that although agency's determination is entitled to deference, "the court nonetheless reviews the determination de novo" in order to satisfy itself that agency is correct); Lardner, 638 F. Supp. 2d at 31 (stating that deferential standard is not vacuous); Schoenman v. FBI, 575 F. Supp. 2d 166, 174 (D.D.C. 2008) (reiterating that while agency specializing in law enforcement is entitled to deference when it invokes Exemption 7, deferential standard is not vacuous); Long, 479 F. Supp. 2d at 27 (noting deference owed, but adding "agency bears the burden of justifying any withholding, and the Court reviews the agency's exemption claims de novo"); L.A. Times, 442 F. Supp. 2d at 897, 899 (noting that while it "owes some measure of deference," court reviewed agency declarations to ascertain sufficiency, finding "competent, uncontroverted evidence" that agency "was functioning pursuant to a law enforcement mandate" and information fell within claimed exemption).

<sup>59</sup> See, e.g., Patterson v. IRS, 56 F.3d 832, 836-38 (7th Cir. 1995) (explaining that because IRS was not enforcing revenue laws, "it is not completely obvious" that its investigation was for law enforcement purpose and requiring agency to provide more than "statutory language" to justify threshold); Anderson v. BOP, No. 10-413, 2011 U.S. Dist. LEXIS 95125, at \*1, \*9-10 (D.D.C. Aug. 25, 2011) (explaining that records pertaining to BOP's transfer of inmate from one correctional complex to another were compiled for law enforcement

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purposes because transfer was generated as part of agency's determination that transfer was necessary to prevent violence); Quinto v. DOJ, 711 F. Supp. 2d 1, 12 (D.D.C. 2010) (finding that "communications" regarding inmate's placement satisfy law enforcement purpose because agency established that there "is a direct relationship between the BOP's duty to ensure the safety of inmates, staff, and the community and its professional decisions as to where and how to house inmates"); Coleman v. Lappin, 535 F. Supp. 2d 96, 98 (D.D.C. 2008) (stating that employment status by itself, even in agency with law enforcement function, is insufficient to establish that disciplinary records were compiled for law enforcement purposes; stating that agency must "demonstrate the circumstances" under which records were compiled and explain what enforcement proceedings occurred or were authorized).