

09-2225-cv

To Be Argued By:
LISA E. PERKINS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-2225-cv

ALLARD K. LOWENSTEIN INTERNATIONAL
HUMAN RIGHTS PROJECT, JEROME N. FRANK
LEGAL SERVICES ORGANIZATION,

Plaintiffs-Appellants,

-vs-

DEPARTMENT OF HOMELAND SECURITY, U.S.
DEPARTMENT OF JUSTICE,

Defendants-Appellees,

DEPARTMENT OF STATE, EXECUTIVE OFFICE
OF THE PRESIDENT,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

=====

BRIEF FOR THE UNITED STATES OF AMERICA

=====

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Jurisdictional Statement

The district court had subject matter jurisdiction under 5 U.S.C. § 552(a)(4)(B), as the “district court . . . in which the complainant resides, or has his principal place of business.” This Court has jurisdiction under 28 U.S.C. § 1291. The district court’s final judgment was entered on March 23, 2009. Plaintiffs’ notice of appeal, filed on May 22, 2009, was timely under Fed. R. App. P. 4(a)(1)(B).

Issue Presented

Records are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, if they reveal techniques or procedures for law enforcement investigations. *Id.* at § 552(b)(7)(E). They are also exempt if they are law enforcement guidelines or relate solely to internal agency procedure and their disclosure could risk circumvention of the law. *Id.* at § 552(b)(2), (b)(7)(E). The Department of Homeland Security withheld information describing criteria that law enforcement officers use to identify and to prioritize terrorist threats. The issue presented is whether this information is exempt from disclosure.

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U.S. DEPT OF JUSTICE,

Defendants-Appellees,

DEPARTMENT OF STATE, EXECUTIVE OF-
FICE OF THE PRESIDENT,

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Preliminary Statement

This case arises under the Freedom of Information Act, 5 U.S.C. § 552. The Lowenstein Project has sought production of a memorandum relating to Operation Frontline, a United States anti-terrorism operation. The Department of Homeland Security redacted certain portions of this memorandum pursuant to two FOIA exemptions that allow withholding of predominantly internal material as well as law enforcement techniques, procedures, and guidelines. *Id.* at § 552(b)(2), (b)(7)(E). The district court granted summary judgment to the Department as to this redacted information and the Project appeals.

Statement of Facts and Proceedings Below

A. Operation Frontline was created to detect, deter, and disrupt terrorist attacks during the 2004 presidential election.

In the months leading up to the 2004 presidential election, the United States received credible intelligence of a terrorist threat. The Defense Intelligence Agency concluded that a terrorist organization desired to conduct an attack in the continental United States before the November presidential election. In response, the Homeland Security Council—a White House office created after the September 11 terrorist attacks—directed federal agencies to identify methods of disrupting the threat. Government Appendix (“GA”) 5.

That the government would anticipate and take steps to prevent a possible terrorist attack in connection with the 2004 presidential election should come as no surprise. That very year, on March 11, terrorist bombs exploded on commuter trains in Madrid, Spain, killing over 200 people. The attacks were widely assumed to have been timed to affect the upcoming Spanish elections. *See, e.g., American-Arab Anti-Discrimination Committee v. Massachusetts Bay Transportation Authority*, No. 04-11652-GAO, 2004 WL 1682859, at *2 (D. Mass. July 28, 2004) (observing that “[i]t is at least plausible, if not likely, that the attack in

Madrid was timed to maximize its disruptive effect on the Spanish elections, pointing up the attractiveness to terrorists of timing a terrorist event to have an impact on the democratic process”). Operation Frontline was conceived and implemented by the Department of Homeland Security’s Immigration and Customs Enforcement division (“ICE”) to respond to the threat. GA 4.

Operation Frontline sought to identify and apprehend suspected terrorists, using information from intelligence databases and other sources. The operation was developed by ICE pursuant to the Department’s mission of “preventing terrorist attacks within the United States” and “reducing the United States’ vulnerability to terrorism.” H.R. Rep. No. 609, 107th Cong., 2d Sess. 63 (2002). The Department is responsible for enforcing the immigration statutes, and Operation Frontline was an ICE initiative. But due to its nature, the operation contemplated some cooperation between the FBI and ICE. GA 4.

In September 2004, Marcy Forman, the Acting Director of ICE’s Office of Investigations, sent a memorandum to special agents and deputy assistant directors regarding Operation Frontline.¹ GA

¹ The Forman Memorandum gives the full name of the program as “Operation Frontline II;” in the interests of brevity, the Department will refer to this simply as “Operation Frontline.”

3–6. This appeal concerns a dispute over disclosure of certain portions of that memorandum. The Forman Memorandum notified law enforcement officers who received it of a “nationwide disruption operation” that was “intended to detect, deter, and disrupt terrorist operations leading up to the Presidential Election.” GA 3. After general background describing Operation Frontline’s structure, the Forman Memorandum turned to a description of the techniques and procedures to be used in Operation Frontline investigations.

The provisions of the Forman Memorandum that are in dispute in this case are contained in three paragraphs on pages 2 and 3 of the memo. GA 4–5. Those paragraphs described the criteria that law enforcement officers were to use in identifying and prioritizing suspected immigration violators for investigation as potential terrorist threats. *Ibid.* The paragraphs described three priorities for investigations and the number of suspects in each category. Priority 1 suspects, the highest priority, were investigated with the assistance of the FBI and its Joint Terrorism Task Force. Local FBI agents assisted with certain Priority 2 cases depending on the “potential source recruitment and intelligence value” of the targets. Priority 3 cases, the lowest priority, were generally investigated by ICE agents without FBI assistance.

B. The Department turned over thousands of pages of information about Operation Frontline to the Lowenstein Project.

In October 2006, appellants the Allard K. Lowenstein International Human Rights Project and its affiliate, the Jerome N. Frank Legal Services Organization (collectively the “Lowenstein Project” or “Project”), requested copies of all documents relating to Operation Frontline. A. 34–37. Pursuant to the Freedom of Information Act, the Lowenstein Project asked for copies of any record “describing or concerning ‘Operation Front Line,’ ‘Operation Frontline,’ or any reasonable variation thereupon.” A. 34. FOIA generally provides for disclosure of government records unless one of several statutory exemptions is met. 5 U.S.C. § 552.

Dissatisfied with the pace of the government’s response to their FOIA request, the Lowenstein Project then filed suit in federal district court to compel the release of the requested documents. *See* A. 23–43 (first amended complaint). The parties subsequently entered into a stipulation regarding the scope of the search the Department would undertake to locate records responsive to the Project’s broad FOIA request. *See* GA 7-11. As part of this stipulation, the Department agreed to review hundreds of randomly selected case files from 24 ICE offices across the country. GA 10-11.

After a near nationwide search and review of over 32,000 pages of records found responsive to the Lowenstein Project’s request, the Department released in whole or in part nearly 5,000 pages of information regarding Operation Frontline. *See* GA 63. The 5,000 pages included a variety of policy documents from ICE Headquarters regarding Operation Frontline, including a redacted version of the Forman Memorandum.² *See ibid.*

C. The district court found that the Department had properly withheld the redacted portions of the Forman Memorandum.

In July 2008, in light of the disclosures already made, the Department and the Lowenstein Project reached a settlement of all claims related to non-policy and field records at ICE Headquarters. *See* GA 15, 152-60. As part of this settlement, the Department agreed to provide aggregate data regarding hundreds of aliens investigated in

² The three paragraphs of that memorandum at issue in this appeal—those describing how leads would be generated and what priorities would be given each method—were initially redacted in full. As explained below, during the course of this litigation, the Department has released much of the redacted information. *See* p.10–11, *infra*.

Operation Frontline who were the subject of the randomly selected case files, including their gender and nationality, and information concerning immigration proceedings relating to them. *See* GA 152-60. The Department then moved for summary judgment on the propriety of withholding the remaining records, of which one was the Forman Memorandum. *See* GA 13.

The Department argued that the remaining pages were properly withheld pursuant to several exemptions in the Freedom of Information Act, and submitted *Vaughn* indices³ justifying each withheld document and redaction. The Department also submitted a declaration by Reba McGinnis, which further detailed the reasons for the exemptions. GA 47. As to the withheld paragraphs of the Forman Memorandum, the *Vaughn* index invoked Exemptions 2 and 7(E). Exemption 2 excludes from FOIA's requirements records that relate primarily to internal agency practices or procedures. 5 U.S.C. § 552(b)(2). Exemption 7(E) excludes law enforcement materials that disclose techniques and procedures for investigations, or

³ “A *Vaughn* index is provided in the course of FOIA litigation by a government agency to correlate specific documents or portions thereof that the agency desires to shield from disclosure with statements of justification for the non-disclosure.” *Ruotolo v. Department of Justice*, 53 F.3d 4, 6 (2d Cir. 1995). *See also Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

law enforcement guidelines that could reasonably be expected to risk circumvention of the law if disclosed. 5 U.S.C. § 552(b)(7)(E). The Department further explained that those exemptions applied to the redacted portions of the Forman Memorandum because the redacted information described “procedures relating to the designation of immigration status violators, coordination with other government agencies of investigative efforts, analysis tools and operations plans.” GA 85. The Department explained that disclosure of the redacted material “would reveal investigative procedures and, therefore, impede the effectiveness of the agency’s activities and future operations.” *Ibid.*

The *Vaughn* index also stated that withholding portions of the Forman Memo was necessary to “protect from mandatory disclosure law enforcement investigative techniques, procedures, and guidelines, the disclosure of which could reasonably be expected to risk circumvention of the law and to thwart future investigations and operations.” GA 86. The index explained that “ICE obtained threat data from a number of sources and used this data to establish investigative priorities in order to determine who might be involved in plans to disrupt the 2004 Presidential election” and that release of the information “would provide a means for terrorist organizations to introduce persons into the United States that would fall outside of the established priority.” *Ibid.*

The district court denied the Department's motion for summary judgment without prejudice to its renewal, so that the Department could describe with more specificity its reasons for withholding the various documents. *See* GA 96–99. The district court did not note any specific defects in the parts of the first *Vaughn* index dealing with the Forman Memorandum. *See* GA 96–97.

Shortly thereafter, the Department renewed its motion for summary judgment, and provided a second *Vaughn* index. *See* GA 133–140. The Department also submitted the documents at issue to the court for *in camera* review. Regarding the Forman Memorandum, the second *Vaughn* index stated that the redacted information described “the methods developed by the agency for the development of new investigative leads.” GA 134. The index explained that the Forman Memorandum “describes how ICE will utilize information stored in a particular database to refine ICE’s targeting priorities[,] defines the priority levels assigned to immigration status violators and also specifies the reporting requirements imposed upon the field offices.” *Ibid.* The index again invoked Exemptions 2 and 7(E) “to withhold information that identifies the methods ICE will use to identify potential threats and assign priority levels to specific groups of immigration status violators.” *Ibid.*

After reviewing the *Vaughn* indices and the Forman Memorandum *in camera*, the district court granted summary judgment in favor of the Department regarding the redacted information here. *Lowenstein v. Department of Homeland Security*, 603 F. Supp. 2d 354 (D. Conn. 2009).

D. The Department released additional portions of the Forman Memorandum while this appeal was pending.

In November 2009, the Department voluntarily released additional portions of the Forman Memorandum. *See* GA 143 n. 3 (stating intent to supplement the disclosures); A. 165 (additional unredacted information provided to plaintiffs). Nearly all of the paragraph describing criteria for identifying the lowest-priority suspects has now been provided. Roughly two-thirds of the paragraph describing the criteria for identifying medium-priority suspects has been provided. All of the paragraph describing the criteria for identifying the highest-priority suspects—the leads on which the FBI’s Joint Terrorism Task Force cooperated—remains redacted.

In another lawsuit, *El Badrawi v. Department of Homeland Security*, No. 3:07-cv-1074 (D. Conn.), the Department has provided a copy of the entire unredacted Forman Memorandum to counsel under an “attorneys’ eyes only” protective order. *See* GA 141–151. The appellants are counsel in *El*

Badrawi. The protective order protects disclosure of the Forman Memorandum by restricting it to counsel and requires that counsel use the protected information “solely for the purposes of [that] litigation and no other.” GA 144.

The Lowenstein Project moved to modify the *El Badrawi* order. See GA 141–151. The Department opposed modification on the ground that this Court lacks jurisdiction to modify a protective order in another case that is not the subject of the instant appeal. See GA 147–150. The Project’s motion was denied and the protective order remains in force today. See Order Denying Motion for *In Camera* Review and to Permit Reference To Certain Information, *Lowenstein v. Department of Homeland Security*, No. 09-225 (2d Cir. November 16, 2009).

The Project also moved for an order requiring the Department to submit the Forman Memorandum to this Court for *in camera* review. GA 145–146. The Department opposed the requested order, arguing that this Court should first consider the parties’ merits briefs and the Department’s *Vaughn* indices and then decide whether *in camera* review was necessary. See GA 145–146. This motion was also denied. See Order Denying Motion for *In Camera* Review and to Permit Reference To Certain Information, *Lowenstein v. Department of*

Summary of Argument

The district court correctly held that the Freedom of Information Act (FOIA) does not require the Department to disclose the databases and other criteria that its law enforcement officers use to identify and prioritize suspected terrorist threats. That information is exempt from release for three independent reasons. First, its release would “disclose techniques and procedures for law enforcement investigations or prosecutions.” 5 U.S.C. § 552(b)(7)(E). Second, its release “would disclose guidelines for law enforcement investiga-

⁴ Although the order denying the motion stated that it was subject to *de novo* review by the merits panel in this case, the Project does not appear to have renewed its motion. The argument is therefore waived. The government continues to object to allowing the Project to use in this appeal a document it received pursuant to a protective order in *El Badrawi, supra*. The government additionally continues to believe that its *Vaughn* indices and declarations provide sufficiently detailed information concerning the bases for withholding the redacted information at issue here. However, should this Court find the indices and declarations insufficient for its review, the government will make available the Forman Memorandum for the Court’s *in camera* inspection.

tions or prosecutions” and that disclosure “could reasonably be expected to risk circumvention of the law.” *Ibid.* And, third, the information involved is “related solely to the internal . . . practices” of the Department. 5 U.S.C. § 552(b)(2).

The Project’s contention that FOIA requires disclosure of the government’s techniques for prioritizing investigations of potential terrorists is unsupported by FOIA’s text and would threaten the effectiveness of law enforcement activities important to national security. Indeed, under the Project’s view of the law, the very clandestine operatives that Operation Frontline was targeting could have requested these techniques and procedures when planning their terrorist operations and adapted their plans to avoid detection. FOIA does not require that counterintuitive and dangerous result, as the district court correctly concluded. This Court should affirm the district court’s decision.

Under FOIA, federal agencies, “upon any request for records,” are generally directed to make the records “promptly available to any person.” 5 U.S.C. § 552(a)(3). In section 552(b), however, FOIA contains several specific exemptions from this disclosure requirement. Exemptions 2 and 7 are at issue here. *Id.* at § 552(b)(2), (b)(7).

Exemption 7 applies to “records or information compiled for law enforcement purposes,” the

disclosure of which would cause one of several specified harms. 5 U.S.C. § 552(b)(7). One of the specified harms is that release of the records would “disclose techniques and procedures for law enforcement investigations or prosecutions.” *Id.* at § 552(b)(7)(E). Another is that production of the records “would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” *Ibid.*

Exemption 2 applies to matters that are “related solely to the internal personnel rules and practices of an agency.” For matters that are of “genuine and significant public interest,” Exemption 2 applies only “where disclosure may risk circumvention of [the law].” *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 547 (2d Cir. 1978) (quoting *Rose v. Department of Air Force*, 425 U.S. 352, 369 (1976)).

The redacted portions of the Forman Memorandum were properly withheld under both clauses of Exemption 7(E) as well as Exemption 2. Because the redacted information directs ICE agents on how to detect and apprehend suspected terrorists, release of that information would disclose “techniques and procedures for law enforcement investigations.” 5 U.S.C. § 552(b)(7)(E). Disclosure of the redacted information would also risk circumvention of the law, and so it was properly withheld under Exemption 7(E) as “guidelines” for law

enforcement investigations. Finally, the redacted information was properly withheld under Exemption 2 because the law enforcement techniques and procedures described in the redacted paragraphs are “related solely to the internal personnel rules and practices of an agency.”

Argument

“This Court reviews *de novo* a district court’s grant of summary judgment in a FOIA case.” *Wood v. FBI*, 432 F.3d 78, 82 (2d Cir. 2005).

A. The redacted paragraphs were properly withheld because they describe techniques and procedures for law enforcement investigations.

1. *Law enforcement techniques and procedures are exempt from disclosure without any showing that disclosure could risk circumvention of the law.*

The first clause of Exemption 7(E) privileges from disclosure law enforcement records if their production “would disclose techniques and procedures for law enforcement investigations or prosecutions.” 5 U.S.C. § 552(b)(7)(E). The redacted portions of the Forman Memorandum fall squarely within that exemption, which, contrary to the

Project's suggestion, requires no showing of a risk of circumvention.

The plain text of Exemption 7(E) contemplates two distinct harms from disclosure of a law enforcement record, either of which is sufficient to withhold the record. FOIA's requirements do not apply to

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

5 U.S.C. § 552(b)(7).

The text is clear. Exemption 7(E) permits withholding of records the production of which would disclose *either* "techniques and procedures," *or* records that disclose "guidelines." The parallel sentence structure indicates that the circumvention condition does not apply to the withholding of "techniques and procedures." The two clauses of the sentence are separated by a comma, whereas the condition is not separated from its reference by anything at all; the words "if such disclosure"

therefore modify only the “guidelines” clause and not the “techniques and procedures” clause. Techniques and procedures may always be withheld, but guidelines must be disclosed unless doing so could reasonably be expected to risk circumvention of the law.

Law enforcement techniques and procedures are thus entitled to “categorical” protection. *Fisher v. Department of Justice*, 772 F. Supp. 7, 12 n. 9 (D.D.C. 1991), *aff’d*, 968 F.2d 92 (D.C. Cir. 1992). Under the “techniques and procedures” clause, the “government need not demonstrate that disclosure of investigative procedures would significantly risk circumvention of the law—it was implicitly presumed by Congress in enacting this exemption that disclosure of such materials would be detrimental to legitimate law enforcement efforts.” *Windels, Marx, Davies & Ives v. Department of Commerce*, 576 F. Supp. 405, 413 (D.D.C. 1983) (internal quotation marks omitted).

The amendment history of Exemption 7(E) confirms what the text states directly. The 1974 Amendments to FOIA created Exemption 7(E), and exempted “investigatory records compiled for law enforcement purposes” to the extent that production would “disclose investigative techniques and procedures.” 5 U.S.C. § 552(b)(7)(E) (1976). The original version of Exemption 7(E) required no demonstration that disclosure would

risk circumvention of the law—but it also did not exempt law enforcement “guidelines.”

In 1986, Congress amended Exemption 7(E) to protect “records or information compiled for law enforcement purposes” that would “disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” See Pub.L. 99-570 § 1802(a). The 1986 Amendments broadened the scope of Exemption 7(E) by protecting (for the first time) “guidelines for law enforcement investigations,” if the disclosure of those guidelines would risk circumvention. But the 1986 Amendments did not contract the scope of the earlier Exemption 7(E) at all. The 1986 Amendments were intended to exempt *more* material from disclosure. See Statement of Sen. Hatch, 132 Cong. Rec. S14040 (September 27, 1986) (amendments were intended to “broaden b(7) and provide some additional provisions to protect records compiled in a lawful investigation”). The circumvention requirement, therefore, is most sensibly read as attaching only to the new basis for withholding that was created along with it.

This Court has previously adopted this interpretation of the 1986 amendment. In *American Civil Liberties Union v. Department of Defense*, this Court explained that in 1986, “Exemption 7(E)

was expanded to allow agencies to withhold information that would disclose law enforcement guidelines—in addition to the already protected techniques and procedures—if disclosure of the guidelines ‘could reasonably be expected to risk circumvention of the law.’” 543 F.3d 59, 79 (2d Cir. 2008), *vacated on other grounds and remanded*, 130 S. Ct. 777 (2009).⁵

The Lowenstein Project cites only a single case—*PHE, Inc. v. Department of Justice*, 983 F.2d 248 (D.C. Cir. 1993)—for the proposition that “techniques and procedures can be withheld only if their disclosure would risk circumvention of the law.” But that case cannot bear the weight that the Lowenstein Project places on it. *PHE* concerned a request for FBI and Department of Justice manuals. The FBI redacted “records and sources of information available to Agents investigating obscenity violations, as well as the type of patterns of criminal activity to look for when investigating certain violations.” *Id.* at 251. The

⁵ The Supreme Court remanded *ACLU* for further proceedings in light of an intervening statute, the Department of Homeland Security Appropriations Act of 2010. 130 S. Ct. 777 (2009). The *ACLU* court’s reasoning on Exemption 7(E) was not the subject of the petition for certiorari or the basis for the Supreme Court’s remand.

district court granted summary judgment to the FBI, and the court of appeals affirmed. As to the DOJ manual, which comprised “guidance for the prosecutor” and “digests of applicable case and statute law,” *ibid.*, the court remanded so that the district court could either elicit a more specific affidavit or conduct *in camera* review. *Id.* at 228.

The *PHE* court had no occasion to consider, and certainly did not hold, that the words of Exemption 7(E) should be given anything other than their plain meaning. The distinctive treatment that *PHE* gave to the FBI manual (which contained techniques and procedures for investigations) and the DOJ manual (which comprised “guidance for the prosecutor”) in fact supports the Department’s argument here.

2. *The redacted portions of the Forman Memorandum describe techniques and procedures for law enforcement investigations.*

Because the redacted paragraphs of the Forman Memorandum describe techniques and procedures for catching suspected terrorists, those paragraphs fall within the plain scope of Exemption 7(E). The Forman Memo was an explanation of how to figure out which of the millions of people who are violating the immigration laws at any given time might be related to the terrorist plot to disrupt the 2004 presidential election. The ordinary meaning of

“techniques and procedures” for investigations surely encompasses how to prioritize targets within that investigation, where to get sources of information to develop the targets of the investigation in the first place, and which targets merit cooperation with the FBI and which do not.

Contrary to the Project’s contention, the redacted information in the Forman Memorandum does not simply contain general law enforcement policies. It contains instructions on specific databases and other criteria that law enforcement officers should use to identify and to prioritize suspected terrorist threats. *See* GA 3–6. Such specific and detailed instructions on investigative methods are clearly law enforcement “techniques and procedures,” not merely general law enforcement policies.

The Forman Memorandum is analogous to other documents that have been properly withheld under FOIA. It closely resembles the BATF manual at issue in *Caplan*, which “included descriptions of the equipment used by agents in making raids, the methods of gaining entry to buildings used by law breakers, factors relating to the timing of raids, and the techniques used by suspects to conceal contraband.” 587 F.2d at 545. It is also similar to an IRS manual that explains how to select people for audits. *See McQueen v. United States*, 264 F. Supp. 2d 502, 521 (S.D. Tex. 2003) (allowing the withholding of “techniques and

procedures” of detecting tax evaders). And in *Schwarz v. Department of the Treasury*, characteristics used by the Secret Service to determine an individual’s threat potential were also held exempt from disclosure. 131 F. Supp. 2d 142, 150 (D.D.C. 2000). The concern in all of these cases is sorting through a deep pool of potential leads and selecting a few that—statistically—are of particular interest. Law enforcement must remain free to develop and share these techniques without fear that criminals will simply request copies and adjust their behavior to avoid detection and apprehension.

The Project argues that the Forman Memorandum is like the prosecutorial guidelines in *Jordan v. Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978). Br. 32. That is incorrect. The techniques and procedures here do not exempt anyone from the law or constrain the scope of which cases will be prosecuted. If an out-of-status alien was not investigated pursuant to Operation Frontline, that alien was of course still subject to the ordinary possibility of routine enforcement by ICE. The concern of the Forman Memorandum was not deciding that whole classes of offenses would go unpunished (as in *Jordan*), but rather catching suspected terrorists from the broad pool of immigration status violators. The techniques and procedures for doing so were rightly withheld by the Department.

B. The redacted paragraphs were properly withheld because they are law enforcement guidelines, disclosure of which could reasonably be expected to risk circumvention of the law.

1. If the redacted guidelines were released, terrorist organizations could introduce operatives that do not fit the intelligence profiles that trigger investigation.

An independent basis for affirming the district court is the second clause of Exemption 7(E), which privileges from disclosure law enforcement records that “would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” *Id.* at 552(b)(7)(E). All of the redacted information was properly withheld under the “techniques and procedures” clause of Exemption 7(E), but even if that information were re-characterized as “guidelines,” withholding would have been proper.

Exemption 7(E) does not require this Court to believe that disclosure of guidelines *will* enable evasion of the law. Rather, it requires only that the agency be “reasonable” in believing that disclosure could (not would) “*risk* circumvention of the law.” 5 U.S.C. § 552(b)(7)(E) (emphasis added). To

reverse the district court, this Court would have to conclude that the Department was not just incorrect but actually unreasonable in fearing that disclosure of the Forman Memorandum's guidelines for identifying potential terrorist threats could be expected to risk circumvention of the law. The probabilistic nature of the inquiry, combined with review for reasonableness rather than correctness, sets a low bar.

Moreover, as in all FOIA cases, in assessing the reasonableness of the Department's decision to withhold the material redacted from the Forman Memorandum, the Court must accord a presumption of good faith to the Department's declarations explaining the records withheld and the grounds for non-disclosure. *See Carney v. Department of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). The deference due the agency is further heightened in this case because the material that would be disclosed implicates national security. Judges have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching review." *Center for National Security Studies v. Department of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003). Because of the Executive's unique expertise in judging threats to national security, and the low showing of risk required, the presumption of good faith should suffice in this case to end the inquiry. To be sure, the ultimate burden for justifying withholding still rests with the Department. But

the Project should nonetheless be required to come forth with very compelling reasons to disbelieve the Executive's affidavits forecasting harm to the national security if they wish to obtain reversal.

The Lowenstein Project has not come close to making that showing. As this Court has held, while "scholars . . . may have an interest in the investigative techniques and procedures employed by Government agents," it is "obvious" that those "immediately and practically concerned with such matters would be individuals embarked upon clandestine and illicit operations, the detection of which would be frustrated if they were privy to the methods employed . . . to ferret them out." *Caplan*, 587 F.2d at 547.

As the district court properly concluded, release of "the specific criteria used" by ICE to determine leads in an anti-terrorism operation "would disclose law enforcement techniques and could be of assistance to those who wish to evade future immigration enforcement operations." *Lowenstein*, 603 F. Supp. 2d at 366. As the Department's *Vaughn* indices stated, "ICE obtained threat data from a number of sources and used this data to establish investigative priorities in order to determine who might be involved in plans to disrupt the 2004 Presidential election." GA 86. Release of that information, "when pieced together with other available information," could "reasonably be expected to reveal the priorities ICE used" in

Operation Frontline. *Ibid.* That, in turn, “would provide a means for terrorist organizations to introduce persons into the United States that would fall outside of the established priority.” *Ibid.* Disclosing the techniques that Operation Frontline used to catch terrorists would “limit the effectiveness of future ICE and other law enforcement operations” as well as “create a vulnerability to our national security.” *Ibid.*

The Lowenstein Project incorrectly suggests (Br. 25–30) that general law enforcement guidance is never exempt from disclosure under FOIA. In making that argument, the Project relies exclusively on cases that predate the 1986 amendments to Section (b)(7)(E), and discuss only whether law enforcement guidance may be withheld under an entirely separate exemption—Exemption 2. *See* Br. 25-30 (citing *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2d Cir. 1978); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc); *Jordan v. Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978); *Cox v. Department of Justice*, 601 F.2d 1 (D.C. 1979) (per curiam); and *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9th Cir. 1980)). The 1986 amendment abrogated any case law to the extent that the case law suggested that general law enforcement guidelines must always be disclosed. Under the plain terms of Exemption 7(E), as amended, such guidelines may

be withheld if they may reasonably be expected to risk circumvention of the law.

Those cases, at any rate, do not stand for the principle that the Lowenstein Project attributes to them. In all but one of the cases, the court concluded that the law enforcement guidance at issue was exempt from disclosure. And in *Jordan*, the sole case that ordered disclosure, the court held only that standards for the exercise of prosecutorial discretion are not exempt under Exemption 2 if there has been no showing that disclosure could lead to circumvention of the law. *See Crooker*, 670 F.2d at 1075 (citing and discussing *Jordan*, 591 F.2d at 784). As discussed above, the redacted information here does not relate to prosecutorial discretion but instead contains methods for identifying and prioritizing potential terrorist threats. And for the reasons described, release of that information would risk circumvention of the law.

2. The Lowenstein Project's arguments to the contrary are without merit.

The Project makes a variety of arguments against withholding under the second clause of Exemption 7(E), all aimed at demonstrating that disclosing the United States' techniques for detecting terrorism could not reasonably be expected to risk circumvention of the law. All of these arguments are mistaken.

The Lowenstein Project first claims, somewhat perplexingly, that the guidelines detailed in the Forman Memorandum are already matters of public record, and disclosing them therefore would not enable terrorists to evade detection. Br. 39–42. That is incorrect.⁶ As Judge Kravitz correctly noted in his opinion, the Forman Memorandum’s techniques for identifying high-priority threats are not publicly known. *Lowenstein*, 603 F. Supp. 2d at 365. And one wonders why the Lowenstein Project would be pursuing this appeal, with the attendant time and expense, if the information at issue were already in the public domain. Moreover, at other points in its brief, the Project appears to make the polar opposite claim: that the Forman Memorandum

⁶ The Lowenstein Project may be alluding to their assertion that most people investigated by Operation Frontline were male, and a substantial number came from countries that have large Muslim populations. See Br. at 41. But correlation is not causation. Aliens were not targeted by Operation Frontline because they were men or Muslims, as the Department has emphasized repeatedly. Operation Frontline was conducted “without regard to race, ethnicity or religion.” A. 78. Operation Frontline was never a program of targeted religious investigation; to the extent that mis-characterization is public, it is due to the Project’s own efforts to disseminate it. See also *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008) (rejecting similar selective enforcement claim made with respect to National Security Entry-Exit Registration (“NSEERS”) program implemented after 9/11).

dum constitutes “secret law” and must be disclosed for that reason. *See* Br. at 30 (“The criteria used by ICE to decide whom to investigate for potential immigration status violations constituted secret law.”).

As to that latter claim, the Project appears to argue (Br. 30) that FOIA contains an affirmative mandate that agencies disclose material that qualifies as “secret law.” In fact, FOIA does not use the term “secret law” or expressly mandate its disclosure. And, although courts have sometimes suggested that FOIA is designed to prevent the existence of “secret law,” the redacted information in the Forman Memorandum is not of that kind. As FOIA cases use the term, “secret law” means undisclosed rules that seek to modify or regulate public behavior—for example, rules that describe what conduct the agency believes is lawful or at least permissible. *See, e.g., Crooker*, 670 F.2d at 1075. But as this Court has explained, material describing “the techniques for apprehending those who engage in breaking the law” is not “secret law.” *See Caplan*, 587 F.2d at 548; *Crooker*, 670 F.2d at 1073–1075 (material that describes “investigative techniques, in the form of prescribed rules and practices for agency personnel” does not constitute “secret law” that should be disclosed). That is precisely what the redacted information in the Forman Memorandum describes.

This Court has, to be sure, stated that an “administrative manual which sets forth or clarifies an agency’s substantive or procedural law should be made available since there is a legitimate public interest in having those affected guide their conduct in conformance with the agency’s understanding.” *Caplan*, 587 F.2d at 548. That comment must, however, be understood in the context in which it was made. The comment appears in a section of the *Caplan* opinion that discusses another section of FOIA, 5 U.S.C. § 552(a)(2)(C). Section 552(a)(2)(C), like the remainder of section 552(a), describes those materials that are generally subject to disclosure under FOIA unless disclosure of the material is exempted under section 552(b). Thus, the *Caplan* court was merely explaining that a manual containing substantive views of the law is a manual that “affect[s] a member of the public,” 5 U.S.C. § 552(a)(2)(C), and is therefore subject to disclosure, *assuming none of the exemptions in section 552(b) applies*. But the Department admits that the Forman Memorandum would be subject to disclosure if no exemption applied to it.

Finally, the Lowenstein Project argues (Br. 43–44) that release of the redacted information presents no risk of circumvention of the law because Operation Frontline is not presently active. That argument is incorrect because, as the Department explained below, some of the techniques for identifying potential terrorist threats described in

the redacted material are still in use, and their disclosure would compromise their effectiveness. *See* GA 118; A.106. Nor would it be appropriate for the court to order disclosure of only those techniques that are no longer in use. The government might want to reinstate use of some of those techniques in the future, but, if the techniques had been disclosed, they likely could not effectively be used again. Moreover, a rule requiring disclosure of techniques that are not currently in use would itself reveal information that would risk circumvention of the law: terrorist organizations would know which techniques are not currently being used and therefore which categories of operatives or type of behavior presents less risk of discovery.

C. The redacted paragraphs were properly withheld because they are predominantly internal.

The redacted paragraphs in the Forman Memorandum are also subject to withholding for a third reason. The redacted information is covered by Exemption 2, which covers matters that are “related solely to the internal personnel rules and practices of the agency.” 5 U.S.C. § 552(b)(2). This Court need not decide whether Exemption 2 applies, because the redacted information was properly withheld under both clauses of Exemption 7(E). If the Court chooses to reach that question, however, it should affirm the district court’s

determination that Exemption 2 was satisfied on these facts.

Courts have held that Exemption 2 applies where internal law enforcement manuals prescribe the methods and strategy to be followed by law enforcement officers in the performance of their duties and disclosure of that material would permit evasion of the law. *See, e.g., Hardy*, 631 F.2d at 656 (“Materials instructing law enforcement agents on how to investigate violations concern internal personnel practices.”); *Cox*, 601 F.2d at 4 (“The exemption covers portions of law enforcement manuals that prescribe the methods and strategy to be followed by law enforcement agents in the performance of their duties.”). For reasons already discussed, disclosure of the redacted paragraphs would risk circumvention of the law. *See* p.24–28, *supra*. Therefore, this Court need only decide whether the paragraphs are “related solely to the internal . . . practices of the agency.” 5 U.S.C. § 552(b)(2).

The Lowenstein Project contends (Br. 44-48) that this requirement is not satisfied because the instructions contained in the redacted portion of Forman Memorandum had some effect on other agencies and the public. That contention is incorrect. All agency action has some ripple effects beyond the walls of the agency itself. *See Schwaner v. Department of Air Force*, 898 F.2d 793 (D.C. Cir 1990); *Crooker*, 670 F.2d at 1073. The law enforce-

ment manuals that were held to be exempt from disclosure in *Caplan*, *Crooks*, *Cox*, and *Hardy* all had “some effect on the public-at-large.” *Crooker*, 670 F.2d at 1073. But, as the D.C. Circuit explained in *Crooker*, what counts is whether the guidance is used “for predominantly internal purposes.” *Ibid.*; *Schwaner*, 898 F.2d at 795. If “it is designed to establish rules and practice for agency personnel, *i.e.*, law enforcement investigatory techniques,” *Crooker*, 670 F.2d at 1073, then it satisfies Exemption 2's requirement that it concern “internal” agency practices.

The redacted material in the Forman Memorandum satisfies this test. It was designed to instruct agents on the techniques and procedures that they should use to identify and prioritize terrorist threats. As explained earlier, it therefore details precisely the “law enforcement investigatory techniques” that *Crooker* contemplates being withheld. It is therefore at least “predominantly” internal, because it was intended for only internal distribution and was aimed at directing ICE’s law enforcement officers.

To the extent that the Forman Memorandum promoted and organized interagency coordination of ICE’s enforcement efforts, that fact simply highlights the seriousness and importance of Operation Frontline to the government’s anti-terrorism efforts. The importance of Operation Frontline counsels against disclosure, not for it.

Moreover, it still consists “solely of instructions to agency personnel.” *Crooker*, 670 F.2d at 1075.⁷

⁷ Contrary to the Project’s contention (Br. at 47-48), all reasonably segregable information from the Forman Memorandum and in particular, the three paragraphs at issue, has been released by the Department, voluntarily and as a result of the district court’s review and ruling. To be sure, the FOIA requires agencies to disclose “[a]ny reasonably segregable *portion* of a record” after redaction of exempt portions. See 5 U.S.C. § 552(b) (emphasis supplied). It does not, however, require any and all segregable *words* within an exempt record be disclosed to the requestor. See *Mead Data Ctr., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d, 242, 261 n.55 (D.C. Cir. 1977); *Nat’l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005). Here, the information redacted within the Forman Memorandum consists solely of information concisely describing law enforcement techniques and guidelines protected from disclosure under Exemptions 2 and 7(E). In sum, the withheld information at issue in this appeal cannot be further meaningfully segregated.

Conclusion

The judgment of the district court should be affirmed.

Dated: March 26, 2010

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P.32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,181 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in cursive script, appearing to read "Lisa E. Perkins".

LISA E. PERKINS
ASSISTANT U.S. ATTORNEY

ADDENDUM

**5 U.S.C. § 552. Public information; agency
rules, opinions, orders,
records, and proceedings**

...

(b) This section does not apply to matters that are--

(2) related solely to the internal personnel rules and practices of an agency;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions,

or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

...