



## Exemption 7(A)

### Introduction

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

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

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

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

Determining the applicability of this Exemption 7 subsection thus requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm.<sup>4</sup> It is well established that in order to satisfy the "pending/prospective"

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<sup>3</sup>(...continued)

"could reasonably' . . . represents a relaxed standard; before 1986, the government had to show that disclosure 'would' interfere with law enforcement"); Gould Inc. v. GSA, 688 F. Supp. 689, 703 n.33 (D.D.C. 1988) (The "1986 amendments relaxed the standard of demonstrating interference with enforcement proceedings."); see also Spannaus v. DOJ, 813 F.2d 1285, 1288 (4th Cir. 1987) (explaining that "agency's showing under the amended statute, which in part replaces 'would' with 'could reasonably be expected to,' is to be measured by a standard of reasonableness, which takes into account the 'lack of certainty in attempting to predict harm'" (quoting S. Rep. No. 98-221, at 24 (1983))).

<sup>4</sup> See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) (holding that government must show how records "would interfere with a pending enforcement proceeding"); Juarez v. DOJ, 518 F.3d 54, 58-59 (D.C. Cir. 2008) (explaining that government must show that its ongoing law enforcement proceeding could be harmed by premature release of evidence or information); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1113-14 (D.C. Cir. 2007) (discussing dual elements necessary to invoke Exemption 7(A): reasonably anticipated law enforcement proceeding and harm if information released); Lion Raisins, Inc. v. USDA, 231 F. App'x 565 (9th Cir. 2007) (stating that applicable standard met where "criminal investigation remains ongoing" and release of information could "jeopardize that investigation"); Lion Raisins, Inc. v. USDA, 231 F. App'x 563 (9th Cir. 2007) (finding that agency submissions described "ongoing proceedings and explained how disclosure" could interfere); Manna v. DOJ, 51 F.3d 1158, 1164 (3d Cir. 1995) ("To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm."); Campbell v. HHS, 682 F.2d 256, 259 (D.C. Cir. 1982) (stating that agency must demonstrate interference with pending enforcement proceeding); EDUCAP, Inc. v. IRS, No. 07-2106, 2009 WL 416428, at \*5 (D.D.C. Feb. 18, 2009) (explaining that Exemption 7(A) permits government to withhold documents related to ongoing proceeding where release could harm case); Cozen O'Conner v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 783 (E.D. Pa. 2008) (stating that to "fit within Exemption 7(A), the government must show" pending or prospective law enforcement proceeding and that release of information could "cause some articulable harm"); Radcliffe v. IRS, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008) (noting that standard met where agency established that release of information could interfere with ongoing investigation); Estate of Fortunato v. IRS, No. 06-6011, 2007 WL 4838567, at \*3 (D.N.J. Nov. 30, 2007) (explaining that "agency must demonstrate" that law enforcement proceeding is pending or prospective and release of information "could reasonably be expected to cause some articulable harm"); Stolt-Nielsen Trans. Group, Ltd. v. DOJ, 480 F. Supp. 2d 166, 179 (D.D.C. 2007) (reiterating necessity of pending or prospective law enforcement proceeding and "some articulable harm" caused by release of information), vacated and remanded on other grounds, 534 F. 3d 728, 733-34 (D.C. Cir. 2008 ) (agreeing that while Exemption 7(A) is applicable, reiterating that "agency cannot justify withholding an entire document simply by showing that it contains some exempt

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requirement of Exemption 7(A), an agency must be able to point to a specific pending or contemplated law enforcement proceeding.<sup>5</sup> As one court has observed, "[i]f an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on some hypothetical enforcement proceeding, the FOIA would be meaningless."<sup>6</sup> Accordingly, the courts have held that the two-part test requires more than

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<sup>4</sup>(...continued)

material"<sup>4</sup> (quoting Mead Data Cent. Inc. v. U.S. Dep't of Air Force, 566 F. 2d 242, 260 (D.C. Cir. 1977)) and remanding for agency to segregate); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at \*6 (D.D.C. Mar. 9, 2007) (noting that agency must identify "concrete prospective law enforcement proceeding" and demonstrate that release of "documents could reasonably be expected to interfere"); Long v. DOJ, 450 F.2d 42, 73 (D.D.C. 2006) (reiterating that "agency must demonstrate" that enforcement proceeding is pending or prospective and that "disclosure of the information could reasonably be expected to cause some articulable harm to the proceeding"); Beneville v. DOJ, No. 98-6137, slip op. at 22 (D. Or. June 11, 2003) (explaining that simply satisfying law enforcement purpose "does not establish the remainder of the requirement . . . that disclosure of the documents could reasonably be expected to interfere with law enforcement proceedings"); Franklin v. DOJ, No. 97-1225, slip op. at 7 (S.D. Fla. June 15, 1998) (magistrate's recommendation) (two-part test), adopted, (S.D. Fla. June 26, 1998), aff'd, 189 F.3d 485 (11th Cir. 1999) (unpublished table decision); Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at \*25 (M.D. Fla. Oct. 1, 1997) (same). But see Goodrich Corp. v. EPA, 593 F. Supp. 2d 184, 193-94 (D.D.C. 2009) (limiting harm to law enforcement proceeding to destruction of evidence or fabrication of alibis by targets of investigation, with no consideration of harm to government's case in court).

<sup>5</sup> See Mapother v. DOJ, 3 F.3d 1533, 1542 (D.C. Cir. 1993) (determining that "in the run of cases involving persons excluded from the United States . . . there is a reasonable likelihood of a challenge" and so holding that "Exemption 7(A)'s requirement that enforcement proceedings be reasonably anticipated is met"); see also Durrani v. DOJ, 607 F. Supp. 2d 77, 90 (D.D.C. 2009) ( finding agency "has not sustained its burden with regard to exemption 7(A) by identifying a pending or potential law enforcement proceeding" and further noting that "criminal proceedings were likely concluded by the affirmance of [plaintiff's] convictions on direct appeal"); Shearson v. DHS, No. 06-1478, 2007 U.S. Dist. LEXIS 16902, at \*1, \*13-15 (N.D. Ohio Mar. 9, 2007) (finding agency assertions too generalized to satisfy standard because there is "no suggestion that government is contemplating any enforcement proceeding"); Nat'l Sec. Archive v. FBI, 759 F. Supp. 872, 883 (D.D.C. 1991) (reasoning that FBI's justification that disclosure would interfere with its overall counterintelligence program "must be rejected" as too general to be type of proceeding cognizable under Exemption 7(A), and permitting FBI to demonstrate whether there existed any specific pending or contemplated law enforcement proceedings).

<sup>6</sup> Badran v. DOJ, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987); see also Dow Jones v. FERC, 219 F.R.D. 167, 174 (C.D. Cal. 2002) (stating that "defendant fails to cite, and the Court was unable to locate, any case in which a court upheld an agency's determination to withhold disclosure pursuant to Exemption 7(A) because disclosure would interfere with settlement discussions or impede the willingness of targets of the investigation to voluntarily disclose additional information"); Ctr. for Auto Safety v. DOJ, 576 F. Supp. 739, 751-55 (D.D.C. 1983) (holding that records concerning modification of consent decree from closed proceeding are not protectible

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the more pendency of enforcement proceedings for the invocation of Exemption 7(A); the government must also establish that some distinct harm could reasonably be expected to result if the record or information requested were disclosed.<sup>7</sup> For example, the Court of Appeals for the District of Columbia Circuit has held that the fact that a judge in a criminal

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<sup>6</sup>(...continued)

when not "being used in an on-going investigation"; disclosure would not interfere with future settlements), partial reconsideration granted, No. 82-0714, 1983 WL 1955 (D.D.C. July 7, 1983); see also Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (stating that documents from unfair labor practice are not protected by Exemption 7(A) when no claim is pending or contemplated); Poss v. NLRB, 565 F.2d 654, 656-58 (10th Cir. 1977) (same).

<sup>7</sup> See, e.g., Sussman, 494 F.3d at 1114 (stressing need for "specific information about the impact of the disclosures" and stating that "on the record before us it is impossible to determine whether disclosure would in fact impede" investigation); Neill v. DOJ, No. 93-5292, 1994 WL 88219, at \*1 (D.C. Cir. Mar. 9, 1994) (explaining that conclusory affidavit lacked specificity of description necessary to ensure meaningful review of agency's Exemption 7(A) claims); Miller v. USDA, 13 F.3d 260, 263 (8th Cir. 1993) (holding that government must make specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); Crooker v. ATF, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (finding that agency failed to demonstrate that disclosure would interfere with enforcement proceedings); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986) (stating that "government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding"); Estate of Fortunato, 2007 WL 4838567, at \*4 (reiterating that "[c]ategorical descriptions of redacted material coupled with categorical indications of anticipated consequences of disclosure is clearly inadequate" (quoting King v. DOJ, 830 F.2d 210, 217 (D.C. Cir. 1987))); Dow Jones Co. v. FERC, 219 F.R.D. 167, 173 (C.D. Cal. 2002) (noting that agency cannot easily demonstrate harm to its proceedings when "subjects of the investigation . . . have copies" of record in question); Scheer v. DOJ, 35 F. Supp. 2d 9, 13-14 (D.D.C. 1999) (finding that agency's assertion that disclosure to requester would harm its investigation "is belied" by agency's full disclosure to target of investigation; therefore, agency "has not met its burden of offering clear proof that disclosure . . . would have interfered with a law enforcement proceeding within the meaning of FOIA exemption 7(A)"); Jefferson v. Reno, No. 96-1284, 1997 U.S. Dist. LEXIS 3064, at \*10 (D.D.C. Mar. 17, 1997) (ruling that neither agency's declaration nor its checklist "describes how the release of any or all responsive documents could reasonably be expected to interfere with these enforcement proceedings"); ACLU Found. v. DOJ, 833 F. Supp. 399, 407 (S.D.N.Y. 1993) (explaining that possibility of interference was not so evident when investigations referred to closed or "generalized class" of cases; accordingly, government must provide sufficient information for court to decide whether disclosure will actually threaten similar, ongoing enforcement proceedings); cf. Lion Raisins Inc. v. USDA, No. 05-0062, 2005 WL 2704879, at \*7-9 (E.D. Cal. Oct. 19, 2005) (explaining that "[h]ere, the worksheets are not identical" to ones in Lion's possession, and while agreeing that USDA's litigation strategy has been revealed in its prior actions and that "it is unlikely that Lion will now try to extricate itself from these accusations of fraudulent fabrication by fabricating more documents," nevertheless finding that falsified document and ongoing proceedings establish that disclosure of "this kind of evidence" would interfere with ongoing law enforcement proceedings), aff'd, 231 F. App'x 563 (9th Cir. 2007).

trial specifically delayed disclosure of certain documents until the end of the trial is alone insufficient to establish interference with that ongoing proceeding.<sup>8</sup> At the same time, courts have afforded protection under Exemption 7(A) despite the fact that criminal discovery procedures may eventually allow access to certain records.<sup>9</sup>

### Duration

It is beyond question that Exemption 7(A) is temporal in nature and is not intended to "endlessly protect material simply because it [is] in an investigatory file."<sup>10</sup> Thus, as a general rule, Exemption 7(A) may be invoked so long as the law enforcement proceeding involved remains pending,<sup>11</sup> or so long as an enforcement proceeding is fairly regarded as prospective<sup>12</sup>

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<sup>8</sup> North v. Walsh, 881 F.2d 1088, 1100 (D.C. Cir. 1989) (stating that standard is "whether disclosure can reasonably be expected to interfere in a palpable, particular way" with enforcement proceedings).

<sup>9</sup> See e.g., Radcliffe, 536 F. Supp. 2d at 438 (explaining that although "[i]t may be true that if this matter proceeds to trial plaintiff will be entitled to discovery of some or all of the documents at issue," withholding proper because Exemption 7(A) was created specifically to avoid early disclosure of evidence and potential resulting impact that such disclosure would have on ongoing government investigation); Owens, 2007 WL 778980, at \*5 (stating that "exemption claims" cannot be defeated "simply by pointing to a judicial proceeding in which some of the responsive documents may or could have been released"); Goodman v. U.S. Dep't of Labor, No. CV-01-515-ST, 2001 U.S. Dist. LEXIS 22748, at \*13 (D. Or. Dec. 12, 2001) (magistrate's recommendation) (explaining that "scope of discovery . . . is not the issue," and that withholding was proper under FOIA standards), adopted, (D. Or. Jan. 14, 2002); Warren v. United States, No. 1:99-1317, 2000 U.S. Dist. LEXIS 17660, at \*18 (N.D. Ohio Oct. 13, 2000) (explaining that although plaintiffs "will likely be entitled to release of all the documents at issue in this proceeding, through the criminal discovery process, that fact does not prohibit reliance on Exemption 7 in the context of this case").

<sup>10</sup> NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 230 (1978); see Solar Sources, Inc. v. United States, 142 F.3d 1033, 1037 (7th Cir. 1998) (stating that "Exemption 7(A) does not permit the Government to withhold all information merely because that information was compiled for law enforcement purposes"); Dickerson v. DOJ, 992 F.2d 1426, 1431 (6th Cir. 1993) (reiterating that when investigation is over and purpose of it expired, disclosure would no longer cause interference); Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at \*25-26 (M.D. Fla. Oct. 1, 1997) (declaring that Exemption 7(A) was enacted "mainly to overrule judicial decisions that prohibited disclosure of investigatory files in 'closed' cases"); cf. Kay v. FCC, 976 F. Supp. 23, 37-38 (D.D.C. 1997) (explaining that agency "may continue to invoke Exemption 7(A) to withhold the requested documents until . . . [the law enforcement proceeding] comes to a conclusion"), aff'd, 172 F.3d 919 (D.C. Cir. 1998) (unpublished table decision).

<sup>11</sup> See, e.g., Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 886-87 (6th Cir. 1984) (finding that NLRB administrative practice of continuing to assert Exemption 7(A) for six-month "buffer period" after termination of proceedings "arbitrary and capricious"); Barney v. IRS, 618 F.2d 1268, 1273-74 (8th Cir. 1980) (explaining that once enforcement proceedings are "either concluded or

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abandoned, exemption 7(A) will no longer apply"); City of Chicago v. U.S. Dep't of the Treasury, No. 01-C-3835, 2002 WL 370216, at \*4 (N.D. Ill. Mar. 8, 2002) (rejecting agency's argument that release of information "would allow members of the general public to 'connect the dots'" in a case in which agency "does not know whether an investigation is ongoing [but] nevertheless releases the information [routinely] after a fixed period of time"), rev'd & remanded on other grounds, No. 02-2259 (7th Cir. Nov. 29, 2005); W. Journalism Ctr. v. Office of the Indep. Counsel, 926 F. Supp. 189, 192 (D.D.C. 1996) ("By definition until his or her work is completed, an Independent Counsel's activities are ongoing . . . and once the task is completed . . . all the records . . . are required to be turned over to the Archivist and at that time would be subject to FOIA requests."), aff'd, No. 96-5178, 1997 WL 195516 (D.C. Cir. Mar. 11, 1997); Linn v. DOJ, No. 92-1406, 1995 WL 417810, at \*25 (D.D.C. June 6, 1995) (ruling that Exemption 7(A) is not applicable when there is "no evidence before the Court that any investigation exists"), appeal dismissed voluntarily, No. 97-5122 (D.C. Cir. July 14, 1997); Kilroy v. NLRB, 633 F. Supp. 136, 142-43 (S.D. Ohio 1985) (holding that Exemption 7(A) "applies only when a law enforcement proceeding is pending"), aff'd, 823 F.2d 553 (6th Cir. 1987) (unpublished table decision); Antonsen v. DOJ, No. K-82-008, slip op. at 9-10 (D. Alaska Mar. 20, 1984) ("It is difficult to conceive how the disclosure of these materials could have interfered with any enforcement proceedings" after criminal defendant had been tried and convicted.).

<sup>12</sup> See, e.g., Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1114 (D.C. Cir. 2007) (explaining that "enforcement proceedings need not be currently ongoing; it suffices for them to be 'reasonable anticipated'"); Boyd v. Criminal Div., DOJ, 475 F.3d 381, 386 (D.C. Cir. 2007) (stating that government's identification of targets of investigation satisfies concrete prospective law enforcement proceeding requirement); Manna v. DOJ, 51 F.3d 1158, 1165 (3d Cir. 1995) (ruling that when "prospective criminal or civil (or both) proceedings are contemplated," information is protected from disclosure); In Def. of Animals v. HHS, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at \*8 (D.D.C. Sept. 28, 2001) ("Previous USDA investigations of animal deaths at the Foundation resulted in formal charges . . . and there is no evidence that the agency would treat its most recent investigation differently."); Judicial Watch v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at \*16 (D.D.C. Apr. 20, 2001) (explaining that "[a]lthough no enforcement proceedings are currently pending, the FBI has represented that such proceedings may become necessary as the investigation progresses"); Gen. Elec. Co. v. EPA, 18 F. Supp. 2d 138, 144 (D. Mass. 1998) (explaining that "it is entirely reasonable for the [a]gency to anticipate that enforcement proceedings are in the offing"); Kay, 976 F. Supp. at 38 ("Moreover, if the proceeding is not pending, an agency may continue to invoke Exemption 7(A) so long as the proceeding is regarded as prospective."); Foster v. DOJ, 933 F. Supp. 687, 692 (E.D. Mich. 1996) (holding that disclosure "could impede ongoing government investigation (and prospective prosecution)"); Richman v. DOJ, No. 90-C-19, slip op. at 13 (W.D. Wis. Feb. 2, 1994) (finding that files pertaining to "pending and prospective" criminal enforcement proceedings are protected); Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (recognizing that Service Lookout Book, containing "names of violators, alleged violators and suspected violators," is protected as proceedings clearly are at least prospective against each violator); Marzen v. HHS, 632 F. Supp. 785, 805 (N.D. Ill. 1985) (concluding that Exemption 7(A) prohibits disclosure of law enforcement records when their release "would interfere with enforcement proceedings, pending, contemplated, or in the future"), aff'd, 825 F.2d 1148 (7th Cir. 1987). But see Shearson v. DHS, No. 06-1478, 2007 U.S. Dist. LEXIS 16902, at \*1, \*15 (N.D.

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or as preventative.<sup>13</sup>

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

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

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

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

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

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

a "prospective law enforcement proceeding."<sup>17</sup> The "prospective" proceeding, however, must be a concrete possibility, rather than a mere hypothetical one.<sup>18</sup>

### Related Proceedings

Further, even after an enforcement proceeding is closed, courts have ruled that the continued use of Exemption 7(A) may be proper in certain instances. One such instance involves "related" proceedings, i.e., those instances in which information from a closed law enforcement proceeding will be used again in other pending or prospective law enforcement proceedings -- for example, when charges are pending against additional defendants<sup>19</sup> or

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<sup>17</sup> See, e.g., Nat'l Pub. Radio v. Bell, 431 F. Supp. 509, 514-15 (D.D.C. 1977) (explaining that although investigation into death of nuclear-industry whistleblower Karen Silkwood is "dormant," it "will hopefully lead to a 'prospective law enforcement proceeding'" and that disclosure "presents the very real possibility of a criminal learning in alarming detail of the government's investigation of his crime before the government has had the opportunity to bring him to justice"); see also FOIA Update, Vol. V, No. 2, at 6.

<sup>18</sup> See Shearson v. DHS, No. 06-1478, 2007 U.S. Dist. LEXIS 16902, at \*13-15 (N.D. Ohio Mar. 9, 2007) (finding "generalized statement that border investigations are 'ongoing' simply does not satisfy government's burden to demonstrate" pending or prospective law enforcement proceeding); In Def. of Animals v. HHS, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at \*9 (D.D.C. Sept. 28, 2001) (stating that "anticipated filing satisfies FOIA's requirement of a reasonably anticipated, concrete prospective law enforcement proceeding"); Judicial Watch v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at \*16 (D.D.C. Apr. 20, 2001) (accepting agency's representation that "proceedings may become necessary as investigation progresses" as sufficient to establish concrete possibility); ACLU Found. v. DOJ, 833 F. Supp. 399, 407 (S.D.N.Y. 1993) (finding that possibility of interference not so evident for investigative documents related to generalized categories of cases; agency must show that disclosure would actually threaten similar, ongoing enforcement proceedings); Badran v. DOJ, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987) (relying on pre-amendment language, court held that mere possibility that person mentioned in file might some day violate law was insufficient to invoke Exemption 7(A)); Nat'l Pub. Radio v. Bell, 431 F. Supp. 509, 514 (D.D.C. 1977) (holding that "dormant" investigation "is nonetheless an 'active' one," which justifies continued Exemption 7(A) applicability); see also 120 Cong. Rec. S9329 (daily ed. May 30, 1974) (statement of Sen. Hart).

<sup>19</sup> See Solar Sources, Inc. v. United States, 142 F.3d 1033, 1040 (7th Cir. 1998) (explaining that although government has "closed" its cases against certain defendants by obtaining plea agreements and convictions, withholding is proper because information "compiled against them is part of the information" in ongoing cases against other targets); New England Med. Ctr. Hosp. v. NLRB, 548 F.2d 377, 385-86 (1st Cir. 1976) (finding Exemption 7(A) applicable when "closed file is essentially contemporary with, and closely related to, the pending open case" against another defendant; applicability of exemption does not hinge on "open" or "closed" label agency places on file); DeMartino v. FBI, 577 F. Supp. 2d 178, 182 (D.D.C. 2008) (explaining that case remains open and pending because co-defendant is "scheduled to be retried" and "other unindicted co-conspirators" remain at large); Hidalgo v. FBI, 541 F. Supp. 2d 250, 256 (D.D.C. 2008) (finding "although [plaintiff was] convicted long ago . . . ongoing  
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when additional charges are pending against the original defendant.<sup>20</sup>

Another circumstance in which the continued use of Exemption 7(A) has been held proper involves post-conviction motions, i.e., those instances in which the requester has filed

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<sup>19</sup>(...continued)

search for -- and possible future trials of -- indicted and unindicted fugitives satisfies" standard); Givner v. EOUSA, No. 99-3454 slip op. at 3, 7 (D.D.C. Mar. 1, 2001) (explaining that although plaintiff is "serving his sentence," withholding is proper because "release of prosecutorial documents could potentially jeopardize" pending trial and habeas action of co-conspirators); Cucci v. DEA, 871 F. Supp. 508, 512 (D.D.C. 1994) (finding protection proper when information pertains to "multiple intermingled investigations and not just the terminated investigation" of subject); Engelking v. DEA, No. 91-0165, slip op. at 6 (D.D.C. Nov. 30, 1992) (reasoning that information in inmate's closed file was properly withheld because fugitive discussed in requester's file is still at large; explaining that records from closed file can relate to law enforcement efforts which are still active or in prospect), summary affirmance granted in pertinent part, vacated in part & remanded, No. 93-5091, 1993 U.S. Dist. LEXIS 33824 (D.C. Cir. Oct. 6, 1993); Warmack v. Huff, No. 88-H-1191-E, slip op. at 22-23 (N.D. Ala. May 16, 1990) (finding Exemption 7(A) applicable to documents in multi-defendant case involving four untried fugitives), aff'd, 949 F.2d 1162 (11th Cir. 1991) (unpublished table decision); Freedberg v. Dep't of the Navy, 581 F. Supp. 3, 4 (D.D.C. 1982) (holding that Exemption 7(A) remained applicable when two murderers were convicted but two other remained at large). But see Linn v. DOJ, No. 92-1406, 1995 WL 417810, at \*9 (D.D.C. June 6, 1995) (explaining that statement that "some unspecified investigation against a fugitive, or perhaps more than one fugitive, was ongoing . . . without any explanation of how release" of information would interfere with "efforts to apprehend this (or these) fugitive (or fugitives) is patently insufficient to justify the withholding of information"), appeal dismissed voluntarily, No. 97-5122 (D.C. Cir. July 14, 1997).

<sup>20</sup> See Pinnavaia v. FBI, No. 04-5115, 2004 WL 2348155, at \*1 (D.C. Cir. Oct. 19, 2004) (explaining that although FBI San Diego Field Office's investigation was closed, its New York Field Office records were part of investigatory files for separate, ongoing investigation, so use of Exemption 7(A) therefore was proper), summary affirmance granted, No. 04-5115, 2004 WL 2348155, at \*1 (D.C. Cir. Oct. 19, 2004); Franklin v. DOJ, No. 98-5339, slip op. at 3 (11th Cir. July 13, 1999) (holding that "disclosure could have reasonably been expected to interfere with [defendant's] federal appeal and state criminal trial"); Seized Prop. Recovery, Corp. v. Customs and Border Prot., 502 F. Supp. 2d 50, 62 (D.D.C. Aug. 17, 2007) (explaining that while underlying forfeiture proceedings have ended, possibility of "different [] investigations, separate and apart from the investigation attendant to the seizure" satisfies standard); Hoffman v. DOJ, No. 98-1733-A, slip op. at 3 (W.D. Okla. Sept. 21, 2001) (explaining that although federal trial was completed, decision to proceed with state prosecution "convinces the Court" that requested records should not be disclosed); Cudzich v. ICE, 886 F. Supp. 101, 106-07 (D.D.C. 1995) (holding that while INS investigation is complete, parts of file "containing information pertaining to pending investigations of other law enforcement agencies" are properly withheld); Kuffel v. BOP, 882 F. Supp. 1116, 1126 (D.D.C. 1995) (ruling that Exemption 7(A) remains applicable when inmate has criminal prosecutions pending in other cases); Dickie v. Dep't of the Treasury, No. 86-649, slip op. at 8 (D.D.C. Mar. 31, 1987) (holding that release of documents from closed federal prosecution could jeopardize state criminal proceedings).

a motion for a new trial or has otherwise appealed the court's action.<sup>21</sup> The extent of protection in such a circumstance, however, varies; some courts have limited Exemption 7(A) protection to only the material not used at the first trial,<sup>22</sup> while other courts in some cases have extended Exemption 7(A) protection to all of the information compiled during all of the law enforcement proceedings.<sup>23</sup>

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<sup>21</sup> See, e.g., James v. U.S. Secret Serv., No. 06-1951, 2007 U.S. Dist. LEXIS 52554, at \*12 (D.D.C. July 23, 2007) (finding that "pending appeal of a criminal conviction qualifies as an ongoing or prospective law enforcement proceeding" and adding that disclosure could "harm the government's prosecution of Plaintiff's appeal"); DeMartino, 577 F. Supp. 2d at 182 (concluding that "law enforcement proceeding has not concluded" because criminal conviction is not final); Kidder v. FBI, 517 F. Supp. 2d 17, 27 (D.D.C. 2007) (reiterating that "pending appeal of a criminal conviction qualifies as a pending or prospective law enforcement proceeding for purposes of Exemption 7(A)"); Kansi v. DOJ, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (explaining that "potential for interference . . . that drives the 7(A) exemption . . . exists at least until plaintiff's conviction is final"; thus, plaintiff's pending motion for new trial is pending law enforcement proceeding for purposes of FOIA); see also Keen v. EOUSA, No. 96-1049, slip op. at 7 (D.D.C. July 14, 1999) (magistrate's recommendation) (reasoning that pending motion to redetermine sentence qualifies as "pending enforcement proceeding for purposes of FOIA Exemption 7(A)"), adopted, (D.D.C. Mar. 28, 2000).

<sup>22</sup> See Pons v. U.S. Customs Serv., No. 93-2094, 1998 U.S. Dist. LEXIS 6084, at \*14 (D.D.C. Apr. 23, 1998) (ruling that disclosure of information not used in plaintiff's prior trials could "interfere with another enforcement proceeding"); Hemsley v. DOJ, No. 90-2413, slip op. at 10 (D.D.C. Sept. 24, 1992) (holding that Exemption 7(A) protection applied when "only pending criminal proceeding" was appeal of denial of new trial motion; "[k]nowledge of potential witnesses and documentary evidence that were not used during the first trial" could "genuinely harm government's case"); cf. Senate of P.R. v. DOJ, 823 F.2d 574, 578 (D.C. Cir. 1987) (relying on language of statute prior to 1986 FOIA amendments to remand case for additional explanation of why no segregable portions of documents could be released without interfering with related proceedings); Narducci v. FBI, No. 93-0327, slip op. at 3-4 (D.D.C. Sept. 22, 1995) (explaining that Exemption 7(A) remains applicable "in light of retrial, not yet scheduled, of several defendants," when agency had "adequately identified" how disclosure would interfere with retrial; however, agency must release all "public source documents").

<sup>23</sup> See James, 2007 U.S. Dist. LEXIS 52554, at \*12 (finding that withheld records outline investigation and that release "of these records" could damage government's case on appeal); DeMartino, 577 F. Supp. 2d at 181-82 (explaining that although plaintiff was convicted, use of Exemption 7(A) justified because premature disclosure could interfere with pending proceedings); Kidder, 517 F. Supp. 2d at 30 (discussing that "evidence may be relevant not only to proceedings in [target's] pending appeal, but also to other matters being investigated"; thus, Exemption 7(A) proper); Keen, No. 96-1049, slip op. at 6-8 (D.D.C. July 14, 1999) (finding use of Exemption 7(A) proper to withhold entire criminal file while motion to "redetermine" sentence is pending); Kansi, 11 F. Supp. 2d at 44 (holding that Exemption 7(A) protection "exists at least until plaintiff's conviction is final"); Burke v. DEA, No. 96-1739, slip op. at 5 (D.D.C. Mar. 31, 1998) (ruling that protection of records "compiled for . . . prosecution of plaintiff in a previous criminal trial" is proper in light of plaintiff's post-conviction appeal because "disclosure of these records could harm the government's prosecution of the plaintiff's

(continued...)

Similarly, Exemption 7(A) also may be invoked when an investigation has been terminated but an agency retains oversight or some other continuing enforcement-related responsibility.<sup>24</sup> For example, it has been found to have been invoked properly to protect impounded ballots where their disclosure could "interfere with the authority of the NLRB" to conduct and process future collective bargaining representation elections.<sup>25</sup>

If, however, there is no such ongoing agency oversight or continuing enforcement-related responsibility, courts do not permit an agency to continue the use of Exemption 7(A) to protect information.<sup>26</sup>

### Types of Law Enforcement Proceedings

The types of "law enforcement proceedings" to which Exemption 7(A) may be

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<sup>23</sup>(...continued)

appeal"); Crooker v. ATF, No. 83-1646, slip op. at 1-2 (D.D.C. Apr. 30, 1984) (finding "no question that Exemption 7(A) is controlling" while motion to withdraw guilty plea is still pending).

<sup>24</sup> See, e.g., Alaska Pulp Corp. v. NLRB, No. 90-1510D, slip op. at 2 (W.D. Wash. Nov. 4, 1991) (stating that Exemption 7(A) remains applicable when corporation found liable for unfair labor practices, but parties remain embroiled in controversy as to compliance); Erb v. DOJ, 572 F. Supp. 954, 956 (W.D. Mich. 1983) (finding withholding proper when investigation "concluded 'for the time being'" and then subsequently reopened); ABC Home Health Servs. v. HHS, 548 F. Supp. 555, 556, 559 (N.D. Ga. 1982) (holding documents protected when "final settlement" was subject to reevaluation for at least three years); Timken v. U.S. Customs Serv., 531 F. Supp. 194, 199-200 (D.D.C. 1981) (finding protection proper when final determination could be challenged or appealed); Zeller v. United States, 467 F. Supp. 487, 501 (S.D.N.Y. 1979) (finding that records compiled to determine whether party is complying with consent decree were protectible).

<sup>25</sup> Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419-20 (N.D. Cal. 1986).

<sup>26</sup> See, e.g., Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 66-67 (D.D.C. 1999) (finding that release of audit statistics and details of settlement from closed investigation of one hospital would not interfere with possible future settlements with other institutions when none were being investigated); Ctr. for Auto Safety v. DOJ, 576 F. Supp. 739, 751-55 (D.D.C. 1983) (rejecting agency's argument that "disclosures which make consent decree negotiations more difficult" qualify as "interference" with law enforcement proceedings because "release at this time of the documents at issue will occur after the termination of any proceeding to which the documents are relevant"), partial reconsideration granted, No. 82-0714, 1983 WL 1955 (D.D.C. July 7, 1983); see also Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (stating that documents from unfair labor practice are not protected by Exemption 7(A) when no claim is pending or contemplated); Poss v. NLRB, 565 F.2d 654, 656-58 (10th Cir. 1977) (same); cf. Linn, 1995 WL 417810, at \*9 (finding that unspecified possible investigation against unknown number of fugitives "is patently insufficient to justify the withholding of information"); Badran, 652 F. Supp. at 1440 (calling agency's position "bewildering and indefensible" when it argued that Exemption 7(A) was proper because it "could use [the information] against a person who might some day violate immigration laws").

applicable have been interpreted broadly by the courts; such proceedings have been held to include not only criminal actions,<sup>27</sup> including those connected with national security,<sup>28</sup> but civil actions<sup>29</sup> and regulatory proceedings<sup>30</sup> as well. They include "cases in which the agency has the initiative in bringing an enforcement action and those . . . in which it must be prepared to

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

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

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

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

respond to a third party's challenge."<sup>31</sup> Enforcement proceedings in state courts<sup>32</sup> and foreign courts<sup>33</sup> also qualify for Exemption 7(A) protection. (For a further discussion of "law enforcement proceeding," see Exemption 7, above.)

### Deference

The Court of Appeals for the District of Columbia Circuit has recognized that "Exemption 7(A) explicitly requires a predictive judgment of the harm that will result from disclosure of information."<sup>34</sup> In Center for National Security Studies v. DOJ, the D.C. Circuit also held that in the national security context, "the long-recognized deference to the executive"

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<sup>31</sup> Mapother v. DOJ, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

<sup>32</sup> See, e.g., Shaw v. FBI, 749 F.2d 58, 64 (D.C. Cir. 1984) (holding that "authorized federal investigation into the commission of state crime [the JFK assassination] qualifies"); Hoffman v. DOJ, No. 98-1733-A, slip op. at 3 (W.D. Okla. Sept. 21, 2001) (stating that although federal proceedings were completed, decision to proceed with state prosecution qualifies); Butler v. Dep't of the Air Force, 888 F. Supp. 174, 182-83 (D.D.C. 1995) (explaining that release could jeopardize pending state criminal proceeding), aff'd per curiam, No. 96-5111 (D.C. Cir. May 6, 1997).

<sup>33</sup> See, e.g., Bevis v. Dep't of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986) (stating that "language of the statute makes no distinction between foreign and domestic enforcement purposes" (citing Shaw, 749 F.2d at 64)); Zevallos-Gonzalez v. DEA, No. 97-1720, slip op. at 11-13 (D.D.C. Sept. 25, 2000) (explaining that even though no indictment in United States was likely, disclosure of information sought would "interfere with efforts of Peruvian officials" to investigate and prosecute).

<sup>34</sup> Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003); see also Bevis v. Dep't of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (finding that government met its burden of identifying prospective law enforcement proceeding because El Salvador, while dismissing charges against suspects, "continues its efforts to fully prosecute"); Wilson v. United States, No. 08-5022, 2009 WL 387086, at \*5 (D.S.D. Feb. 11, 2009) (stating that very nature of request for intelligence and investigative reports involving motorcycle gang activity "indicates to the Court that [requester] is seeking information the release of which could interfere with law enforcement proceedings"); Cozen O'Conner v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 783 (E.D. Pa. 2008) (noting that harm "may be presumed from the nature of the document"); Powers v. DOJ, No. 03-C-893, 2006 U.S. Dist. LEXIS 62756, at \*27-29 (E.D. Wis. Sept. 1, 2006) (although document did not exist, explaining that agency's use of Exemption 7(A) was proper because if document had existed, release could cause harms enumerated by agency); Watkins Motor Lines, Inc. v. EEOC, No. 8:05-1065, 2006 WL 905518, at \*5 (M.D. Fla. Apr. 7, 2006) (finding, in case in which EEOC continued to investigate even after charging party withdrew complaint, that agency's use of Exemption 7(A) was proper because "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings" (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978))).

utilized by the courts when applying Exemptions 1 and 3<sup>35</sup> should also apply in the Exemption 7A context.<sup>36</sup> As noted by another court, however, such deference to agencies is not necessarily afforded in cases that do not implicate national security.<sup>37</sup> Also, even with granting greater deference to agencies in the national security area, courts still carefully review the government's submissions to determine if they meet Exemption 7(A)'s standards.<sup>38</sup>

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<sup>35</sup> 5 U.S.C. § 552(b)(1), (3) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524).

<sup>36</sup> Ctr. for Nat'l Sec. Studies, 331 F.3d at 928, 932 (explaining that courts "must defer" to executive on national security matters; therefore, "we owe the same deference under Exemption 7(A)" when national security is at issue); Am.-Arab Anti-Discrimination Comm. v. DHS, 516 F. Supp. 2d 83, 89 (D.D.C. 2007) (finding information about individuals arrested on national security criteria withholdable under Exemption 7(A) and explaining that "Center for National Security Studies may have ratcheted up the degree of deference that must be accorded the executive, but it was clear long before that decision that the courts are not simply to use their own best judgment in a national security context"); L.A. Times Commc'ns v. Dep't of the Army, 442 F. Supp. 2d 880, 899 (C.D. Cal. 2006) (stating that "Court defers to [Army officer's] predictive judgments" about Exemption 7(A) harm in insurgency setting); Edmonds v. FBI, 272 F. Supp. 2d 35, 55 (D.D.C. 2003) (stating that deference "must be extended to Exemption 7(A) in cases like this one, where national security issues are at risk" (citing Ctr. for Nat'l Sec. Studies, 331 F. 3d at 927-28)).

<sup>37</sup> See Shearson v. DHS, No. 06-1478, 2007 U.S. Dist. LEXIS 16902, at \*13-16 (N.D. Ohio Mar. 9, 2007) (explaining that agency's mere statement that "border investigations are 'ongoing'" does not satisfy its burden that enforcement proceedings are likely, nor does statement "implicate issues of national security"; adding that "government's reliance on [Ctr. for Nat'l Sec. Studies v. DOJ] is misplaced").

<sup>38</sup> See Ctr. for Nat'l Sec. Studies, 331 F.3d at 926-32 (while stating that "[w]e have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated," nonetheless still reviewing standards agencies must meet and stressing that "we do not abdicate the role of the judiciary"); see also Am.-Arab Anti-Discrimination Comm., 516 F. Supp. 2d at 89-90 (noting that "courts have consistently deferred to executive affidavits predicting harm to the national security," but nonetheless reviewing agency submissions to determine if agency "satisfies" test of reasonableness and provides "sufficient detail"); Kidder v. FBI, 517 F. Supp. 2d 17, 27-28 (D.D.C. 2007) (mentioning deference given to law enforcement agencies, but stressing that agency must show, even in case involving terrorism and intelligence gathering, how release of records could interfere with proceedings); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at \*6-8 (D.D.C. Mar. 9, 2007) (noting "sensitive investigations" involving terrorist bombings in Tanzania and Kenya, yet requiring agency to provide sufficient detail to allow court to trace link between document and purported interference with "potential criminal proceedings"); Haddam v. FBI, No. 01-434, slip op. at 23-27 (D.D.C. Sept. 8, 2004) (stating that courts generally do not question FBI's assessments, but finding that FBI has not shown how release could jeopardize ongoing investigation or national security).

Generic Categories

When invoking Exemption 7(A), it is "well-established that the government may justify its withholdings by reference to generic categories of documents, rather than document-by-document."<sup>39</sup> When an agency elects to use the "generic" approach, it "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings."<sup>40</sup> (For a further discussion, see Litigation Considerations, Vaughn Index, below.)

More generally, with respect to the showing of harm to law enforcement proceedings required to invoke Exemption 7(A), the Supreme Court in NLRB v. Robbins Tire & Rubber Co. rejected the position that "interference" must always be established on a document-by-document basis, and held that a determination of the exemption's applicability may be made "generically," based on the categorical types of records involved.<sup>41</sup> This approach was reaffirmed in 1989 by the Supreme Court in DOJ v. Reporters Committee for Freedom of the Press and further extended to include situations arising under other FOIA exemptions in which records can be entitled to protection on a "categorical" basis.<sup>42</sup> Courts accept affidavits in Exemption 7(A) cases that specify the distinct, generic categories of documents at issue and the harm that would result from their release, rather than requiring extensive, detailed itemizations of each document.<sup>43</sup>

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<sup>39</sup> Powers v. DOJ, No. 03-C-893, 2006 U.S. Dist. LEXIS 62756, at \*29 (E.D. Wis. Sept. 1, 2006).

<sup>40</sup> Bevis v. Dep't of State, 801 F.2d 1386, 1389-90 (D.C. Cir. 1986); see also United Am. Fin. v. Potter, 531 F. Supp. 2d 29, 40 (D.D.C. 2008) (explaining that "definitions of the relevant categories of documents must be sufficiently distinct," that agency must review each document to determine category in which it belongs, and that agency must explain with "some specificity" how disclosure could interfere with enforcement proceedings); Newry Ltd. v. Customs and Border Prot., No. 04-2110, 2005 WL 3273975, at \*5 (D.D.C. July 29, 2005) (referring to three-fold task); Beneville v. DOJ, No. 98-6137, slip op. at 17-18 (D. Or. June 11, 2003) (same); Judicial Watch v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at \*13-16 (D.D.C. Apr. 20, 2001) (same); Voinche v. FBI, 46 F. Supp. 2d 26, 31 (D.D.C. 1999) (same); Kay v. FCC, 976 F. Supp. 23, 35 (D.D.C. 1997) (same), aff'd, 172 F.3d 919 (D.C. Cir. 1998) (unpublished table decision); Jefferson v. Reno, No. 96-1284, 1997 U.S. Dist. LEXIS 3064, at \*12 (D.D.C. Mar. 17, 1997) (same); Maccaferri Gabions, Inc. v. DOJ, No. 95-2576, slip op. at 11-13 (D. Md. Mar. 26, 1996) (same), appeal dismissed voluntarily, No. 96-1513 (4th Cir. Sept. 19, 1996); Cudzich v. ICE, 886 F. Supp. 101, 106 (D.D.C. 1995) (same); Cucci v. DEA, 871 F. Supp. 508, 511 (D.D.C. 1994) (same).

<sup>41</sup> 437 U.S. 214, 236 (1978).

<sup>42</sup> Reporters Comm., 489 U.S. 749, 776-80 (1989) (Exemption 7(C)).

<sup>43</sup> See, e.g., Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., No. 03-14823, slip op. at 6-7 (11th Cir. June 24, 2004) (declaring that "[a]ll Amtrak has to do is show a reasonable expectation of 'interference' from release of the category of documents involved

(continued...)

<sup>43</sup>(...continued)

here, as opposed to having to do a document by document or page by page analysis," and noting supporting decisions in Sixth, Eighth, and Ninth Circuits); Lynch v. Dep't of the Treasury, No. 99-1697, 2000 WL 123236, at \*2 (9th Cir. Jan. 28, 2000) (explaining that "government need not 'make a specific factual showing with respect to each withheld document'" (quoting Lewis v. IRS, 823 F.2d 375, 380 (9th Cir. 1987))); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1038 (7th Cir. 1998) (reiterating that government "may justify its withholdings by reference to generic categories of documents, rather than document-by-document"); In re DOJ, 999 F.2d 1302, 1308 (8th Cir. 1993) (en banc) (The "Supreme Court has consistently interpreted Exemption 7 of the FOIA (specifically so far subsections 7(A), 7(C), and 7(D))" to permit government to proceed on a "categorical basis" and to not require a document-by-document Vaughn Index.), on remand sub nom. Crancer v. DOJ, No. 89-234, slip op. at 6 (E.D. Mo. Oct. 4, 1994) (magistrate's recommendation) (approving FBI's "generic" affidavit as sufficient), adopted, (E.D. Mo. Nov. 7, 1994); Dickerson v. DOJ, 992 F.2d 1426, 1431 (6th Cir. 1993) (stating that it is "often feasible for courts to make 'generic determinations' about interference"); Lewis v. IRS, 823 F.2d 375, 380 (9th Cir. 1987) (holding that IRS need only make general showing and is not required to make specific factual showing with respect to each withheld page); Wright v. OSHA, 822 F.2d 642, 646 (7th Cir. 1987) (explaining that "detailed listing is generally not required under Exemption 7(A)"); Spannaus v. DOJ, 813 F.2d 1285, 1288 (4th Cir. 1987) (stating that Supreme Court accepts generic determinations); Curran v. DOJ, 813 F.2d 473, 475 (1st Cir. 1987) (holding that generic determinations permitted); Bevis, 801 F.2d at 1389 (finding that agency may take "generic approach, grouping documents into relevant categories"); Crooker v. ATF, 789 F.2d 64, 67 (D.C. Cir. 1986) ("Because generic determinations are permitted, the government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document."); Campbell v. HHS, 682 F.2d 256, 265 (D.C. Cir. 1982) (recognizing that "government may focus upon categories of records"); Radcliffe v. IRS, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008) (finding that "government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding," but may make generic determinations); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at \*7-8 (D.D.C. Mar. 9, 2007) (discussing "generic approach endorsed in Bevis"); Newry, 2005 WL 3273975, at \*5 (explaining that "agency need not detail the potential interference on a document-by-document basis," but may group documents into relevant categories that are "sufficiently distinct to allow a court to grasp" how release of information in question would interfere with law enforcement proceedings (quoting Bevis, 801 F.2d at 1389)); Changzhou Laosan Group v. Customs and Border Prot., No. 04-1919, 2005 WL 913268, at \*8 (D.D.C. Apr. 20, 2005) (stating that agency may take generic approach and group documents into relevant categories that allow court to grasp how release would interfere with proceedings); Env'tl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005) (stating that an "agency is not required to establish on a document-by-document basis the interference that would result from the disclosure of each document," but instead may take generic approach "based on categorical types of records" (citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978)); Sandgrund v. SEC, 215 F. Supp. 2d 178, 180-81 (D.D.C. 2002) (acknowledging that generic or categorical approach is proper, but finding some descriptions to be "too broad or generic" to satisfy "government's Vaughn obligation" and to permit meaningful court review); ACLU Found. v. DOJ, 833 F. Supp. 399, 407 (S.D.N.Y. 1993) (An agency "must supply sufficient facts about the alleged interference . . . . This does not, however, necessarily require an

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Nevertheless, in decisions discussing the procedures necessary to use such a categorical approach, courts stress the importance of agencies conducting a document-by-document review prior to placing the records into categories.<sup>44</sup> Indeed, an agency's ability to place documents into categories "does not obviate the requirement that an agency conduct a document-by-document review"; rather, it must conduct a document-by-document review in order to assign documents to proper categories.<sup>45</sup>

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<sup>43</sup>(...continued)

individualized showing for each document."); see also FOIA Update, Vol. V, No. 2, at 3-4 ("FOIA Counselor: The 'Generic' Aspect of Exemption 7(A)") (advising agencies on most efficient and practical uses of Exemption 7(A)); cf. Robinson v. DOJ, No. 00-11182, slip op. at 8-9 (11th Cir. Mar. 15, 2001) (reiterating that while courts can accept generic determinations of interference with enforcement proceedings, government must "make at least some minimal showing"; because district court ruled sua sponte, it "lacked an adequate factual basis for its decision"); Beneville, No. 98-6137, slip op. 22-23 (D. Or. June 11, 2003) (holding that "Exemption 7(A) does not authorize 'blanket exemptions' for 'all records relating to an ongoing investigation,'" and instructing agency to "submit additional briefing" describing why it did not segregate and release records such as newspapers and magazine articles in its initial response (quoting Campbell, 682 F.2d at 259)).

<sup>44</sup> See, e.g., Bevis, 801 F.2d at 1389 (explaining that agency "must itself review each document to determine the category in which it properly belongs"); United Am. Fin., 531 F. Supp. 2d at 40 (stating that under generic category approach, agency must review each document to determine in which category it properly belongs); Gavin v. SEC, No. 04-4522, 2006 U.S. LEXIS 75227, at \*12-14 (D. Minn. Oct. 13, 2006) (explaining that agency must conduct "document-by-document review of responsive documents for categorization"); Edmonds v. FBI, 272 F. Supp. 2d 35, 54 (D.D.C. 2003) (explaining that agency may group documents into categories, but that "[i]n order to utilize this categorical approach, [an agency] must 'conduct a document-by-document review' of all responsive documents to assign documents to the proper category" (quoting Bevis, 801 F.2d 1389-90)); Kay v. FCC, 976 F. Supp. 23, 35 (D.D.C. 1997) (same), aff'd, 172 F.3d 919 (D.C. Cir. 1998) (unpublished table decision); (explaining that an "agency must conduct a document-by-document review in order to assign each document to a proper category"); Hillcrest Equities, Inc. v. DOJ, No. CA3-85-2351-R, slip op. at 7 (N.D. Tex. Jan. 26, 1987) (declaring that government must review each document to determine category in which it belongs); see also Inst. for Justice & Human Rights v. EOUSA, No. 96-1469, 1998 U.S. Dist. LEXIS 3709, at \*16-17 (N.D. Cal. Mar. 18, 1998) (determining that declarations "do not establish that each document was reviewed"); Jefferson, 1997 U.S. Dist. LEXIS 3064, at \*10 n.1 (stating that "it would appear from a review of their declaration that Defendants may have never conducted a document-by-document review of responsive material").

<sup>45</sup> Gavin v. SEC, No. 04-4522, 2006 WL 208783, at \*2 (D. Minn. Jan. 26, 2006) (citing In re DOJ, 999 F.2d at 1305-09); see also In re DOJ, 999 F.2d at 1309 (explaining that agency must conduct document-by-document review to assign documents to proper categories); Kidder v. FBI, 517 F. Supp. 2d 17, 28 (D.D.C. 2007) (same); Gavin v. SEC, No. 04-4522, 2006 WL 1738417, at \*3 (D. Minn. June 20, 2006); Gavin, 2006 U.S. Dist. LEXIS 75227, at \*11-13 (approving agency's withholding of that portion of records for which agency finally conducted document-by-document review, but denying agency's motion as to remaining documents for

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Likewise, although it has been stated that the "FOIA permits agencies to craft rules exempting certain categories of records from disclosure under Exemption 7(A) instead of making a record-by-records showing,"<sup>46</sup> courts nevertheless do restrict the use of those rules because as one court has found, an "agency's ability to rely on categorical rules . . . has limits."<sup>47</sup> Some courts describe the proper approach to categorizing records by explaining that agencies bear the burden of "identifying either specific documents or functional categories of information that are exempt from disclosure, and disclosing any reasonably segregable, non-exempt" portions, because to do otherwise "would eviscerate the principles of openness in government that the FOIA embodies."<sup>48</sup>

#### Adequate Descriptions of Categories

Specific guidance has been provided by the Courts of Appeals for the First, Fourth, and D.C. Circuits as to what constitutes an adequate "generic category" in an Exemption 7(A) affidavit.<sup>49</sup> The general principle uniting their decisions is that affidavits must provide at least

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<sup>45</sup>(...continued)

which it had not conducted such review); Edmonds, 272 F. Supp. 2d at 54 (explaining that to use categorical approach, agency must conduct document-by-document review to assign documents to proper category); Inst. for Justice, 1998 U.S. Dist. LEXIS 3709, at \*16-17 (stating that declarations need to establish that each document was reviewed) .

<sup>46</sup> Long v. DOJ, 450 F.2d 42, 73 (D.D.C. 2006).

<sup>47</sup> Id.; see Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 896 (D.C. Cir. 1995) (stating that "[t]here are limits" to use of categorical rules); cf. Lawyers' Comm. for Civil Rights v. U.S. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at \*14 (N.D. Cal. Sept. 30, 2008) (finding that agency required to demonstrate that reasonable segregable portions of documents within categories had been released); Owens, 2007 WL 778980, at \*7 (explaining that even under generic approach, categories must allow reviewing court to trace rational link between document and likely interference).

<sup>48</sup> Long, 450 F.2d at 76; see United Am. Fin., 531 F. Supp. 2d at 38-40 (reiterating that agency "should be mindful of the standards applicable in this Circuit" and that even under categorical approach, agency must review each document because there is "no 'blanket exemption'"); Gavin, 2006 U.S. LEXIS 75227, at \*12-14 (refuting agency's assertion that categorization eliminates duty to segregate; explaining that agency must conduct "document-by-document review of responsive documents for categorization and segregation purposes"); see also Lawyers' Comm., 2008 WL 4482855, at \*12 (stating that "doctrine of segregability applies to all FOIA exemptions" and adding that "Ninth Circuit has held that it is reversible error for the district court 'to simply approve the withholding of an entire document without entering a finding on segregability'" (quoting Wiener v. FBI, 943 F.2d 972, 988 (9th Cir. 1991))).

<sup>49</sup> See Spannaus v. DOJ, 813 F.2d 1285, 1289 (4th Cir. 1987) (stating that "details regarding initial allegations giving rise to this investigation; notification of [FBI Headquarters] of the allegations and ensuing investigation; interviews with witnesses and subjects; investigative reports furnished to the prosecuting attorneys," and similar categories are all sufficient); Curran v. DOJ, 813 F.2d 473, 476 (1st Cir. 1987) (same); Bevis v. Dep't of State, 801 F.2d 1386, (continued...)

a general, "functional" description of the types of documents at issue sufficient to indicate the type of interference threatening the law enforcement proceeding.<sup>50</sup> It should be noted,

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<sup>49</sup>(...continued)

1390 (D.C. Cir. 1986) (explaining that "identities of possible witnesses and informants, reports on the location and viability of potential evidence, and polygraph reports" are sufficient; categories "identified only as 'teletypes,' 'airtels,' or 'letters'" are insufficient); see also Cucci v. DEA, 871 F. Supp. 508, 511-12 (D.D.C. 1994) (holding that "evidentiary matters category" -- described as "witness statements, information exchanged between the FBI and local law enforcement agencies, physical evidence, evidence obtained pursuant to search warrants and documents related to the case's documentary and physical evidence" is sufficient); cf. Solar Sources, Inc. v. United States, 142 F.3d 1033, 1036-39 (7th Cir. 1998) (explaining that agency's six broad categories and eight subcategories "may have provided a sufficient factual basis" for judicial review, but cautioning that "we might give some weight to appellants' argument [that categories did not provide functional descriptions] had the district court not conducted a thorough in camera review").

<sup>50</sup> See, e.g., Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1084 (9th Cir. 2004) (explaining that its holding does "not imply that the government must disclose facts that would undermine the very purpose of its withholding," but that particularly if agency wants court to rely on in camera declaration, it must justify its exemption position "in as much detail as possible"); Curran, 813 F.2d at 475 ("Withal, a tightrope must be walked: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag."); Crooker v. ATF, 789 F.2d 64, 67 (D.C. Cir. 1986) ("The hallmark of an acceptable Robbins category is thus that it is functional; it allows the court to trace a rational link between the nature of the document and the alleged likely interference."); Owens v. DOJ, No. 04-1701, 2006 WL 3490790, at \*6 (D.D.C. Dec. 1, 2006) (observing that "courts reviewing the withholding of agency records under Exemption 7 cannot demand categories 'so distinct as prematurely to let the cat out of the investigative bag,'" but finding that agency's categories in this case did not provide "so much as a bare sketch of the information" and that agency therefore had not met its burden under Exemption 7(A) (quoting Curran, 813 F.2d at 475)); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at \*3 (D. Minn. Oct. 24, 2005) (stating that "[p]roper utilization of the categorical approach requires" categories to be "functional," which is defined as allowing "'court to trace a rational link between the nature of the document and the alleged likely interference'" (quoting Bevis, 801 F.2d at 1389)); Pinnavaia v. FBI, No. 03-112, slip op. at 11 (D.D.C. Feb. 25, 2004) (stating that declaration provides "adequate basis to find that disclosure of the withheld information would interfere with law enforcement proceedings"), summary affirmance granted, No. 04-5115, 2004 WL 2348155, at \*1 (D.C. Cir. Oct. 19, 2004) (explaining that "FBI's affidavits have substantiated its claim" that release could reasonably be expected to interfere with enforcement proceedings (citing Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003))); Voinche v. FBI, 46 F. Supp. 2d 26, 31 (D.D.C. 1999) (explaining that generic approach is appropriate, but that agency must demonstrate how each category of documents, if disclosed, could reasonably be expected to interfere with law enforcement proceedings); Hoffman v. DOJ, No. 98-1733-A, slip op. at 15, 18 (W.D. Okla. Dec. 15, 1999) (explaining that while Supreme Court has approved categorical approach, responsive documents must be grouped into "categories that can be linked to cogent reasons for nondisclosure"); Kitchen v. DEA, No. 93-2035, slip op. at 12-13 (D.D.C. Oct. 11, 1995) (approving categorical descriptions when court can trace rational link between

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

### Descriptions of Harm

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

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<sup>50</sup>(...continued)

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

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

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

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

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The courts have long accepted that Congress intended that Exemption 7(A) apply "whenever the government's case in court would be harmed by the premature release of evidence or information,"<sup>54</sup> or when disclosure would impede any necessary investigation prior

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<sup>53</sup>(...continued)

of Detroit Field Office -- "details some of the evidence developed and being developed, and the direction and scope" of twenty-seven-year-long Hoffa disappearance investigation and thus "calls into question the veracity of the FBI's justification for withholding"; in camera review ordered); cf. Va. Dep't of State Police v. Wash. Post, No. 04-1375, 2004 WL 2198327, at \*5 (4th Cir. 2004) (recognizing that "law enforcement agencies must be able to investigate crime without the details of the investigation being released to the public in a manner that compromises the investigation") (non-FOIA case); Cook v. DOJ, No. 04-2542, 2005 WL 2237615, at \*2 (W.D. Wash. Sept. 13, 2005) (stating that "[t]he Court is persuaded, however, that disclosure of the non-public information contained in the existing records could reasonably be expected to hinder the investigation" and not, as contended, facilitate help from public in apprehending 1971 airplane hijacker).

<sup>54</sup> NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978); see, e.g., Mapother v. DOJ, 3 F.3d 1533, 1543 (D.C. Cir. 1993) (holding that release of prosecutor's index of all documents he deems relevant would provide "critical insights into [government's] legal thinking and strategy"); Radcliffe v. IRS, 536 F. Supp. 2d 423, 437-38 (S.D.N.Y. 2008) (explaining that "even if matter proceeds to trial," agency has established that releasing records of offshore credit card accounts would interfere with enforcement proceedings by providing earlier access and "exact contents" of agency documents); Stolt-Nielsen Trans. Group, Ltd. v. DOJ, 480 F. Supp. 2d 166, 180 (D.D.C. 2007) (noting that release of information "would provide potential witnesses with insights into the Division's strategy and the strength of its position"), vacated and remanded on other grounds, 534 F. 3d 728, 733-34 (D.C. Cir. 2008) (remanding for agency to segregate and adding that "FOIA does not require that information must be helpful to the requestee before the government must disclose it. FOIA mandates disclosure of information, not solely disclosure of helpful information"); Faiella v. IRS, No. 05-238, 2006 WL 2040130, at \*3 (D.N.H. July 20, 2006) (stating that "disclosing information under active consideration" could undermine any future prosecution by "prematurely disclosing the government's potential theories, issues, and evidentiary requirements"); Suzhou Yuanda Enter. Co. v. Customs and Border Prot., 404 F. Supp. 2d 9, 14 (D.D.C. 2005) (agreeing that release of information "would interfere with an agency investigation [by] informing the public of the evidence sought and scrutinized by this type of investigation"); Env'tl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005) (explaining that disclosure "would prematurely reveal the EPA's case"); Judicial Watch v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 179 (D.D.C. 2004) (finding that release of agent notes and information concerning export violations could "reasonably be expected to interfere" with proceedings); Rosenglick v. IRS, No. 97-747-18A, 1998 U.S. Dist. LEXIS 3920, at \*7-8 (M.D. Fla. Mar. 10, 1998) (explaining that early access could "aid a wrongdoer"); Palmer Commc'ns v. DOJ, No. 96-M-777, slip op. at 4 (D. Colo. Oct. 30, 1996) (finding that release would harm "court's ability to control the use of discovery materials . . . [resulting in] an unacceptable interference with a law enforcement proceeding"); Durham v. USPS, No. 91-2234, 1992 WL 700246, at \*1 (D.D.C. Nov. 25, 1992) (deciding that release of investigative memoranda, witness files, and electronic surveillance material would substantially interfere with pending homicide investigation by impeding government's ability to prosecute its strongest case), aff'd, No. 92-5511 (D.C. Cir. July 27, 1993). But see Goodrich (continued...)

to the enforcement proceeding.<sup>55</sup> In Robbins Tire, the Supreme Court found that the NLRB had

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<sup>54</sup>(...continued)

Corp. v. EPA, 593 F. Supp. 2d 184, 193-94 (D.D.C. 2009) (limiting harm to investigatory interference and stating that "litigation advantage is not the kind of harm Exemption 7(A) is intended to guard against").

<sup>55</sup> See, e.g., Lynch v. Dep't of the Treasury, No. 99-1697, 2000 WL 123236, at \*2 (9th Cir. Jan. 28, 2000) (stating that agency declarations "made clear" that release of records could harm "efforts at corroborating witness statements . . . alert potential suspects . . . [and] interfere with surveillance"); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (stating that disclosure could interfere by revealing "scope and nature" of investigation); Azmy v. DOD, 562 F. Supp. 2d 590, 605 (S.D.N.Y. 2008) (explaining that disclosure of "names of individuals and organizations of ongoing law enforcement interest" could reasonably be expected to interfere with investigation because "subjects of the Government's interest would likely attempt to conceal their activities"); Stolt-Nielsen, 480 F. Supp. 2d at 180 (finding that release of information could "chill necessary investigative communications with foreign governments"); Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, No. 05-00806, 2006 U.S. Dist. LEXIS 89614, at \*21-24 (D.D.C. Dec. 12, 2006) (finding that release of records regarding alleged misuse of tribal gaming revenues during investigation could allow targets to ascertain direction of investigations, to identify potential charges to be brought, and to expose state and nature of current investigations, thereby undermining federal investigations); Gerstein v. DOJ, No. C-03-04893, slip op. at 11 (N.D. Cal. Sept. 30, 2005) (explaining that release of sealed warrants "could reasonably be expected to interfere" with ongoing investigation); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 119 (D.D.C. 2005) (holding that "release of this information could undermine the effectiveness" of agency's investigation); Judicial Watch v. DOJ, 306 F. Supp. 2d 58, 75-76 (D.D.C. 2004) (observing that release of documents during course of investigation could damage agency's ability to obtain information); Kay, 976 F. Supp. at 38-39 (holding that agency "specifically established that release" would permit the requester to gain insight into FCC's evidence against him, to discern narrow focus of investigation, to assist in circumventing investigation, and to create witness intimidation, and that disclosure would "reveal the scope, direction and nature" of investigation); Pully, 939 F. Supp. at 436 (explaining that requester's promise not to interfere with investigation is of "no consequence" because government "need not take into account the individual's propensity or desire to interfere"; objective showing that disclosure could lead to interference found sufficient); W. Journalism Ctr. v. Office of the Indep. Counsel, 926 F. Supp. 189, 192 (D.D.C. 1996) (noting that disclosure could "contaminate the investigative process"), aff'd, No. 96-5178, 1997 WL 195516 (D.C. Cir. Mar. 11, 1997); Butler v. Dep't of the Air Force, 888 F. Supp. 174, 182-83 (D.D.C. 1995) (finding that disclosure would interfere with pending investigations by local police department), aff'd per curiam, No. 96-5111 (D.C. Cir. May 6, 1997); Kay v. FCC, 867 F. Supp. 11, 19 (D.D.C. 1994) (holding that documents would reveal scope of investigation and strength of case against plaintiff; disclosure of documents, "even redacted to exclude proper names," could lead to retaliatory action and intimidation of witnesses); Vosburgh v. IRS, No. 93-1493, 1994 WL 564699, at \*2-3 (D. Or. July 5, 1994) (stating that disclosure of "DMV" record, memoranda of interview, police report, and portions of search warrants could interfere with IRS's investigation by revealing nature, scope, and direction of investigation, evidence obtained, government's strategies, and by providing requester with opportunity to create defenses and tamper with evidence); Int'l Collision Specialists, Inc. v.

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established interference with its unfair labor practice enforcement proceeding by showing that release of its witness statements would create a great potential for witness intimidation and could deter their cooperation.<sup>56</sup>

Similarly, in a 2005 decision involving the FBI's still-ongoing investigation into a 1971 airplane hijacking, the court discussed the difficulties with gathering reliable information from witnesses by first noting that disclosure of nonpublic information "could reasonably be expected to hinder the investigation," rather than, as contended by the FOIA plaintiff, advance the public's help in solving the crime.<sup>57</sup> This court went on to describe in detail the kinds of harm that could result from the release of nonpublic information, and thus hinder the investigation, by enumerating that the requested FOIA disclosure could make it "far more difficult" for the FBI:

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<sup>55</sup>(...continued)

IRS, No. 93-2500, 1994 WL 395310, at \*2, 4 (D.N.J. Mar. 2, 1994) (ruling that disclosure could reasonably be expected to interfere with enforcement proceedings by enabling requester "to determine nature, source, direction, and limits" of IRS investigation and to "fabricate defenses and tamper with evidence"); Church of Scientology v. IRS, 816 F. Supp. 1138, 1157 (W.D. Tex. 1993) (stating that disclosure could reasonably be expected to interfere with enforcement proceedings, subject IRS employees to harassment or reprisal, and reveal direction and scope of IRS investigation).

<sup>56</sup> 437 U.S. at 239; see also Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 929 (D.C. Cir. 2003) (reasoning that requested list of names "could be of great use" by terrorists in "intimidating witnesses"); Solar Sources, 142 F.3d at 1039 (stating that disclosure could result in "chilling and intimidation of witnesses"); EDUCAP, Inc. v. IRS, No. 07-2106, 2009 WL 416428, at \*6 (D.D.C. Feb. 18, 2009) (explaining that "agency's expressed concern that release [] could deter potential witnesses from providing information is sufficient" to show interference); Judicial Watch, Inc. v. DOJ, 102 F. Supp. 6, 19-20 (D.D.C. 2000) (reiterating that prematurely disclosing documents related to witnesses could result in witness tampering or intimidation and could discourage continued cooperation); Anderson v. U.S. Dep't of Treasury, No. 98-1112, 1999 U.S. Dist. LEXIS 20877, at \*10 (W.D. Tenn. Mar. 24, 1999) (finding that disclosure allows "possibility of witness intimidation" and interference with proceedings); Accuracy in Media, Inc. v. Nat'l Park Serv., No. 97-2109, 1998 U.S. Dist. LEXIS 18373, at \*26 (D.D.C. Nov. 13, 1998) (acknowledging that "disclosure of witnesses' statements and reports acquired by law enforcement personnel may impede the [Office of Independent Counsel's] investigation"), aff'd on other grounds, 194 F.3d 120 (D.C. Cir. 1999); Kansi v. DOJ, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (holding that disclosure provides "potential for interference with witnesses and highly sensitive evidence"); Anderson v. USPS, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998) (explaining that release "would expose actual or prospective witnesses to undue influence or retaliation"), aff'd, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision); Wichlacz, 938 F. Supp. at 331 (finding Independent Counsel "justified in concluding that there are substantial risks of witnesses intimidation or harassment [and] reduced witness cooperation" in investigation which remains active and ongoing); Holbrook v. IRS, 914 F. Supp. 314, 316 (S.D. Iowa 1996) (releasing information might permit targets of pending investigation to "tamper with or intimidate potential witnesses").

<sup>57</sup> Cook, 2005 WL 2237615, at \*2.

(a) to verify and corroborate future witness statements and evidence, (b) to discern which tips, leads, and confessions have merit and deserve further investigation and which are inconsistent with the known facts and can be safely ignored, and (c) to conduct effective interrogations of suspects.<sup>58</sup>

Other courts have ruled that interference has been established when, for example, the disclosure of information could prevent the government from obtaining data in the future.<sup>59</sup>

The exemption has been held to be properly invoked when release would hinder an

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<sup>58</sup> Id.

<sup>59</sup> See, e.g., Ctr. for Nat'l Sec. Studies, 331 F.3d at 930 (recognizing that witnesses "would be less likely to cooperate" and that a "potential witness or informant may be much less likely to come forward and cooperate with the investigation if he believes his name will be made public"); Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 311 (D.C. Cir. 1988) (ruling that disclosure might identify who had provided documents and would "thereby subject them to potential reprisals and deter them from providing further information"); Stolt-Nielsen, 480 F. Supp. 2d at 180 (stating that "release of this information would . . . chill necessary investigative communications with foreign governments, and have a chilling effect on amnesty applications"); Watkins Motor Lines, Inc. v. EEOC, No. 8:05-1065, 2006 WL 905518, at \*8-9 (M.D. Fla. Apr. 7, 2006) (noting that fact that witness does not object to disclosure of notes from interviews "is not dispositive," as disclosure could reasonably be expected to cause harm, and adding that "the possibility of harm from disclosure of witness statements arises regardless of whether the witness is favorable to the person seeking disclosure" (citing Robbins Tire, 437 U.S. at 241-42)); Kay, 976 F. Supp. at 38-39 (finding potential for "witness intimidation and discourage[ment] future witness cooperation" in ongoing investigation of alleged violation of FCC's rules); Wichlacz, 938 F. Supp. at 331 (reducing cooperation of potential witnesses when they learn of disclosure, thus interfering with ongoing investigation); Dow Jones & Co. v. DOJ, 880 F. Supp. 145, 150 (S.D.N.Y. 1995) (Disclosing "statements by interviewees . . . might affect the testimony or statements of other witnesses and could severely hamper the Independent Counsel's ability to elicit untainted testimony."), vacated on other grounds, 907 F. Supp. 79 (S.D.N.Y. 1995); Kay, 867 F. Supp. at 19 (explaining that witness "intimidation would likely dissuade informants from cooperating with the investigation as it proceeds"); Manna v. DOJ, 815 F. Supp. 798, 808 (D.N.J. 1993) (disclosing FBI reports could result in chilling effect on potential witnesses), aff'd, 51 F.3d 1158, 1165 (finding "equally persuasive the district court's concern for persons who have assisted or will assist law enforcement personnel"); Crowell & Moring v. DOD, 703 F. Supp. 1004, 1011 (D.D.C. 1989) (holding that disclosure of identities of witnesses would impair grand jury's ability to obtain cooperation and would impede government's preparation of its case); Gould, 688 F. Supp. at 703 (disclosing information would have chilling effect on sources who are employees of requester); Nishnic v. DOJ, 671 F. Supp. 776, 794 (D.D.C. 1987) (disclosing identity of foreign source would end its ability to provide information in unrelated ongoing law enforcement activities); Timken v. U.S. Customs Serv., 531 F. Supp. 194, 199-200 (D.D.C. 1981) (holding that disclosure of investigation records would interfere with the agency's ability "in the future to obtain this kind of information").

agency's ability to control or shape investigations,<sup>60</sup> would enable targets of investigations to elude detection<sup>61</sup> or to suppress or fabricate evidence,<sup>62</sup> or would prematurely reveal evidence

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

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

<sup>62</sup> See, e.g., Juarez v. DOJ, 518 F.3d 54, 58 (D.C. Cir. 2008) (finding that release "would compromise the investigation as it could lead to destruction of evidence"); Solar Sources, 142 F.3d at 1039 (stating that disclosure "could result in destruction of evidence"); EDUCAP, 2009 WL 416428, at \*5 (upholding protection for "documents related to an ongoing investigation target because disclosure . . . could allow the target to destroy or alter evidence, fabricate fraudulent alibis, and intimidate witnesses" (quoting North v. Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989))); Mendoza v. DEA, No. 06-0591, 2006 WL 3734365, at \*4 (D.D.C. Dec. 20, 2006) (reiterating that disclosure could assist fugitives and other targets to avoid apprehension and to develop false alibis), aff'd, No. 07-5006, 2007 U.S. App. LEXIS 22175, at \*2 (D.C. Cir. Sept. 14, 2007); Watkins Motor Lines, 2006 WL 905518, at \*8 (finding that "even if the Court disregards the allegation that Plaintiff may falsify or dispose of records, Defendants have made a sufficient showing of harm that could reasonably be expected to result from disclosure"); Lion Raisins, Inc. v. USDA, No. 05-0062, 2005 WL 2704879, at \*7-8 (E.D. Cal. 2005) (agreeing that it is "unlikely that Lion will now try to extricate itself from these accusations of fraudulent fabrication by fabricating more documents directly under the nose of USDA," yet ruling that the documents nevertheless were properly withheld), aff'd, 231 F. App'x 563 (9th Cir. 2007); Alyeska Pipeline, 856 F.2d at 312 (ruling that disclosure could allow for destruction or alteration of evidence, fabrication of alibis, and identification of witnesses); Accuracy in  
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or strategy in the government's case.<sup>63</sup> Still other courts have indicated that any premature disclosure, by and of itself, can constitute interference with an enforcement proceeding.<sup>64</sup>

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<sup>62</sup>(...continued)

Media, Inc. v. U.S. Secret Serv., No. 97-2108, 1998 WL 185496, at \*4 (D.D.C. Apr. 16, 1998) (explaining that release could permit witnesses to modify, tailor, or fabricate testimony); Cujas v. IRS, No. 1:97-00741, U.S. Dist. LEXIS 6466, at \*14 (M.D.N.C. Apr. 15, 1998) (finding that release of information would "alert" plaintiff to scope and direction of case and provide "opportunity to dispose" of assets), aff'd, 162 F.3d 1154 (4th Cir. 1998) (unpublished table decision); Rosenglick, 1998 U.S. Dist. LEXIS 3920, at \*7 (reiterating that disclosure "could aid wrongdoer in secreting or tampering with evidence"); Maccaferri Gabions, Inc. v. DOJ, No. 95-2576, slip op. at 14 (D. Md. Mar. 26, 1996) (determining that disclosure of information could provide plaintiff with opportunity to alter or destroy evidence), appeal dismissed voluntarily, No. 96-1513 (4th Cir. Sept. 19, 1996); Holbrook, 914 F. Supp. at 316 (releasing information could allow targets to construct defenses); Nishnic, 671 F. Supp. at 794 (releasing information might allow subjects to suppress or fabricate evidence).

<sup>63</sup> See, e.g., Ctr. for Nat'l Sec. Studies, 331 F.3d at 928 (stating that requested information "would enable al Qaeda or other terrorist groups to map the course of the investigation," thus giving terrorist organizations "a composite picture"); Solar Sources, 142 F.3d at 1039 (determining that disclosure could result in "revelation of the scope and nature of the Government's investigation"); Mapother, 3 F.3d at 1543 (holding that release of prosecutor's index of all documents he deems relevant would afford a "virtual roadmap through the [government's] evidence . . . which would provide critical insights into its legal thinking and strategy"); Suzhou, 404 F. Supp. 2d at 14 (agreeing that disclosure could "inform the public of the evidence sought and scrutinized in this type of investigation"); Hambarian v. Comm'r, No. 99-9000, 2000 U.S. Dist. LEXIS 6217, at \*7 (C.D. Cal. Feb. 16, 2000) (explaining that disclosure would reveal agency's theories and analysis of evidence); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at \*8 (S.D.N.Y. Sept. 30, 1999) (finding that release of memoranda would reveal substance of information gathered and thus interfere with enforcement proceedings); Anderson, 1999 U.S. Dist. LEXIS 20877, at \*10 (reasoning that disclosure of requested "checkspread" (agency's compilation of checks written by requester) "could very well jeopardize the proceedings by more fully revealing the scope and nature" of government's case); Anderson, 7 F. Supp. 2d at 586 (stating that release of requested information "would disclose the focus" of government's investigation); Maccaferri, No. 95-2576, slip op. at 14 (D. Md. Mar. 26, 1996) (reasoning that disclosure of records requested would give "premature insight into the Government's strategy and strength of its position"); Cecola v. FBI, No. 94 C 4866, 1995 WL 143548, at \*3 (N.D. Ill. Mar. 30, 1995) (finding that release of information in ongoing criminal investigation might alert plaintiff to government's investigative strategy); Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at \*4 (S.D.N.Y. May 26, 1993) (explaining that disclosure sought "risks alerting targets to the existence and nature" of investigation); Manna, 815 F. Supp. at 808 (holding that disclosure would obstruct justice by revealing agency's strategy and extent of its knowledge); Raytheon Co. v. Dep't of the Navy, 731 F. Supp. 1097, 1101 (D.D.C. 1989) (holding that requested information "could be particularly valuable to [an investigative target] in the event of settlement negotiations").

<sup>64</sup> See Robbins Tire, 437 U.S. at 224-25, 234-37 (concluding that disclosure of "witness statements in pending unfair labor practice proceedings" would generally interfere with

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In contrast, the D.C. Circuit has held that the mere fact that defendants in related ongoing criminal proceedings might obtain documents through the FOIA that were ruled unavailable "through discovery, or at least before [they] could obtain them through discovery," does not itself "constitute interference with a law enforcement proceeding."<sup>65</sup> Furthermore, Exemption 7(A) ordinarily will not afford protection when the target of the investigation has possession of or has submitted the information in question.<sup>66</sup> Nevertheless, courts have upheld protection for "selected" information provided by the target which would suggest the

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<sup>64</sup>(...continued)

enforcement proceedings); Lewis v. IRS, 823 F.2d 375, 380 (9th Cir. 1987) (agreeing with "reasoning of the Eight Circuit" that "government is not required to make a specific factual showing [of harm] with respect to each withheld document" (quoting Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir. 1980))); Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir. 1980) (stating that disclosure "prior to the institution of civil or criminal tax enforcement proceedings, would necessarily interfere with such proceedings"); Safeway, Inc. v. IRS, No. C05-3182, 2006 WL 3041079, at \*5 (N.D. Cal. Oct. 24, 2006) (explaining that "under exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document," and thus agency's "general concern that revealing the scope of [its] case could frustrate its ability to pursue it" is sufficient (quoting Barney, 618 F.2d at 1273)); Steinberg v. IRS, 463 F. Supp. 1272, 1273 (S.D. Fla. 1979) (explaining that "premature disclosure of [requested] records could seriously hamper the ongoing investigations and prejudice the government's prospective case").)

<sup>65</sup> North, 881 F.2d at 1097.

<sup>66</sup> See, e.g., Lion Raisins v. USDA, 354 F.3d 1072, 1085 (9th Cir. 2004) (stating-- in a situation in which investigatory target already possessed copies of documents sought -- that "[b]ecause Lion already has copies . . . USDA cannot argue that revealing the information would allow Lion premature access to the evidence upon which it intends to rely at trial"); Wright v. OSHA, 822 F.2d 642, 646 (7th Cir. 1987) (observing that disclosure of information provided by plaintiff would not provide plaintiff "with any information that it does not already have"); Estate of Fortunato v. IRS, No. 06-6011, 2007 WL 4838567, at \*4 (D.N.J. Nov. 30, 2007) (explaining that because information appears to be either in plaintiff's possession or known to plaintiff, agency "has not met its burden of justifying the withholding of these documents under Exemption 7(A)); Dow Jones Co. v. FERC, 219 F.R.D. 167, 174 (C.D. Cal. 2002) (stating that there cannot be harm, because "each target company has a copy . . . and therefore is on notice as to the government's possible litigation strategy and potential witnesses"); Scheer v. DOJ, 35 F. Supp. 2d 9, 14 (D.D.C. 1999) (declaring that agency assertions of harm and "concern proffered . . . cannot stand" when agency itself disclosed information to target); Ginsberg v. IRS, No. 96-2265-CIV-T-26E, 1997 WL 882913, at \*3 (M.D. Fla. Dec. 23, 1997) (reiterating that "where the documents requested are those of the [requester] rather than the documents of a third party . . . 'it is unlikely that their disclosure could reveal . . . anything [the requester] does not know already'" (quoting Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986))); see also Oncology Servs. Corp. v. NRC, No. 93-0939, slip op. at 17 (W.D. Pa. Feb. 7, 1994) (finding that agency may not categorically withhold transcribed interviews, conducted in presence of requester's attorney, for interviewed individuals who consented to release of their own transcripts); cf. Campbell v. HHS, 682 F.2d 256, 262 (D.C. Cir. 1982) (discussing legislative history of Exemption 7(A), and distinguishing between records generated by government and those "submitted to the government by such targets").

nature and scope of the investigation.<sup>67</sup> Indeed, in a case in which two clients requested statements that their attorney made to the SEC and argued that the "information their attorney conveyed to the [agency] must be treated as coming from them," it was held that the "harm in releasing this information flows mainly from the fact that it reflects the [agency] staff's selective recording . . . and thereby reveals the scope and focus of the investigation."<sup>68</sup>

### Changes in Circumstances

Because Exemption 7(A) is temporal in nature, in the past it generally had been recognized that once Exemption 7(A) applicability ceased because of a change in underlying circumstances an agency then could invoke other applicable exemptions at a later point in time.<sup>69</sup> The Supreme Court, the Court of Appeals for the District of Columbia Circuit, and other

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<sup>67</sup> See Willard v. IRS, 776 F.2d 100, 103 (4th Cir. 1985) (concluding that "selectivity in recording" those portions of interviews that agents considered relevant "would certainly provide clues . . . of the nature and scope of the investigation"); Linsteadt v. IRS, 729 F.2d 998, 1004 & n.10, 1005 (5th Cir. 1984) (stating that release of "any statements made by [target] during the course of the tax investigation" would frustrate investigation by revealing reliance government placed upon particular evidence and by aiding targets in tampering with evidence); Arizechi, 2008 U.S. Dist. LEXIS 13753, at \*1, \*15 (finding that disclosure of target's tax "information returns (Forms W-2, K-1, 1098, and 1099)" could reveal reliance agency placed on evidence); see also Grasso v. IRS, 785 F.2d 70, 76-77 (3d Cir. 1986) (tempering its order to release records where "IRS had not shown" that disclosure could interfere with investigation by adding that, in some circumstances, "memorandum of the individual's own statement may be exempt from disclosure, as, for example, when it discloses the direction of [a] potential investigation").

<sup>68</sup> Swan, 96 F.3d at 500-01.

<sup>69</sup> See Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 906-07 (D.C. Cir. 1996) (permitting agency on remand to apply exemptions other than Exemption 7(A) for records of investigation which was terminated during litigation); Dickerson v. DOJ, 992 F.2d 1426, 1430 n.4 (6th Cir. 1993) (explaining that "when exemption (7)(A) has become inapplicable," records may still be protected under other exemptions); Senate of P.R. v. DOJ, 823 F.2d 574, 589 (D.C. Cir. 1987) (finding that "district court did not abuse its discretion in permitting the DOJ to press additional FOIA exemptions after its original, all-encompassing (7)(A) exemption claim became moot"); Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982) (holding government not barred from invoking other exemptions after reliance on Exemption 7(A) rendered inapplicable by conclusion of underlying law enforcement proceeding); W. Journalism Ctr. v. Office of the Indep. Counsel, 926 F. Supp. 189, 192 (D.D.C. 1996) (explaining that once Independent Counsel's task is completed, documents are "turned over to the Archivist and at that time would be subject to FOIA [disclosure]"); Curcio v. FBI, No. 89-0941, slip op. at 4-6 (D.D.C. Mar. 24, 1995) (permitting agency to invoke new exemptions when Exemption 7(A) is no longer applicable, because agency has "made a clear showing of what the changed circumstances are and how they justify permitting the agency to raise new claims of exemption" and has "proffered a legitimate reason why it did not previously argue all applicable exemptions"); cf. Miller Auto Sales, Inc. v. Casellas, No. 97-0032, slip op. at 3 (W.D. Va. Jan. 6, 1998) (remanding to give agency "opportunity to make a new FOIA

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circuit courts of appeals have approved the generic approach and the functional test for Exemption 7(A).<sup>70</sup>

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

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

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<sup>69</sup>(...continued)

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

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

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

<sup>72</sup> See id. at 769.

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

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

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

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

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<sup>74</sup>(...continued)

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

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

<sup>76</sup> See Maydak, 218 F.3d at 765-66.

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

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

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

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

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

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

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

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

(continued...)

Post-Maydak Rulings

Notwithstanding the ruling in Maydak v. DOJ,<sup>84</sup> several cases that have been decided subsequently have permitted agencies to raise exemptions not invoked initially in litigation.<sup>85</sup> In August v. FBI, the Court of Appeals for the District of Columbia Circuit declared that "we have repeatedly acknowledged that there are some 'extraordinary' circumstances in which courts of appeals may exercise their authority . . . to require 'such further proceedings to be had as may be just under the circumstances,' in order to allow the government to raise FOIA exemption claims it failed to raise the first time around."<sup>86</sup> It further explained that "[g]iven the drafters' recognition that the harms of disclosure may in some cases outweigh its benefits, we have avoided adopting a 'rigid press it at the threshold, or lose it for all times' approach to . . .

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<sup>83</sup>(...continued)

in the administrative proceeding, the Court would nevertheless be free to consider [it]"); Boyd v. U.S. Marshals Serv., No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at \*6 (D.D.C. Mar. 15, 2002) (stating that although defendant did not raise exemptions other than Exemption 7(A) at administrative level, it did not have to do so because "government must assert all applicable exemptions [only] in the district court proceedings"), summary judgment granted on other grounds, 2004 U.S. Dist. LEXIS 27406 (D.D.C. Sept. 22, 2004); Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1318 (D. Utah 2003) (recognizing that although "at the administrative level" agency "did not cite Exemption 7 . . . an agency may raise a particular exemption for the first time in the district court"); Dubin v. Department of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981) (explaining that agency did not waive FOIA exemptions in litigation by not raising them during administrative process), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision).

<sup>84</sup> 218 F.3d 760 (D.C. Cir. 2000).

<sup>85</sup> See Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1118 (D.C. Cir. 2007) (explaining that exemption first raised in "subsequent motion for reconsideration" was timely raised because "[w]e have in the past permitted agencies to escape summary judgment in FOIA cases based on evidence first submitted on motions for reconsideration"); see also Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at \*5 (D. Minn. Aug. 23, 2007) (remanding for reprocessing "closed investigations" files where "Exemption 7(A) no longer applies"); Sciba v. Bd. of Governors of the Fed. Reserve Sys., No. 04-1011, 2005 WL 758260 at \*1 n.3 (D.D.C. Apr. 1, 2005) (permitting agency to later invoke exemptions not raised in its Answer, and reiterating that "an exemption only need be raised at a point in the district court proceedings that gives the court an adequate opportunity to consider it," and further noting that "agency only waives FOIA exemptions by failing to claim them in the original proceedings before the district court"), summary judgment granted, 2005 WL 3201206 (D.D.C. Nov. 4, 2005); Maydak v. DOJ, 362 F. Supp. 2d 316, 319 (D.D.C. 2005) (permitting agency to invoke exemptions not raised previously because "plaintiff has had ample opportunity to respond to the [agency's] alleged new claims, which, in any event, are being asserted in 'the original district court proceedings'"); Summers v. DOJ, No. 98-1837, slip op. at 7 (D.D.C. Apr. 13, 2004) (explaining that "government is required to raise all claimed exemptions at the district court proceedings, but [precedent] does not hold that all exemptions must be raised at the same time").

<sup>86</sup> 328 F.3d 697, 700 (D.C. Cir. 2003) (quoting Maydak, 218 F.3d at 767).

agenc[ies'] FOIA exemption claims."<sup>87</sup>

This recognition of "the harms of disclosure" mentioned in August was relied upon by the District Court for the District of Columbia in Piper v. DOJ.<sup>88</sup> The court found that "in certain FOIA cases where the judgment will impinge on rights of third parties that are expressly protected by FOIA . . . district courts not only have the discretion, but sometimes the obligation to consider newly presented facts and to grant relief."<sup>89</sup> Thus, the court concluded that it would reconsider its prior ruling to determine if the "redactions, newly justified" were proper.<sup>90</sup>

Along these same lines, in two post-Maydak cases in which Exemption 7(A) became no longer applicable because the investigations had closed, the courts in both instances explained the special circumstances surrounding the situations that justified remands for further exemption consideration.<sup>91</sup> In Trentadue v. Integrity Committee, the Court of Appeals for the Tenth Circuit specifically stated that it would "retain jurisdiction" and ordered a "limited remand" after the law enforcement proceeding terminated because, though the agency raised other exemptions at the district court level, the "district court did not rule on these alternate bases for exemption."<sup>92</sup> In Gavin v. SEC, the court simply remanded the case back to the agency.<sup>93</sup>

The D.C. Circuit likewise did not apply Maydak rigidly in two other cases where the agencies did not invoke all applicable exemptions at the district court level.<sup>94</sup> In LaCedra v. EOUSA, the agency, due to its misreading of a FOIA request, conducted a limited search and processed only a portion of the requested records.<sup>95</sup> Stating that "[n]othing in Maydak requires an agency to invoke any exemption applicable to a record that the agency in good faith believes has not been requested," the D.C. Circuit permitted the agency to invoke all applicable exemptions on remand.<sup>96</sup>

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<sup>87</sup> Id. at 699.

<sup>88</sup> 374 F. Supp. 2d 73, 78 (D.D.C. June 1, 2005).

<sup>89</sup> Id. at 78-79 & n.1 (citing August, 328 F.3d at 699-702).

<sup>90</sup> Id. at 79.

<sup>91</sup> Trentadue v. Integrity Comm., No. 04-4200, slip op. at 4 (10th Cir. Sept. 27, 2005); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at \*2 (D. Minn. Oct. 24, 2005).

<sup>92</sup> Trentadue, No. 04-4200, slip op. at 4 (10th Cir. Sept. 27, 2005).

<sup>93</sup> Gavin, 2005 WL 2739293, at \*2 & n.2.

<sup>94</sup> See United We Stand Am. v. IRS, 359 F.3d 595 (D.C. Cir. 2004); LaCedra v. EOUSA, 317 F.3d 345 (D.C. Cir. 2003).

<sup>95</sup> LaCedra, 317 F.3d at 348.

<sup>96</sup> Id.

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

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

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

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<sup>97</sup> 359 F.3d at 597.

<sup>98</sup> Id. at 598 (quoting government's brief).

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

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

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

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

<sup>103</sup> 494 F.3d at 1118.

<sup>104</sup> Id. at 1119.

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

#### Time Frame for Determining Exemption 7(A) Applicability

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

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<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> 218 F. 3d 760 (D.C. Cir. 2000).

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

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

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

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Exclusion Considerations

As a final Exemption 7(A)-related matter, agencies should be aware of the "(c)(1) exclusion,"<sup>111</sup> which was enacted by the FOIA Reform Act in 1986.<sup>112</sup> This special record exclusion applies to situations in which the very fact of a criminal investigation's existence is as yet unknown to the investigation's subject, and disclosure of the existence of the investigation (which would be revealed by any acknowledgment of the existence of responsive records) could reasonably be expected to interfere with enforcement proceedings.<sup>113</sup> In such circumstances, an agency may treat the records as not subject to the requirements of the FOIA. (See the discussion of the operation of subsection (c)(1) under Exclusions, below.)

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

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

<sup>113</sup> See Attorney General's 1986 Amendments Memorandum at 18-22.